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NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook ...*, followed by the year (for example, *Yearbook ... 1994*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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The reports of the special rapporteurs and other documents considered by the Commission during its forty-seventh session, which were originally issued in mimeographed form, are reproduced in the present volume, incorporating the corrigenda issued by the Secretariat and the editorial changes required for the presentation of the final text.

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ABBREVIATIONS

CAHDI	Committee of Legal Advisers on Public International Law
ECE	Economic Commission for Europe
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ILC	International Law Commission
ILO	International Labour Organization
IMO	International Maritime Organization
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
UICN	World Conservation Union
UNCC	United Nations Compensation Commission
UNEP	United Nations Environment Programme
UNHCR	Office of the United Nations High Commissioner for Refugees

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AFDI	<i>Annuaire français de droit international</i> (Paris)
AJIL	<i>American Journal of International Law</i> (Washington, D.C.)
BYBIL	<i>British Year Book of International Law</i> (Oxford)
<i>I.C.J. Reports</i>	ICJ, <i>Reports of Judgments, Advisory Opinions and Orders</i>
ILM	<i>International Legal Materials</i> (Washington, D.C.)
ILR	<i>International Law Reports</i>
<i>P.C.I.J., Series A</i>	PCIJ, <i>Collection of Judgments</i> (Nos. 1-24: up to and including 1930)
<i>P.C.I.J., Series B</i>	PCIJ, <i>Collection of Advisory Opinions</i> (Nos. 1-18: up to and including 1930)
<i>P.C.I.J., Series A/B</i>	PCIJ, <i>Judgments, Orders and Advisory Opinions</i> (Nos. 40-80: beginning in 1931)
UNRIAA	United Nations, <i>Reports of International Arbitral Awards</i>

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NOTE CONCERNING QUOTATIONS

In quotations, words or passages followed by an asterisk were not italicized in the original.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

**FILLING OF A CASUAL VACANCY
(ARTICLE 11 OF THE STATUTE)**

[Agenda item 1]

DOCUMENT A/CN.4/465

Note by the Secretariat

*[Original: English]
[1 February 1995]*

1. Following the election on 26 January 1995 of Mr. Vladlen Vereshchetin as a judge of the International Court of Justice, one seat has become vacant on the International Law Commission.

2. In this case, article 11 of the statute of the Commission is applicable. It prescribes:

In the case of a casual vacancy, the Commission itself shall fill the vacancy having due regard to the provisions contained in articles 2 and 8 of this statute.

Articles 2 and 8, to which article 11 refers, read as follows:

Article 2

1. The Commission shall consist of thirty-four members who shall be persons of recognized competence in international law.
2. No two members of the Commission shall be nationals of the same State.
3. In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

Article 8

At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured.

3. The term of the member to be elected by the Commission will expire at the end of 1996.

STATE RESPONSIBILITY

[Agenda item 3]

DOCUMENT A/CN.4/469 and Add.1 and 2*

Seventh report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur

[Original: English]
[9, 24 and 29 May 1995]

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* Incorporating document A/CN.4/469/Corr.1.

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Multilateral instruments cited in the present report

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Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, <i>Treaty Series</i> , vol. 78, p. 277.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	<i>Ibid.</i> , vol. 660, p. 195.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, p. 331.
International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)	<i>Ibid.</i> , vol. 1015, p. 243.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	<i>Ibid.</i> , vol. 1249, p. 13.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	<i>Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 51</i> , resolution 39/46, annex.

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Introduction

1. The present report consists of two chapters. Chapter I deals with the legal consequences of the internationally wrongful acts characterized as international crimes of

States in article 19 of part one of the draft articles.¹ It also contains the proposed draft articles relating to the said consequences. Chapter II addresses a few outstanding issues relating to the draft articles on the regime of countermeasures and contains an additional draft article of part three relating to dispute settlement following countermeasures against crimes.

¹For the text of articles 1-35 of part one adopted on first reading by the Commission, see *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

CHAPTER I

**The legal consequences of internationally wrongful acts characterized as crimes
in article 19 of part one of the draft articles****A. Introduction**

2. The debate carried out at the forty-sixth session of the Commission on the basis of the fifth² and sixth³ reports, particularly on the basis of chapter II of the fifth and sixth reports, indicates that in dealing with the legal consequences of the so-called “international crimes of States”, the Commission is facing—apart from questions of terminology, degree or emphasis—two interrelated problems or sets of problems. One of them is the identification—*de lege lata* or *de lege ferenda*—of the “special” or “supplementary” consequences of the internationally wrongful acts in question as compared to the internationally wrongful acts generally known as international “delicts”. This could be defined as the merely normative aspect of the consequences of international crimes of States. The other problem, or set of problems, is the identification of the entity or entities which is or should be called upon, in a measure to be decided, to determine and/or implement the said special or supplementary consequences. This could be called the institutional aspect.

3. With regard to the normative aspect, the debate has amply shown that the members of the Commission favouring the retention of the distinction set forth in article 19 of part one accept the obvious and inevitable implication of that distinction. The implication is that, for the said distinction to have any sense or purpose, some special or supplementary consequences are or should be attached to international crimes as opposed to international delicts.

4. As for the institutional aspect, the debate has shown with equal clarity that the members favouring the retention of the distinction of article 19 believe that the implementation of any special or supplementary consequences requires or should be made to require some form or forms of intervention by one or more international bodies in order to reduce, if not exclude altogether, the arbitrariness that might otherwise characterize the implementation of the said consequences by individual States or groups of States operating without any form of control.

5. Less articulately but no less surely, two further major points emerged from the debate at the forty-sixth session. One point was the close interrelationship between what has been called the merely normative aspect and the institutional aspect. The extent to which special

or supplementary consequences of crimes—namely aggravations of the consequences of delicts—can be credible *de lege lata* or acceptable *de lege ferenda* depends largely on the extent to which adequate instruments or devices can be envisaged, *de lege lata* or *de lege ferenda*, for their proper and above all not arbitrary implementation. A minimum condition for any significant aggravation would be, in the opinion of the Special Rapporteur, some form of objective, juridically dependable determination as to the existence of a crime and its attribution to a State. Although only a few members made specific suggestions with regard to the precise nature of the instrumentalities to be relied upon for such a determination, the debate at the forty-sixth session showed that most members favouring the retention of article 19—whatever their reservations on various aspects of the matter—considered that an objective determination as to the existence and attribution of a crime should be a prerequisite for the implementation of any special regime. This was recognized also by members who opposed the retention of the distinction.

6. Another point that seems implicit in the views of most members favouring the retention of article 19 is that the special regime to be proposed for crimes could hardly be envisaged as a matter of strict codification. Although the existence of particularly serious internationally wrongful acts sanctioned by aggravated consequences was rightly considered by the Commission as a part of international law at its twenty-eighth session, when article 19 was adopted on first reading,⁴ it seems clear that the precise identification and formulation of the special consequences of such wrongful acts and the determination of an implementation regime for such consequences are bound to impose upon the Commission an effort of progressive development more pronounced than in any other area of State responsibility.

7. Because of the close interrelationship between the identification of the special or supplementary consequences and the devising of an implementation regime, one may well wonder whether it would not be better to deal with the institutional problem before dealing with the purely normative one. Two reasons, however, lead to preference for the reverse order. First of all, it is better to determine what is ultimately to be implemented before thinking of ways and means of implementation. Secondly, while both areas surely involve important issues of progressive development, the determination of the special or supplementary consequences seems to involve

² *Yearbook ... 1993*, vol. II (Part One), p. 1, document A/CN.4/453 and Add.1–3.

³ *Yearbook ... 1994*, vol. II (Part One), p. 3, document A/CN.4/461 and Add.1–3.

⁴ See *Yearbook ... 1976*, vol. II (Part Two), pp. 95 *et seq.*

a greater number of *de lege lata* aspects. By dealing first with the latter area the exploration can at least be started from *terra cognita* or less *incognita*.

8. Section B of the present chapter is thus devoted to the identification of the special or supplementary legal consequences of international crimes and to the formulation of the provisions that should be added to the articles of part two relating to the legal consequences of international delicts. Section C deals with the institutional aspect. Section D contains concluding remarks.

B. The special or supplementary consequences of international crimes of States

1. GENERAL

9. The distinction set forth in article 19 of part one of the draft articles between two kinds of internationally wrongful acts is based upon the higher degree of gravity of international crimes as compared to international delicts. It follows as a matter of course that this difference should be reflected in the consequences attached (*de lege lata*) or to be attached (*de lege ferenda*) to the internationally wrongful acts categorized as crimes. The starting point obviously lies in the articles of part two provisionally adopted to date.⁵

10. The relevant articles of part two, namely articles 6-8, 10, 10 *bis*, 11, 13 and 14, are formulated in such terms as to cover the consequences of virtually any internationally wrongful act regardless of its categorization under article 19 of part one. This applies both to articles 6-10 *bis* on substantive consequences and articles 11-14 on instrumental consequences. None of these articles refers in fact to one or the other of the two categories of breaches established in article 19. The underlying idea, however, is a different one. Having accepted, as a matter of method, the Special Rapporteur's suggestion that the problem of the special or supplementary consequences of crimes should better be approached at the last stage of the elaboration of part two of the draft articles (this in view of the particular complexity of the subject), the Commission has covered essentially, in articles 6-14, the consequences of delicts. It has kept in abeyance, so to speak, the special or supplementary consequences of crimes.

11. It follows that, although formulated in broad terms encompassing *prima facie* the consequences of any internationally wrongful act, articles 6-14 cover exhaustively, in principle, the consequences of delicts but not the consequences of crimes. More specifically, the Commission, in elaborating those articles, has left open two issues:

(a) First, if any of the consequences of internationally wrongful acts contemplated in articles 6-14 extends to crimes and, in the affirmative, whether any such consequence should be modified, either by way of strengthening the position of the injured States or by way of aggravating the position of the wrongdoing State;

(b) Secondly, if any further consequences are or should be attached to crimes over and above those contemplated in articles 6-14.

The following paragraphs deal with each of those two issues, first with regard to the substantive consequences and then with regard to the instrumental consequences. In both cases, the best method is to proceed in the order followed in articles 6-14.

2. SUBSTANTIVE CONSEQUENCES

(a) General

12. The general substantive consequence is reparation in the broadest sense, extending to cessation and inclusive of restitution in kind, compensation, satisfaction and guarantees of non-repetition. Considering that an obligation to provide reparation in a broad sense is in principle a consequence of any internationally wrongful act regardless of its degree of gravity, it could hardly be doubted that such an obligation is also incumbent upon any State which has committed a crime. Any such State would therefore be subject to the general duty of cessation/reparation set forth in articles 6 and 6 *bis* of part two of the draft articles.⁵

13. Considering further that, in the case of crimes, all States are injured States under the definition formulated in article 5 of part two, especially paragraph 3 of that article, any State should be entitled to obtain cessation/reparation (in the above broad sense) from the State which has committed or is committing a crime.

14. The active and passive aspects of the responsibility relationship could therefore be covered in an article 15 of part two which would be the introductory provision of the special regime governing the substantive consequences of international crimes of States.

15. The special regime is introduced (together with that on instrumental consequences) by a *chapeau* provision, namely article 15 (see section E in the present chapter, below).

16. The provision extending to the case of crimes the general obligations of cessation and reparation set forth in article 6 appears in paragraph 1 of draft article 16 (see section E in the present chapter, below). It will be followed by provisions adapting to crimes the provisions on cessation and reparation contained in articles 6 *bis* to 10 *bis*.

(b) Cessation of wrongful conduct

17. Nothing needs to be modified about cessation of wrongful conduct (art. 6) obviously applicable indifferently to crimes and delicts.

⁵ For the text of articles 1-6 *bis*, 7-8, 10-10 *bis*, see *Yearbook ... 1993*, vol. II (Part Two), pp. 53-54; for the text of articles 11, 13 and 14, see *Yearbook ... 1994*, vol. II (Part Two), pp. 151-152, footnote 454 (article 11 was adopted by the Commission, given that it would eventually be reconsidered in the light of the text finally adopted for article 12).

(c) *Restitution in kind*

18. As contemplated in article 7 of part two of the draft articles, the obligation to provide restitution in kind is subject to a number of mitigations set forth in subparagraphs (a)-(d). Of these mitigations, the first (material impossibility) and the second (breach of an obligation arising from a peremptory norm of international law) seem to be no less appropriate in the case of crimes than in the case of delicts. The same does not seem to hold true, however, for the exceptions contemplated in subparagraphs (c) and (d) of article 7.

19. The exception of subparagraph (c), according to which the injured State would not be entitled to claim restitution in kind where that would involve “a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation”, should not apply in the case of a crime. Considering the *erga omnes* relationship deriving from such a serious internationally wrongful act, most injured States (in the sense of paragraph 3 of article 5 of part two) would probably not derive any individual substantive benefit from compliance, by the wrongdoing State, with its specific obligation to provide restitution in kind. There would thus be little or no sense in establishing a comparative relationship between the situation of the wrongdoer, on one side, and that of one or a few injured States, on the other side. The prevailing consideration should be that the wrongdoing State must restore to the fullest possible extent a state of affairs the maintenance of which is of essential interest—in conformity with the notion set forth in article 19 of part one of the draft articles¹—to the international community, and this even if a heavy burden is thus placed on the State which has jeopardized that state of affairs by infringing fundamental rules of international law.

20. A similar doubt arises, although to a more limited extent, with regard to that further mitigation of the obligation to provide restitution in kind which is set forth in article 7 (d) of part two. The reference is to the safeguard of the wrongdoing State’s “political independence or economic stability”.

21. The preservation of economic stability, despite its great importance for the people as well as the State concerned, does not seem to present, when assessed against the sacrifice of the injured States’ interest to obtain restitution, quite the same degree of essentiality. With all due consideration for economic sovereignty and economic self-determination, it is questionable whether the States injured by a serious infringement of a rule safeguarding an essential interest of the international community should be deprived totally or in part of restitution in kind because such a remedy might jeopardize the stability of the wrongdoing State’s economy. Such a contingency would not justify relieving the wrongdoing State of the elementary obligation to restore, to the extent materially feasible, the situation pre-existing the breach. However, the waiver of the mitigation should be tempered by a proviso safeguarding the vital needs of the wrongdoing State’s population.

22. Notwithstanding its apparent severity, the suggested waiver of the economic stability safeguard, which is the subject of article 7 (d) of part two, would be particularly appropriate in a situation where the wrongdoing State had enhanced its economic prosperity by the very crime it had committed. An example could be the case of a State having drawn a major economic advantage, in the area of trade relations with other States, from a policy of exploitation or slave labour to the detriment of an ethnically, ideologically, religiously or socially differentiated part of its population in massive breach of obligations relating to fundamental human rights. Another example could be that of a colonial Power enhancing its economic prosperity by pursuing a policy of ruthless exploitation of the resources and the population of a dependent territory. The wrongdoing State could not in such cases be relieved of the obligation to provide restitution in kind, namely to restore the original situation of the unlawfully exploited population or territory by invoking that compliance with this obligation. This would have—as it might well have—a substantial negative impact on its economic stability.

23. Some consideration should also be given, as regards the mitigating factor contained in article 7 (d) of part two, to the possibility of distinguishing, within the general concept of “political independence”, political independence and political regime. Surely, one thing is the independence of a State, namely its existence as a distinct sovereign entity alongside its peers and as a distinct person of international law—and the preservation of that status—another thing is the so-called “freedom of organization” which every sovereign State is entitled to enjoy in the choice of its form of government and in the appointment of its leaders. The two concepts are of course closely interrelated, “freedom of organization” being precisely among the principal manifestations and consequences of the existence of an entity as an independent, sovereign State. There may well be a difference, however, from the viewpoint of the mitigating factor under discussion.

24. If it may be admitted that political independence in the first sense—namely in the sense of independent statehood—would have to be preserved, together, it is to be assumed, with territorial integrity, even at the price of relieving a “criminal” State from the obligation to provide restitution in kind, the same may not be true for the “freedom of organization”—namely for the regime—of such a State. Especially in the case of aggression (a wrongful act frequently perpetrated by dictators or despotic governments), it is far from sure, in the Special Rapporteur’s view, that the obligation to provide full restitution in kind could be mitigated simply because compliance with it could jeopardize the continued existence of a condemnable regime. It should not be overlooked that the preservation of a regime responsible for serious breaches of essential international obligations such as those relating to self-determination, decolonization or human rights may constitute by itself an internationally wrongful act of a very serious nature. Although they cannot be considered as real precedents of individual claims of States for international crimes, illustrations of demands of restitution in kind in cases connoting the type of crimes under paragraph 3 (b) of article 19 of part

one can be found in the practice of United Nations bodies.⁶

25. Whether or not the limitation related to the survival of a political regime falls within the ambit of the mitigating factor set forth in article 7 (d) of part two, it should be excluded in the case of any one of the four kinds of crimes contemplated in paragraph 3 of article 19 of part one.

26. The above considerations lead to the conclusion that the mitigation of the obligation to provide restitution in kind contained in article 7 (d) should not be applicable in the case of a crime, except where full compliance with that obligation would put in jeopardy:

(a) The existence of the wrongdoing State as a sovereign and independent member of the international community or—it is assumed—its territorial integrity; or

(b) The vital needs of its population in a broad sense, namely, the essential requirements, of a physical or moral nature, of the survival of the population.

27. The provision on restitution in kind as adapted to crimes is set forth in paragraph 2 of draft article 16 (see section E of the present chapter, below).

(d) *Compensation*

28. No adaptation seems to be necessary with regard to compensation as contemplated in article 8 of part two of the draft articles. Based as it is upon the concept of reparation by equivalent of any economically assessable injury or damage (inclusive of moral damage to private parties), it applies in full in the case of crimes as it does in the case of delicts.

⁶ Examples are the demands of restitution in kind addressed by the Security Council to States whose behaviour connotes *grasso modo* categories of crimes contemplated in article 19, paragraph 3. Examples of demands of *restitutio* that might affect economic stability are provided by the Security Council resolutions relating to the colonial policies of Portugal and requiring that State to proceed to the immediate recognition of the right of the peoples of the Territories under its administration to self-determination and independence. See also, for more detailed requests, paragraph 5 (a), (d) and (e) of Security Council resolution 180 (1963) of 31 July 1963 and resolutions 312 (1972) of 4 February 1972 and 322 (1972) of 22 November 1972.

With regard to the “excessive onerousness” (as provided under article 7 (c) of part two), one may recall the demands addressed to South Africa for the adoption of urgent and effective measures to put an end to the political system of racial discrimination (see especially Council resolutions 181 (1963) of 7 August 1963, 392 (1976) of 19 June 1976, 417 (1977) of 31 October 1977, 473 (1980) of 13 June 1980, 554 (1984) of 17 August 1984, and 556 (1984) of 23 October 1984). Similarly, in the case of Southern Rhodesia, the Council has not only declared the total constitutional illegitimacy of the declaration of independence and other legislative enactments of the Ian Smith regime; it has also stated quite explicitly that the end of that regime was the first prerequisite for the re-establishment of legality in the territory of Southern Rhodesia (see, especially, Council resolutions 423 (1978) of 14 March 1978, 445 (1979) of 8 March 1979 and 448 (1979) of 30 April 1979).

On the question of the “onerousness” of demands addressed to South Africa, see also the fifth report of the Special Rapporteur (footnote 2 above), p. 44, para. 180.

(e) *Satisfaction and guarantees of non-repetition*

29. Another rule on reparation to be reviewed in connection with crimes is paragraph 3 of article 10 of part two relating to that special form of reparation which is satisfaction, a remedy closely interrelated and frequently confused with the guarantees of non-repetition contemplated in article 10 *bis*.⁷

30. Paragraph 3 of article 10 rules out any demands that “would impair the dignity” of the wrongdoing State. The idea is to exclude demands compliance with which would affect, rather than just the dignity, the existence and the sovereignty of the wrongdoing State, namely, its independence, its liberty or its form of government. Although it is expressed only with regard to satisfaction in a narrow sense, this restriction is presumably applicable also to the closely related area of the so-called guarantees of non-repetition. In both areas a differentiation between international crimes of States and delicts seems to be called for.

31. Whether dignity is understood in a narrow or a broad sense, the Special Rapporteur would consider it inappropriate to extend the benefit of that safeguard to a State which is the author of a crime of the kind contemplated in paragraph 3 of article 19 of part one.¹ It would be absurd to allow such a State to rely on dignity in the narrow sense and invoke an image or majesty it has itself offended by wilful wrongful conduct. But it would be equally absurd to allow a State which has committed or is committing an international crime to evade particular demands of satisfaction or guarantees of non-repetition by invoking such broad concepts as sovereignty, independence or liberty. As in the case of demands of restitution in kind, the only restrictions which such demands could reasonably be subjected to are those which could be indispensable for the safeguard of:

(a) The continued existence of the wrongdoing State as a sovereign and independent member of the international community and—it is assumed—its territorial integrity; and

(b) The vital needs of the wrongdoing State’s population, the concept of vital needs being taken in a broad sense, encompassing the population’s essential requirements of a physical or moral nature.

32. Unless areas such as these are affected, the State which committed or is committing a crime should not be permitted to evade, by invoking its sovereignty or independence, not only demands for disarmament, demilitarization, dismantling of war industry, destruction of weapons, acceptance of observation teams, or change to a form of government not incompatible with fundamental freedoms, civil and political rights and self-determination as may be addressed to it following a crime of aggress-

⁷ It is indeed difficult to distinguish, among the forms of satisfaction, those that are called for only as a matter of thoroughness of reparation and those which may operate as guarantees of non-repetition.

sion,⁸ but also demands that could be justified as forms of satisfaction or guarantees of non-repetition further to the commission of crimes of the kinds contemplated in paragraph 3 (b), (c) or (d) of article 19 of part one. The Special Rapporteur is thinking of demands for abrogation of discriminatory, racial or segregationist legislation, popular consultations such as free elections or plebiscites, restoration of fundamental rights and freedoms,⁹ dismantling of environmentally dangerous plants and compliance with the *aut dedere aut judicare* principle with regard to individuals accused of *delicta juris gentium*.¹⁰ Demands such as these would affect neither the

wrongdoing State's existence (and in that sense its political independence) nor the vital needs of its population. This applies particularly to the obligation of the wrongdoing State not to refuse demands of fact-finding, including in its territory, in order to permit control of full compliance with its obligations of cessation/reparation and guarantees of non-repetition (compare, in this regard, paragraph 31 (b) above).

33. The relevant provision is to be found in paragraph 3 of draft article 16 of part two (see section E of the present chapter, below).

3. INSTRUMENTAL CONSEQUENCES

(a) General

34. Whatever specific features the regime of countermeasures against crimes may have to assume as compared to the regime envisaged in articles 11-14 of part two of the draft articles,⁵ it will present two characteristics.

35. First, the option to resort to countermeasures, reserved, in the case of most delicts, to one or more States, extends in the case of crimes—as does the right to claim compliance with the special or supplementary substantive consequences—to all States. This seems to be an inevitable consequence of the fact that, while only some kinds of delicts involve violations of *erga omnes* obligations, all crimes consist of infringements of *erga omnes* obligations.¹¹ This is recognized in paragraph 3 of article 5 of part two of the draft articles, whereby, in the case of a crime, all States are injured States. It follows that, subject to any qualifications that the Commission may

⁸ Significant—whatever the legal merits of the respective decisions—are precedents emerging from Security Council resolutions concerning Iraq following the Gulf war. The Special Rapporteur recalls resolution 687 (1991) of 3 April 1991 imposing upon Iraq a series of obligations relating to the destruction and control of ballistic, chemical and biological armaments and the disposal of arms, arms components and structures susceptible of military use. The modalities of implementation of such obligations were specified in subsequent resolutions providing for the competence of special commissions (see for example, Council resolutions 699 (1991) of 17 June 1991, 707 (1991) of 15 August 1991 and 715 (1991) of 11 October 1991). In the latter resolution the Council approved the plans worked out by the Secretary-General of the United Nations and the IAEA Director-General formulating in detail the powers of the Special Commission and Iraq's related obligations. On the particularly stringent character of such forms of guarantees of non-repetition see, *inter alia*, Graefrath and Mohr, "Legal consequences of an act of aggression: the case of the Iraqi invasion and occupation of Kuwait", pp. 127-129; Marauhn, "The implementation of disarmament and arms control obligations imposed upon Iraq by the Security Council", pp. 784-786; Sucharitkul, "The process of peace-making following Operation 'Desert Storm'", pp. 2528; Roberts, "United Nations Security Council resolution 687 and its aftermath: the implications for domestic authority and the need for legitimacy", pp. 602607 and 610; and Gowlland-Debbas, "Security Council enforcement action and issues of State responsibility", p. 83.

A further particularly stringent guarantee provided for in resolution 687 (1991) is the Security Council's demand that Iraq respect the Kuwaiti border as determined by a previous territorial delimitation treaty between the two States and the Security Council's decision to guarantee the inviolability of the said border through the establishment of a demilitarized zone which penetrates Iraqi territory for 10 kilometres and Kuwaiti territory for 5 kilometres, the said area to be subject to surveillance and the continued presence of observers. See also the subsequent Security Council resolutions 773 (1992) of 26 August 1992, 833 (1993) of 27 May 1993 and 949 (1994) of 15 October 1994, where it is recalled, in particular, that Iraq "must unequivocally commit itself by full and formal constitutional procedures to respect Kuwait's sovereignty, territorial integrity and borders".

⁹ An example is offered by the demands addressed by the Security Council to South Africa to repeal or revise its apartheid legislation (see footnote 6 above in fine).

¹⁰ Leaving aside their legal merits, which the Special Rapporteur does not need nor intend to address in the present report, he may recall, as examples of theoretically conceivable measures, the demands addressed by the Security Council to the Libyan Arab Jamahiriya by resolutions 731 (1992) of 21 January 1992 and 748 (1992) of 31 March 1992. Essentially, the Libyan Arab Jamahiriya, accused of international terrorism, was required to deliver for trial the persons allegedly responsible for the Lockerbie bombing, practically a "forced" extradition which exceeded the forms of satisfaction that the country concerned would have been under an obligation to provide under article 10 of part two of the draft articles. Rightly or wrongly, such a demand would impair the dignity of the State to which it was addressed. The Special Rapporteur needs hardly recall that very different views have been expressed by commentators on the *Lockerbie* case: see Graefrath, "Leave to the Court what belongs to the Court: the Libyan case", especially pp. 184 *et seq.*; Weller, "The Lockerbie case: a premature end to the 'New World Order'?", pp. 302 *et seq.*;

Tomuschat, "The Lockerbie case before the International Court of Justice", pp. 38 *et seq.*; Beveridge, "The Lockerbie affair", pp. 907 *et seq.*; Arcari, "Le risoluzioni 731 e 748 e i poteri del Consiglio di Sicurezza in materia di mantenimento della pace", pp. 932 *et seq.*; Andrés Sáenz de Santa María, "¿De maximis non curat praetor ...? El Consejo de Seguridad y el TIJ en el asunto *Lockerbie*", pp. 327 *et seq.*; Oriuela Calatayud, "La actuación del Consejo de Seguridad de la ONU en el asunto *Lockerbie*: paradigma de 'incontrolable' abuso de poder", pp. 395 *et seq.*

Other examples borrowed from the practice of the Security Council are resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993 by which the Council established an International Criminal Tribunal for the trial of persons allegedly responsible for grave violations of humanitarian law in the territory of the former Yugoslavia. In particular, the obligation of the possibly responsible State or States to deliver such persons would represent (leaving aside here again the legal merits of the whole matter) a "supplementary" consequence of considerable impact upon the sovereignty-independence of the target State or States (especially in view of the combination of the State and individual liability). See, *inter alia*, Graefrath and Mohr, loc. cit., p. 130.

¹¹ On the relationship between *erga omnes* obligations and international crimes, see Starace, "La responsabilità risultante de la violation des obligations à l'égard de la communauté internationale", especially pp. 289 *et seq.*; Lattanzi, "Sanzioni internazionali", pp. 554-555; de Hoogh, "The relationship between *jus cogens*, obligations *erga omnes* and international crimes: peremptory norms in perspective", pp. 183 *et seq.*; and Annacker, "The legal regime of *erga omnes* obligations in international law", pp. 131 *et seq.*

deem appropriate to introduce in extending the said option to all States, a State committing a crime is in principle considerably more exposed to countermeasures than a State committing a breach. There is thus an increase in the virtual or actual pressure exercised by the law upon any potential or actual “criminal” States.

36. There is, secondly, an increased pressure deriving from the aggravation of the substantive consequences provided for in article 7 (c)-(d) (Restitution in kind) and paragraph 3 of article 10 (Satisfaction) of part two. The onerousness of the consequences to be faced by the State which has committed a crime is particularly evident with regard to guarantees of non-repetition. If, as noted, the *omnes* injured States are entitled to address to the wrongdoing State demands for disarmament, demilitarization, dismantling of war industry, destruction of weapons, acceptance of observation teams, adoption of laws affording adequate protection for minorities and establishment of a form of government not incompatible with fundamental freedoms, civil and political rights and self-determination, the weight of the countermeasures intended to compel the latter State, in case of refusal, to comply with such demands will be greater than that of measures following upon a delict. The aggravation of the wrongdoing State’s substantive obligations results in an increased likelihood of non-compliance, by the State concerned, with the “secondary” obligations deriving from the crime. It is the weight of the two factors and their interaction which differentiates the regime of the consequences of crimes from that of the consequences of delicts and justifies treating the former as a special category of wrongful act.¹² A further, highly important element of aggravation is of course represented by the solemn condemnation which the crime and its author would elicit on the part of the international bodies which would be entrusted under the regime proposed (see below section C, paras. 100 *et seq.*) with the basic determination as to the existence and attribution of an international crime and, consequently, on the part of the international community at large.

37. Like the rules concerning the substantive consequences, the provisions relating to the instrumental con-

¹² The close relationship between the substantive and instrumental consequences of crimes (close to the point of abolishing a distinction already tenuous in some forms of ordinary satisfaction) manifests itself in some features of the regime imposed upon Iraq by United Nations resolutions following the Gulf war. Without entering into the merits of the individual measures (on which he reserves here his opinion), the Special Rapporteur refers in particular to the creation by the Security Council, under resolution 687 (1991) of 3 April 1991, of a compensation fund financed by Iraqi oil exports and the further specifications deriving from Council resolutions 705 (1991) and 706 (1991), both of 15 August 1991, and 778 (1992) of 2 October 1992. Although it cannot be categorized as a countermeasure in a narrow sense, the United Nations Compensation Commission arrangement secures—whatever its legal merits—the institutionalized implementation of the substantive consequences of a crime of aggression. The substantive and instrumental consequences are both aggravated by the circumstance that the arrangement subjects the economy of Iraq to a particularly stringent international control. Also on these aspects, see Graefrath and Mohr, *loc. cit.*, p. 121; Gowlland-Debbas, “Security Council enforcement ...”, p. 82, and Dupuy, “Après la guerre du Golfe”, p. 636.

sequences of crimes could usefully be preceded by a general opening provision echoing the general provision concerning delicts contained in article 11 of part two. This opening provision should set forth the general principle that any State injured by an international crime of a State whose demands are not met with an adequate response on the part of that State is entitled to resort to countermeasures under the conditions and subject to the limitations specified in subsequent provisions—which provisions would adapt to the case of crimes, where necessary, the provisions of articles 11-14 of part two.

38. Considering that article 11 has only been tentatively adopted, the Special Rapporteur hopes that its formulation could be reviewed, taking into account the specificity of crimes, in two respects, namely:

- (a) The “response” from the wrongdoing State; and
- (b) The function of countermeasures.

39. The provision on crimes corresponding to article 11 is the subject of paragraph 1 of draft article 17 (see section E of the present chapter, below).

(b) *Dispute settlement and prior communication*

40. The first problem will be to determine whether and possibly to what extent the conditions of lawful resort to countermeasures spelled out in article 12 of part two of the draft articles,¹³ should apply also in the case of a crime. The Special Rapporteur is referring to summation or notification and, more particularly, to prior resort to available means of dispute settlement.

41. To begin with the requirement of prior resort to available means of dispute settlement, an adjustment seems to be indispensable. As indicated in the present report (paras. 4-5 above and paras. 85-109 below), the taking of countermeasures against a State which has committed or is committing a crime should be preceded by some form of pronouncement by one or more international organs, as to at least the existence of a crime and its attribution. Such a pronouncement, whatever its nature and whatever the nature of the international body, should suffice for any injured States to be entitled severally or collectively to resort to countermeasures, regardless of whether dispute settlement means are available or used. The basic condition set forth in article 11 of part two of the draft articles—namely, the absence of an “adequate response”, particularly the failure of the wrongdoing State to desist from the unlawful conduct—should suffice for the injured States to be entitled to react.

¹³ For the text of draft article 12 (Conditions of resort to countermeasures) as proposed by the Special Rapporteur in his fourth report, see *Yearbook ... 1992*, vol. II (Part One), p. 1, document A/CN.4/444 and Add.13; for the text of draft article 12 (Conditions relating to resort to countermeasures) as adopted by the Drafting Committee at the forty-fifth session of the Commission, see *Yearbook ... 1993*, vol. I, 2318th meeting, para. 3.

42. It will be recalled that paragraph 2 (b) of article 12 of part two leaves open the possibility for the injured State to resort to “urgent, temporary measures as are required to protect the rights of the injured State or limit the damage caused by the internationally wrongful act” even before resorting to the available dispute settlement procedures. This issue does not arise in the present context, bearing in mind that the condition of prior resort to dispute settlement procedures would not apply in the case of a crime. A problem does arise, however, with regard to the requirement of a prior pronouncement by an international body, referred to in the preceding paragraph and in the relevant article, as a prerequisite for lawful reaction on the part of any one of the *omnes* States injured by a crime. It seems reasonable to say that although, prior to such pronouncement, the *omnes* States injured by a crime are not entitled to resort to full countermeasures, they are nonetheless entitled to resort to such urgent interim measures as are required to protect their rights or limit the damage caused by the crime. The Special Rapporteur is referring to measures aimed at securing immediate access to the victims for purposes of rescue and/or aid or preventing the continuation of a genocide, measures concerning humanitarian convoys, anti-pollution action, passage facilities, etc.

43. The corresponding provision is to be found in paragraph 2 of draft article 17 of part two (see section E of the present chapter, below).

44. However, the option to resort to countermeasures should obviously be closed altogether in case of submission of the matter by the alleged wrongdoing State to the binding third party adjudication procedure to be envisaged in part three.¹⁴ By analogy with the provisions of part three as proposed for the settlement of post-countermeasure disputes relating to delicts, the competent third party would be empowered to indicate interim measures with binding effect. The option to resort to countermeasures would revive in case of failure of the wrongdoing State to comply with a third party indication of interim measures or with its obligation to pursue the adjudication procedure in good faith.

45. As for article 12 of part two and its requirement of timely communication, it does not seem that it should apply in the case of a crime, except perhaps in relation to particularly severe measures which might have adverse consequences for the wrongdoing State’s population. A State which has committed or is committing a wrongful act of the degree of gravity of the crimes singled out in article 19 of part one, presumably involving a measure of wilful intent, should not be entitled to a warning that might reduce the effectiveness of the countermeasures. Considering anyway that as noted (see para. 36 above) and as pro-

¹⁴ As understood in the fifth report of the Special Rapporteur (see footnote 2 above), the draft articles of part three proposed by this Special Rapporteur left deliberately untouched the problem of post-countermeasures dispute settlement in the case of crimes (see *Yearbook ... 1993*, vol. II (Part Two), pp. 45 *et seq.*, footnotes 116–117, 121–123 and 125). The proposed provision shall be found in chapter II below. See also, however, section C, para. 109, of the present chapter.

posed (see section C, paras. 100 *et seq.*, below), any special form of reaction to a crime on the part of individual States or groups of States would be preceded by open debates within one or more international bodies, it is unlikely that a wrongdoing State would be unaware of the possibility that injured States could resort to countermeasures.

(c) Proportionality

46. Although bearing at least one half of the responsibility for the formulation at the forty-fifth session of the Commission of article 13 of part two of the draft articles,⁵ the Special Rapporteur has come to entertain serious doubts, after reconsidering that provision in connection with the instrumental consequences of crimes, as to the appropriateness of the said formulation. He is referring to the clause according to which proportionality should be measured in relation to “the gravity of the internationally wrongful act and the effects thereof on the injured State”. Prompted initially by the difficulty of applying such a criterion to countermeasures against the author of a State crime, his doubts now extend, to an almost equal degree, to the implications of the clause in question in relation to delicts. The Special Rapporteur recommends therefore that the Commission give more thought to the matter on the basis of the following considerations.

47. The degree of gravity of an internationally wrongful act should be determined by reference to a number of factors, including the objective importance and subjective scope of the breached rule, the dimension of the infringement, the subjective element, inclusive of the degree of involvement of the wrongdoing State’s organizational structure and of the degree of fault (ranging from *culpa levis* or *levissima* to negligence, gross negligence and wilful intent) and, ultimately, the effects of the breach upon both the injured State and the “object of the protection” afforded by the infringed rule.¹⁵

48. The Special Rapporteur is of course aware that his colleagues have so far rejected his suggestion that, even for delicts, the subjective element should be taken into more explicit consideration, in determining the degree of gravity and the consequences, than it is in paragraph 2 (c) of article 10 (Satisfaction) of part two.¹⁶

¹⁵ To illustrate the effects upon the “object of protection” (or “protected object”), reference may be made to the damage, injury or harm suffered by individuals as a consequence of the violation of human rights obligations. Another example is the damage to the common parts of the human environment caused by a violation of obligations relating to the safeguard of the environment.

¹⁶ Among the authors who believe that the element of fault or the wilfulness of the State which has committed a wrongful act is relevant in determining the consequences other than strictly compensatory of the wrongful act (satisfaction, guarantees of non-repetition, countermeasures), the Special Rapporteur recalls Ago, “La colpa nell’illecito internazionale”, p. 302; Oppenheim, *International Law: A Treatise*, p. 354; Luzzatto, “Responsabilità e colpa in diritto internazionale”, p. 63; Brownlie, *System of the Law of Nations: State Responsibility*,

49. Whatever the attitude with regard to delicts, the Special Rapporteur presumes that a different opinion might well prevail—as he believes it should—with regard to the relevance of the subjective element of crimes. There is hardly any question that wilful intent (*dolus* as the gravest degree of fault) is an essential, sine qua non feature of a crime. It is a point which the Special Rapporteur has occasionally referred to in his reports.¹⁷ Should not, then, this element be considered more explicitly than it was in the cited provision of article 10? Can we, when dealing with proportionality, ignore this element? What about the objective importance and subjective scope of the infringed rule? Is it appropriate, anyway, to refer explicitly to the “effects”—and the effects upon the injured State (or States)—while mentioning neither the importance of the rule, nor *culpa* or *dolus*, nor the effects upon the “protected object” (human beings, peoples, the environment)? Are we sure that by expressly mentioning specific factors for the assessment of gravity (such as the effects of the wrongful act upon given subjects, as opposed to objects) while remaining silent on other factors, a misleading message is not conveyed that may affect the proper evaluation of the degree of gravity by stressing certain factors to the detriment of others?

50. The problem is compounded by the difference between delicts and crimes. To speak of the effects of the breach *on the injured State* may be relatively appropriate (despite the noted emphasis on one factor to the detriment of others) in the case of most delicts. In the area of delicts, the injured party is likely to be a single State but even there, it will not always be so. In the case of an *erga omnes* delict, the gravity of the effects may well vary from one injured State to another. Assuming that this

(Footnote 16 continued.)

p. 46; and Simma, “Reflections on article 60 of the Vienna Convention on the Law of Treaties and its background in general international law”, p. 12. On the relationship between the “psychological element” and the crime of State, see Rigaux, “Le crime d’État. Réflexions sur l’article 19 du projet d’articles sur la responsabilité des États”, pp. 320–323.

The Special Rapporteur’s position was expressed in the second report (*Yearbook ... 1989*, vol. II (Part One), pp. 47–55, document A/CN.4/425 and Add.1, paras. 164–190) and especially in draft article 10 (*ibid.*, para. 191). According to paragraph 2 of that draft article, the choice of form or forms of satisfaction shall be made “taking into account the importance of the obligation breached and the existence or degree of wilful intent or negligence”. See also Arangio-Ruiz, “State fault and the forms and degrees of international responsibility: questions of attribution and relevance”, pp. 25–41. The problem of State fault is treated thoroughly by Palmisano. Interesting remarks on the relevance of “wilfulness” in international responsibility can be found in Salmon, “L’intention en matière de responsabilité internationale”, pp. 413 *et seq.* The decisive importance of “intent” and “mental state” in the qualification of a wrongful act as a crime is stressed by the United States Government in its observations on article 19 (Genocide) of the draft Code of Crimes against the Peace and Security of Mankind (see the thirteenth report of the Special Rapporteur, document A/CN.4/466, para. 58).

¹⁷ See, in particular, the second report of the Special Rapporteur (footnote 16 above), paras. 164–190; on the decisive relevance of the subjective element in international crimes of States—particularly of wilful intent—see the writings cited in footnote 16, as well as Palmisano, “Les causes d’aggravation de la responsabilité des États et la distinction entre ‘crimes’ et ‘délits internationaux’”, especially pp. 645–647, 661–664 and 666–668.

would not be a major difficulty, what about an *erga omnes* violation of human rights obligations? What effect does such a violation have on each and every State? In terms of physical damage, the effect may be minimal. In terms of injury (to be measured against the importance of the rule and of the infringed human right or freedom), the effect is in principle very significant for *omnes* States involved; but what about the States’ diverse perceptions of the injury? For a State whose legal system is highly developed in the area of human rights and public opinion very sensitive to violations by other States, the effect will be very significant. For a State in a different situation, it may be minor or inexistent. Crimes being always *erga omnes*, the assessment of gravity on such a subjective basis as that suggested by the article 13 formula may lead to difficulties. First, there may be considerable variations depending on differences in the extent of damage or differences of perception among the *omnes* injured States. Secondly, there may well be damage to a “protected object” transcending the degree of injury suffered or perceived by any one of the injured States.

51. Once more one is confronted with maximalistic and minimalistic theoretically conceivable solutions. An ambitious solution would be to attempt an enumeration, as complete as possible, of the multiple relevant factors of gravity. This would lead too far into a revision of article 13, with little chance of success. Another solution would be to leave article 13 as it stands for delicts and try a different formulation for crimes. Considering, however, that the “effects on the injured State” clause is also inappropriate for delicts and that a drastically different treatment of delicts and crimes in that respect might be misleading for the interpreter, a better solution would be simply to drop that clause for both delicts and crimes. For both, the rule would be article 13 as amended through the elimination of the words “effects on the injured State”.

52. For delicts as well as crimes, the proportionality criterion would thus remain the gravity of the wrongful act alone as a whole. Instead of mentioning some factors of gravity and omitting others, article 13 would refer to the whole range of those factors as reflected in the term “wrongful act” as an all-embracing concept. It will be for the commentary to explain the choice of the Commission: a choice that appears logically more correct and more adaptable to the multiplicity and variety of the concurring factors of gravity of a wrongful act.

53. The concept of the gravity of the effects upon one or more given States—the so-called directly or more directly injured States—would obviously be subsumed under the comprehensive concept of gravity of the violation, encompassing all factors like those tentatively listed in paragraph 47 above.

54. The relevant provision is to be found in paragraph 3 of draft article 17 of part two (see section E of the present chapter, below).

(d) *Prohibited countermeasures*

55. As regards prohibited countermeasures, no significant departure from the text of article 14 of part two of

the draft articles, as adopted by the Commission at its forty-sixth session,⁵ seems to be called for in relation to crimes.

56. It can hardly be doubted that the prohibitions contained in article 14 (a)-(b) of part two, extend to countermeasures in response to a crime. The Special Rapporteur is referring to the prohibition of countermeasures consisting in the threat or use of force and the prohibition of forms of extreme economic or political coercion.

57. The prohibitions contemplated in the preceding paragraph apply, of course, neither to the forcible measures decided upon by the Security Council under Chapter VII of the Charter of the United Nations nor to self-defence under Article 51 of the Charter.¹⁸ Both exceptions are covered by draft article 20 (see section E of the present chapter, below).

58. Equally applicable to crimes seem to be the prohibitions contained in the last three subparagraphs of article 14. The Special Rapporteur is referring to the prohibitions which are intended to safeguard the inviolability of diplomatic or consular agents, premises, archives and documents (art. 14 (c)), basic human rights (art. 14 (d)) and the obligations deriving from a peremptory norm of international law (art. 14 (e)).

¹⁸ The exception to the prohibitions set forth in article 14, paragraph 1 (a)-(b), of part two in the case of measures adopted under Chapter VII of the Charter of the United Nations is clearly confirmed by the practice of the Security Council. This applies both to the use of force and to the use of severe economic measures:

(a) With regard to the use of force, one may recall, in addition to the major example of resolution 678 (1990) of 29 November 1990 authorizing the use of force against Iraq, a number of Security Council resolutions providing similar authorizations in order to impose compliance with substantive obligations of the wrongdoing State. Examples are Council resolutions 678 (1990), 686 (1991) of 2 March 1991, 687 (1991) of 3 April 1991 and 773 (1992) of 26 August 1992. These resolutions, all concerning the aftermath of the Gulf war, reiterate the Security Council's decision to guarantee with all necessary means compliance by Iraq with its reparation obligations, the inviolability of the Iraqi-Kuwait border and the maintenance of the demilitarized zone established in the border area. The use of force is also authorized in other resolutions intended to ensure the effectiveness of measures adopted by the Council under Articles 40 (provisional measures) and 41 (economic sanctions) of the Charter. A well-known precedent is resolution 221 (1966) of 9 April 1966 which requested the British Government to prevent, "by the use of force if necessary", the arrival at the harbour of Beira, Mozambique, of oil supplies for Southern Rhodesia. Of a similar purpose are resolutions 787 (1992) of 16 November 1992 and 820 (1993) of 17 April 1993 relating to the enforcement of economic measures against the Federal Republic of Yugoslavia (Serbia and Montenegro). Other authorizations to use force have been issued by the Security Council in order to enforce protective measures of a humanitarian character. Such is the case of resolutions 770 (1992) of 13 August 1992, 781 (1992) of 9 October 1992 and 813 (1993) of 26 March 1993. For a review of Security Council practice, see Freudenschuß, "Between unilateralism and collective security: authorizations of the use of force by the UN Security Council";

(b) A departure from article 14, paragraph 2 (b), seems to be envisaged with respect to the economic measures available to the Council under Article 41 of the Charter, whenever the intensity, scope, and duration of such measures attain the level of "extreme measures of ... economic coercion".

59. Although they were originally intended to apply to countermeasures following upon mere delicts, the said prohibitions must extend, in view of the high importance of the "protected objects", to countermeasures in response to crimes. As a result, of course, the kinds of measures that injured States may take against a "criminal" State will be significantly reduced. In the case of crimes as opposed to that of delicts, however, the constraints deriving from the three prohibitions will be counterbalanced by the increase in the number of States—*omnes* injured States—entitled to resort to those countermeasures which are not covered by the prohibitions. This is not without importance given the multiplicity of actors—not to mention the "hue and cry" effect of a finding of crime by competent international bodies. The best illustration of the range of measures not involving the use of force that may be taken is provided by Article 41 of the Charter of the United Nations which, although pertaining to a context different from that of international responsibility, can offer, *mutatis mutandis*, useful guidance to any one of the *omnes* injured States in determining their reaction. According to that provision, non-forcible measures may include "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations". Taken by a number of States, which may amount to the totality of the members of the international community, measures such as these (which, it is true, also encompass measures of mere retortion) would—combined with moral condemnation—constitute a far more effective reaction and deterrent than any similar measures taken by one or a few States injured by a delict.¹⁹

¹⁹ However, some thought should be given by the Commission to the problem of those countermeasures that may affect the sovereignty-independence (exclusive of territorial sovereignty), the liberty or the domestic jurisdiction of the wrongdoing State. Although such elements are not mentioned in article 14 of part two of the draft, they may be implied either in the prohibition of military force and extreme forms of political or economic pressure or in the prohibition safeguarding peremptory rules (*jus cogens*). Assuming—as the Special Rapporteur assumes—that such is the correct solution with regard to delicts, can the same thing be said with regard to crimes? Are there not, for example, situations or circumstances in which one or more of the *omnes* injured States could lawfully violate under article 11 of part two (provided they did not infringe the prohibition of force or extreme political or economic measures) the sovereignty-independence or domestic jurisdiction of a State which has committed or is committing a crime? Examples could be the imposition of protected areas, no-fly zones, *in loco* fact-finding and control and other forms of intrusive action in the criminal State's territory vis-à-vis private parties or government officials, or the arrest or seizure of the criminal State's merchant ships on the high seas *et similia*. Would it not be showing undue leniency towards an aggressive State to bar the application to that State, by the *omnes* State injured by the act of aggression, of countermeasures infringing upon the said State's independence or domestic jurisdiction except on the basis of Security Council measures under Chapter VII of the Charter of the United Nations and, of course, self-defence?

When we speak of "domestic jurisdiction" we have in mind (at least within the present context) not the area in which the wrongdoing State would be free from international obligations but the sphere of inter-individual relations within the State, subject to the public and private law of that State and to the exclusive competence or jurisdic-

(Continued on next page.)

60. In conclusion, article 14 of part two, as adopted, does not call for any adaptation to be applicable to crimes.

4. OTHER CONSEQUENCES OF CRIMES

61. The special regime of the consequences of crimes should be completed by adding two further sets of provisions. One set of provisions should specify that the State which has committed or is committing a crime shall not be entitled to oppose fact-finding operations and control missions in its territory for the verification of compliance with the obligations of cessation and reparation. A second set of provisions should cover a number of special obligations of *omnes* injured States, broadening the scope of the proposals made by the preceding Special Rapporteur, Mr. Riphagen, in his draft article 14.²⁰ The object of such obligations would be to ensure consistency, solidarity or cooperation among States in condemning the crime, censuring the conduct of the law-breaking State and otherwise reacting thereto.

62. The obligations of injured States referred to in the preceding paragraph should be intended to ensure that:

(a) The law-breaking State does not find any support for the maintenance or legitimization of the situation created in its favour by the perpetration of the crime; and

(b) The actions of other States lawfully seeking to reinstate the infringed right are not hindered.

To that end the proposals of Mr. Riphagen could be used, subject to some important additions and adjustments.

63. According to Mr. Riphagen's draft article 14, paragraph 2, the States would be under the obligation:

(a) Not to recognize as legal the situation created by the crime;

(b) Not to render aid or assistance to the State which has committed such crime in maintaining the situation created by such crime;

(c) To join other States in affording mutual assistance in carrying out the obligations under subparagraphs (a) and (b).

64. Subparagraph (a) could usefully and appropriately be reinforced through the addition of a clause specifying

(Footnote 19 continued.)

tion of the State's legislative, administrative and judicial organs. We are leaving out, for present purposes, the question of whether this is or not the only correct notion of domestic jurisdiction and the Special Rapporteur's views in that regard (see Arangio-Ruiz, "Le domaine réservé—L'organisation internationale et le rapport entre droit international et droit interne: cours général de droit international public", p. 225).

²⁰ For the text, see *Yearbook ... 1985*, vol. II (Part Two), p. 20, footnote 66.

that *ex delicto jus non oritur* should apply to both the national and the international legal effects that may have derived or be deriving from the situation created by the internationally wrongful act. National and international law should both be expressly mentioned.²¹

65. Subparagraph (b) could with advantage be more forcibly worded.²²

66. Subparagraph (c) is per se satisfactory—notwithstanding possible drafting improvements—as it expresses the duty of all States to assist each other in complying with the obligations set forth in subparagraphs (a)-(b).²³ In addition, it might be useful to provide that the *omnes* injured States should coordinate, insofar as possible, their respective reactions.

67. The enunciation of the positive obligation to cooperate could usefully be supplemented by a mention of the more precise and perhaps more significant duty not to

²¹ The basic obligation concerned has found expression in the Security Council's practice. Faced with situations possibly belonging in the category of international crimes, the Council called States not to recognize (and to consider null and void) all legal effects deriving therefrom. See, for instance, resolution 216 (1965) of 12 November 1965, in which the Council condemned the unilateral declaration of independence by the regime of Southern Rhodesia and called upon States "not to recognize this illegal racist regime"; resolution 662 (1990) of 9 August 1990, in which the Council called upon States not to recognize the legal effects of the Iraqi declaration of annexation of Kuwait; and resolution 554 (1984) of 17 August 1984, in which the Council declared void and without legal effects the new constitution and the elections carried out in that country by the Government of South Africa. Moreover, the Council itself declared in explicit terms the radical nullity of all acts taken by the wrongdoing State with regard to the unlawful situation. Compare in addition resolution 217 (1965) of 20 November 1965 on Southern Rhodesia, and resolutions 664 (1990) of 18 August 1990 and 687 (1991) of 3 April 1991, concerning respectively the nullity of the Iraqi decrees of closure of foreign diplomatic missions in Kuwait and declarations by Iraq concerning its external debts. On these points, see Gowlland-Debbas, "Security Council enforcement ...", pp. 74–76.

²² Here too, illustrations are provided by Security Council practice. In addition to the resolutions cited above in footnote 21, see the explicit terms of resolution 218 (1965) of 23 November 1965, by which the Council requested all States "to refrain forthwith from offering the Portuguese Government any assistance which would enable it to continue its repression of the peoples of the Territories under its administration".

²³ As for these obligations, reference may be made to Security Council resolution 402 (1976) of 22 December 1976 in which the Council, after commending Lesotho for its decision not to recognize the so-called independence of Transkei granted by South Africa, appealed to all States "to provide immediate financial, technical and material assistance to Lesotho so that it can carry out its economic development programmes and enhance its capacity to implement fully the United Nations resolutions on apartheid and bantustans" (see also resolution 535 (1983) of 29 June 1983). The practice of the Council seems to confirm that such assistance takes mainly the form of economic aid and support offered to countries particularly exposed to the negative impact of the political and economic isolation of the law-breaking State. Relevant in this respect are the various cases of assistance afforded by the Council on the basis of Article 50 of the Charter of the United Nations (see, *inter alia*, resolutions 386 (1976) of 17 March 1976 and 669 (1990) of 24 September 1990). Concerning the mutual assistance obligation, it should also be possible to remedy the problem deriving from resort to countermeasures (or other forms of political pressure) which may, because of their intensity, affect the rights of States other than the law-breaking State.

hinder in any way the action of the States which choose to exercise their right to react to a crime. Such a provision would more clearly outlaw the conduct of any State which not only abstains from reacting to a grave infringement of a fundamental legal interest of the international community but thwarts—by action or omission—the measures put into effect by other States or otherwise reduces their effectiveness.²⁴

68. Further useful additions would be:

(a) A provision concerning the implementation of the *dedere aut judicare* principle vis-à-vis individuals accused of “connected” *delicta juris gentium*;

(b) A provision relating to cooperation with international bodies which may be involved in the reaction to a crime;

(c) A provision under which the *omnes* injured States should facilitate the adoption and implementation of lawful measures called for by emergencies caused by the crime.

69. The relevant draft article 18 (see section E of the present chapter, below) covers the two sets of provisions referred to in paragraph 61 above.

C. The indispensable role of international institutions

1. GENERAL

70. Aside from being objectively more severe, the substantive and instrumental consequences of crimes present, as noted, the difference reflected in article 5, paragraph 3, of part two of the draft articles.⁵ Reference is made to the difference inherent in the fact that while most—albeit not all—delicts involve only one or a few injured States, any crime may involve, possibly (albeit not always) in different degrees, all States as injured States.

71. The fact that all States are involved as injured States does not mean, on the other hand, that the implementation of the consequences of crimes is structurally different from the implementation of the consequences of most delicts. In both cases the actors are States. This is obvious for those consequences of internationally wrong-

ful acts which are common to both categories of wrongful acts and is equally true for those special or supplementary consequences which have been considered in the previous section as attaching exclusively to crimes. In the predominantly inorganic condition of the inter-State system, even the implementation of the consequences of internationally wrongful acts resulting—in the words of article 19, paragraph 2, of part one¹—“from the breach ... of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole” seems to remain in principle, under general international law, in the hands of States.

72. This obvious corollary of the absence, in the inter-State system, of authoritative institutions for the enforcement of the law is of course not surprising. Even in the area where States have entrusted an international institution with the far-reaching function of taking direct forcible measures for the maintenance of peace, it is always through the action of States that effective enforcement actually takes place. The concept of an organized international community is, indeed, an overstatement.²⁵

73. Considering the gravity of crimes and the severity of their special or supplementary consequences, very serious difficulties might arise from a universalization of the status of injured State. The risks of arbitrariness, inconsistencies and conflict involved in deciding on the existence of a crime and its attribution and in subsequently implementing the consequences will be very high. Unlike the implementation of responsibility for delict which normally concerns two or a few States, the implementation of responsibility for crimes involves the *omnes* injured States and the risks of arbitrariness and conflict increase geometrically.²⁶

74. The Commission would therefore be ill-advised if it did not try to reduce the area of potential discord in implementation. The debate at the forty-sixth session shows that all the members of the Commission—including those who advocated the abandonment of the distinction embodied in article 19 of part one—are fully aware of the importance of the issue.

75. Some of the institutional problems which could arise in connection with the implementation of the rules relating to international crimes of States were discussed

²⁴ To illustrate this point, by way of analogy, resolutions of the Security Council are to be recalled that condemned the attitude of countries which, by maintaining economic or diplomatic relations with the law-breaking State, contribute to reducing the effectiveness of the reaction against such State. See, for instance, paragraph 6 of resolution 277 (1970) of 18 March 1970, in which the Council “condemns the policies of the Governments of South Africa and Portugal, which continue to maintain political, economic, military and other relations with the illegal régime of Southern Rhodesia in violation of the relevant resolutions of the United Nations”; compare also resolutions 253 (1968) of 29 May 1968, 314 (1972) of 28 February 1972, 320 (1972) of 29 September 1972, 333 (1973) of 22 May 1973 and 437 (1978) of 10 October 1978, all related to the Southern Rhodesian case.

²⁵ The Special Rapporteur’s serious perplexities with regard to the current theories on international organization (see, *inter alia*, Arangio-Ruiz, “The normative role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations”, pp. 629–731, especially the appendix, pp. 663 *et seq.*; “Le domaine réservé ...”, pp. 151–161, 402–427 and 435 *et seq.*; and “Reflections on the problem of organization in integrated and non-integrated societies”).

²⁶ Some of the problems were identified by a number of speakers at the Florence symposium of 1984 (see *International Crimes of State—A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility*, J. H. H. Weiler, A. Cassese and M. Spinedi, eds. (Berlin, New York, 1989)). An example is Stein’s “Observations on ‘crimes of States’”, pp. 198 *et seq.*

in the fifth report of the Special Rapporteur;² and institutional problems have been evoked more or less explicitly—although rather vaguely—in the course of the debate at the forty-sixth session and not only by members favouring the distinction embodied in article 19 of part one. A closer look at the possible options now seems indispensable.²⁷

76. From the debate itself and from an analysis of the reactions of States and international bodies to breaches akin to those singled out in the four subparagraphs of paragraph 3 of article 19, there emerges a number of theoretical options (more or less innovative) which should be explored.

77. The conceivable options seem to be:

(a) A high degree of institutionalization—through resort to existing international organs or to organs to be created—of the totality or the greater part of the process of implementation of the consequences of crimes, starting from the decision on the existence and attribution of a crime and moving to the determination of the actual substantive and instrumental consequences of the breach. Within the framework of the same option, one step further could be taken in the direction of institutionalization and entrusting even the actual application of any or all of the special or supplementary consequences to the same or to another international organ;

(b) A more or less reduced degree of institutionalization through resort to existing international organs. This option would include any formula other than the most ambitious ones, the minimal solution being to entrust to one or more existing international bodies the determination that triggers any process of implementation of the consequences of a crime, namely the determination as to whether a crime has been or is being perpetrated and as to whether the breach is attributable to one or more given States.

2. INSTANCES OF “ORGANIZED” REACTION TO VIOLATIONS OF FUNDAMENTAL INTERNATIONAL OBLIGATIONS

78. Important instances of institutional reaction to gross violations of international obligations akin to those which would be condemned as crimes under article 19 of part one of the draft articles¹ can be found in the practice of the General Assembly and Security Council. The Special Rapporteur deems it necessary to make clear, however, that in referring to any such instances in the present chapter he shall let aside both the merits of the United

Nations reactions in each particular instance, on one side, and the precise legal qualification of case from the viewpoint of State responsibility, on the other side.

79. To begin with the reaction of the General Assembly in cases probably falling under article 19, paragraph 3 (a), of part one, suffice it to recall the numerous resolutions by which the Assembly strongly condemned during the 1960s and 1970s, the aggressive policies carried out by some colonial or racist States—such as Portugal, South Africa or the minority regime of Southern Rhodesia—towards dependent populations or neighbouring States on the African continent.²⁸ Mention may also be made—again without taking a stand on the merits of each situation—of several resolutions by which the Assembly condemned armed attacks by Israel against the territory of Lebanon, or explicitly qualified as aggressive the policy of that State in the territories occupied after 1967.²⁹ Other important instances of vigorous condemnation of acts of aggression by the Assembly include Israel's armed attack against the Iraqi nuclear installations,³⁰ the United States of America's bombing of Tripoli and Benghazi,³¹ and the Union of Soviet Socialist Republics' intervention in Afghanistan.³² More recently, the Assembly strongly condemned the continuing violations of the territorial integrity and sovereignty of Bosnia

²⁸ See, for instance, the preambular part of General Assembly resolution 3113 (XXVIII), in which it “condemned the repeated acts of aggression committed by armed forces of Portugal against independent African States, which constitute a violation of the sovereignty and territorial integrity of those States”, and found these activities likely to “seriously disturb international peace and security”; in the same vein, see also Assembly resolutions 2707 (XXV) and 2795 (XXVI). Similar findings are reflected in resolutions 31/154 A and 32/116 in connection with the armed attacks conducted by the Rhodesian regime against the territories of Botswana, Mozambique and Zambia. As for South Africa, the Assembly condemned in an impressive series of resolutions what it qualified as acts of aggression perpetrated by that Government from the non-independent territory of Namibia against Angola, Botswana, Lesotho and Zambia: see, *inter alia*, resolutions 31/146, 32/9 D, 33/182 A, 33/206, 38/17, 38/36 A, 39/50 A, 40/25, 40/97 A, 41/39 A and 42/14 A.

²⁹ Particularly explicit are the terms of General Assembly resolution 38/17, by which it “strongly condemn[ed] the massacre of Palestinians and other civilians in Beirut and the Israeli aggression against Lebanon, which endangers stability, peace and security in the region”, and the terms of its resolution 37/123 A, by which the Assembly declared that “Israel's decision of 14 December 1981 to impose its laws, jurisdiction and administration on the occupied Golan Heights constitutes an act of aggression under the provisions of Article 39 of the Charter of the United Nations and General Assembly resolution 3314 (XXIX)” and found “all Israeli policies and practices of, or aimed at, annexation of the occupied Palestinian and other occupied territories of Lebanon to be in violation of international law and of the relevant United Nations resolutions”. On the question of Lebanon, see also resolutions 35/207, ES-7/5, 37/43 and 40/25. For further condemnations of the allegedly illegal and aggressive Israeli policies in occupied territories, see, *inter alia*, resolutions 38/180 A, 39/146 B, 40/168 B, 41/162 B, 42/209 C, 43/54 B, 44/40 B and 45/83 B.

³⁰ See General Assembly resolution 36/27, in which the Assembly “strongly condemns Israel for its premeditated and unprecedented act of aggression in violation of the Charter of the United Nations and the norms of international conduct, which constitutes a new and dangerous escalation in the threat to international peace and security”.

³¹ See General Assembly resolution 41/38.

³² See General Assembly resolution ES-6/2.

²⁷ The problem of the possible forms of “institutionalized” reaction to violations of *erga omnes* obligations which could fall under the category of international crimes has been deeply debated in literature; see, *inter alia*, Frowein, “Collective enforcement of international obligations”, especially pp. 73–77; Hailbronner, “Sanctions and third parties and the concept of public international order”, pp. 2 *et seq.*; Simma, “Does the UN Charter provide an adequate legal basis for individual or collective responses to violations of obligations *erga omnes*?”; Picone, “Nazioni Unite e obblighi ‘*erga omnes*’”; Annacker, *loc. cit.*, especially pp. 156 *et seq.*

and Herzegovina and asked for the immediate cessation of such aggressive and hostile acts.³³

80. The General Assembly also reacted in a number of situations probably falling under article 19, paragraph 3 (b), of part one, dealing with colonial occupation and domination maintained in breach of the principle of self-determination. At the general level, the Assembly asserted in a number of resolutions the “criminal” character of such policies and described them as a potential threat to international peace and security.³⁴ The Assembly did not hesitate to denounce explicitly the individual States it considered to be responsible for such practices. Suffice it to recall—without, here again, entering into the merits of each case—the colonial rule of Portugal in the African territories under its administration,³⁵ the illegal presence of South Africa in Namibia,³⁶ the rule of the minority regime of Southern Rhodesia³⁷ and the policy of Israel in the Palestinian occupied territories.³⁸

81. As for the type of crime provided for in article 19, paragraph 3 (c), of part one, namely, a “serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being”, a well-known example is the General Assembly’s reiterated condemnation of the racial regime of South Africa and the Assembly’s call to the Security Council for the adoption of measures under Chapter VII of the Charter of the United Nations.³⁹ Most recently, the Assembly also reacted to massive violations of human rights coming under the concept of genocide: repression of the Kurdish and Shi’ite minorities in Iraq,⁴⁰ “ethnic cleansing” and

other systematic mass violence and abuse in Bosnia and Herzegovina.⁴¹

82. Examples of institutional reactions to situations likely to fall under the category of international crimes may also be found, of course, in the practice of the Security Council. With regard to aggression, the two precedents of the Korean war and the Gulf war may be recalled. In both cases, the Council reacted so strongly—after determining that a breach of international peace had occurred—as to recommend or authorize the use of armed force by Member States.⁴² Short of such extreme reactions, strong condemnations of instances of aggression were voiced by the Council in a number of other cases, some of which have already been mentioned with reference to the General Assembly.⁴³ More recently, the Council found that the continuing acts of aggression directed against the territory of Bosnia and Herzegovina by the Serbian army were likely to constitute a grave threat to international peace and security and, on that basis, imposed a series of enforcement measures against the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) for its assistance to irregular Serbian units.⁴⁴

83. Not differently from the General Assembly, the Security Council has uttered strong condemnations of the colonial and repressive practices violating the principle of self-determination. In some instances, it has also adopted measures under Chapter VII of the Charter of the

³³ See, for example, General Assembly resolution 47/121.

³⁴ Compare the set of General Assembly resolutions devoted to the question of the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, *inter alia*, resolutions 2189 (XXI), 2326 (XXII), 2465 (XXIII), 2548 (XXIV), 2621 (XXV), 2708 (XXV), 2878 (XXVI), 2908 (XXVII), 3163 (XXVIII), 3328 (XXIX), 3481 (XXX), 31/143, 32/42, 33/44, 34/93, 35/118 and 35/119.

³⁵ See, for instance, paragraph 4 of General Assembly resolution 2270 (XXII), in which it “strongly condemns the colonial war being waged by the Government of Portugal against the peaceful peoples of the Territories under its domination, which constitutes a crime against humanity and a grave threat to international peace and security”. See also, in the same vein, resolutions 2107 (XX), 2395 (XXIII), 2707 (XXV), 2795 (XXVI) and 3113 (XXVIII).

³⁶ See, *inter alia*, General Assembly resolutions 2074 (XX), 2145 (XXI), 2325 (XXII), 2403 (XXIII), 2517 (XXIV), 2678 (XXV), 2871 (XXVI), 3031 (XXVII), 3111 (XXVIII), 3295 (XXIX) and also the resolutions cited above (footnote 28).

³⁷ See, *inter alia*, General Assembly resolutions 2022 (XX), 2151 (XXI), 2383 (XXIII), 2508 (XXIV), 2652 (XXV), 2946 (XXVII), 3115 (XXVIII), 3116 (XXVIII), 3297 (XXIX), 3298 (XXIX) and 3396 (XXX).

³⁸ See, for example, General Assembly resolutions 3414 (XXX), 31/61, 32/20, 33/29, 34/70, ES-7/2, 35/35 A, 35/169 A, 36/226 A, 37/86 E, 37/123 F, 38/17, 38/180 D, 39/146 A, 40/25, 40/168 A, 41/101, 41/162 A, 42/95, 42/209 B, 43/54 A, 44/40 A, 45/83 A and 46/82.

³⁹ See, *inter alia*, General Assembly resolutions 2202 A (XXI), 2307 (XXII), 2396 (XXIII), 2506 B (XXIV), 2671 F (XXV), 2775 F (XXVI), 2923 E (XXVII), 3151 G (XXVIII), 3324 E (XXIX), 31/6 I, 32/105 K, 33/24, 38/11 and 41/35 A.

⁴⁰ See General Assembly resolution 46/134.

⁴¹ See General Assembly resolutions 47/147 and 48/88.

⁴² For the Korean case, see in particular Security Council resolutions 82 (1950), 83 (1950) and 84 (1950); for the Gulf war, see in particular resolutions 660 (1990) and 678 (1990).

⁴³ Specifically, the Security Council condemned in various resolutions the aggressions perpetrated by racist or colonial Powers on the African continent against the territorial integrity of neighbouring independent States. See resolutions 268 (1969) of 28 July 1969, 273 (1969) of 9 December 1969, 275 (1969) of 22 December 1969, 289 (1970) of 23 November 1970, 290 (1970) of 8 December 1970, 294 (1971) of 15 July 1971, 302 (1971) of 24 November 1971 and 321 (1972) of 23 October 1972 for armed attacks directed by Portugal against Zambia, Guinea and Senegal. See also resolutions 326 (1973) of 2 February 1973, 328 (1973) of 10 March 1973, 403 (1977) of 14 January 1977, 406 (1977) of 25 May 1977, 411 (1977) of 30 June 1977, 424 (1978) of 17 March 1978, 455 (1979) of 23 November 1979, for similar acts perpetrated by the minority racial regime of Southern Rhodesia against Zambia, Botswana and Mozambique; finally, see resolutions 300 (1971) of 12 October 1971, 387 (1976) of 31 March 1976, 428 (1978) of 6 May 1978, 447 (1979) of 28 March 1979, 454 (1979) of 2 November 1979, 466 (1980) of 11 April 1980, 475 (1980) of 27 June 1980, 527 (1982) of 15 December 1982, 545 (1983) of 20 December 1983, 546 (1984) of 6 January 1984, 567 (1985) of 20 June 1985, 571 (1985) of 20 September 1985, 574 (1985) of 7 October 1985, 577 (1985) of 30 December 1985 and 602 (1987) of 25 November 1987, for what concerns the repeated aggressions launched by South Africa from the non-independent territory of Namibia against Zambia, Angola and Lesotho. As further examples, mention may be made of resolution 487 (1981) of 19 June 1981, by which the Council deplored the attack of Israel against the Iraqi nuclear plant and resolutions 573 (1985) of 4 October 1985 and 611 (1988) of 25 April 1988 by which the Council condemned the same State for acts of aggression perpetrated against the territorial integrity of Tunisia.

⁴⁴ See, in particular, resolutions 752 (1992) of 15 May 1992, 757 (1992) of 30 May 1992, 787 (1992) of 16 November 1992, 819 (1993) of 16 April 1993 and 820 (1993) of 17 April 1993.

United Nations. One may recall the Portuguese policies in overseas territories, the illegal occupation of Namibia by South Africa and the minority regime of Southern Rhodesia.⁴⁵

84. The Security Council reacted similarly to massive violations of human rights. Noteworthy in this respect are the resolutions condemning the policy of apartheid of the South African Government,⁴⁶ and those related to genocide in Iraqi Kurdistan and “ethnic cleansing” in the territory of the former Yugoslavia.⁴⁷

3. CONCEIVABLE OPTIONS FOR AN “ORGANIZED” DETERMINATION OF EXISTENCE/ATTRIBUTION OF AN INTERNATIONAL CRIME

85. Going back to the problem and to the possible solutions considered (para. 77 above), the first option indicated does not seem to be practical. Although such a degree of institutionalization of the reaction of an “organized international community” to crimes may be theoretically desirable, and might occasionally be achieved in limited, specific areas, it would require a major development of the inter-State system which is very unlikely to occur in the foreseeable future.

86. On the other hand, the alternative option indicated is worthy of serious consideration. Although it would also involve a relatively high degree of progressive development, it seems much less problematic. Express or

⁴⁵ See, for the Portugal issue, Security Council resolutions 180 (1963) of 31 July 1963, 183 (1963) of 11 December 1963, 218 (1965) of 23 November 1965, 312 (1972) of 4 February 1972 and 322 (1972) of 22 November 1972; on the Namibian question resolutions 264 (1969) of 20 March 1969, 269 (1969) of 12 August 1969, 276 (1970) of 30 January 1970, 283 (1970) of 29 July 1970, 301 (1971) of 20 October 1971, 310 (1972) of 4 February 1972, 366 (1974) of 17 December 1974, 385 (1976) of 17 March 1976, 439 (1978) of 13 November 1978, 539 (1983) of 28 October 1983 and 566 (1985) of 19 June 1985; and on the case of Southern Rhodesia, resolutions 216 (1965) of 12 November 1965, 217 (1965) of 20 November 1965, 221 (1966) of 9 April 1966, 232 (1966) of 16 December 1966, 253 (1968) of 29 May 1968, 277 (1970) of 18 March 1970, 388 (1976) of 6 April 1976 and 409 (1977) of 27 May 1977.

⁴⁶ Explicit in this regard is Security Council resolution 473 (1980) of 13 June 1980, in which the Council declared that “the policy of apartheid is a crime against the conscience and dignity of mankind and is incompatible with the rights and dignity of the man, the Charter of the United Nations and the Universal Declaration of Human Rights, and seriously disturbs international peace and security”; see also, *inter alia*, resolutions 181 (1963) of 7 August 1963, 182 (1963) of 11 December 1963, 190 (1964) of 9 June 1964, 191 (1964) of 18 June 1964, 417 (1977) of 31 October 1977, 418 (1977) of 4 November 1977, 554 (1984) of 17 August 1984, 556 (1984) of 23 October 1984, 569 (1985) of 26 July 1985 and 591 (1986) of 28 November 1986.

⁴⁷ For the Kurdish case, see Security Council resolution 688 (1991) of 5 April 1991; for the gross violations of human rights in the former Yugoslavia, see in addition to those mentioned above (footnote 44), Council resolutions 770 (1992) and 771 (1992), both of 13 August 1992. On Council action in cases concerning gross violations of human rights, see, *inter alia*, Gaja, “Genocidio dei curdi e dominio riservato”; Malanczuk, “The Kurdish crisis and allied intervention in the aftermath of the second Gulf war”; Alston, “The Security Council and human rights: lessons to be learned from the Iraq-Kuwait crisis and its aftermath”; Ramcharan, “The Security Council: maturing of international protection of human rights”.

implied indications in comparable directions did emerge from the debate at the forty-sixth session of the Commission.

87. That debate shows conclusively, in particular, that the most crucial problem to be faced in the application of any rules that the Commission may adopt (*de lege lata* or *de lege ferenda*) with regard to the special or supplementary consequences of crimes, relates to determination of the existence of any such wrongful act and its attribution to one or more States. Surely, this problem arises for any internationally wrongful act, whatever its degree of gravity; and it becomes particularly acute whenever the breach—even if it constitutes a mere delict—involves more than one injured State. But the exceptional gravity of crimes and the fact that they involve all States as injured States requires imperatively that some form of collective determination be made, by an international body, as regards the prerequisite for implementation of the consequences of a crime, namely the existence of a breach and its attribution. A number of solutions could theoretically be envisaged in the light of the specific functions of available international organs.

(a) *A determination made exclusively by the International Court of Justice, General Assembly or the Security Council?*

88. *Prima facie*, the most appropriate choice should be dictated by the essentially judicial nature of the determination in question. This would thus lead to the obvious conclusion that, although the implementation of the consequences would remain—as in the case of delicts—in the hands of States, the determination as to the existence and attribution of the breach should emanate from the most authoritative and representative judicial body at present in existence, namely, ICJ. It is the only existing permanent body possessing, in principle, the competence and the technical means to determine the existence, attribution and consequences of an internationally wrongful act.⁴⁸

89. Such a solution, obviously implying the acceptance (in the future convention on State responsibility) of the compulsory jurisdiction of ICJ, would come across at least two serious obstacles. In the first place, no international institution performing the task of a prosecutor is to be found, at the side of a strictly judicial organ like ICJ. The Court itself would not be in a position to “filter” or “screen” the allegations levelled against allegedly criminal States. Secondly, once ICJ were endowed with the indispensable compulsory jurisdiction, even for the limited purpose of the basic determination in question, it would be difficult to confine such a general jurisdictional link to the area of hopefully infrequent internationally wrongful acts defined as crimes. Any State could, by alleging that another State has committed or is committing a crime, bring that State before the Court for the purpose of determining the existence of a mere delict.

⁴⁸ See the fifth report of the Special Rapporteur (footnote 2 above), p. 49, para. 214.

90. Another theoretically conceivable option would be that the future convention entrust the determination in question to the General Assembly or to the Security Council.

91. The General Assembly would seem to be particularly appropriate for a number of reasons. Compared to the Security Council in particular, the General Assembly is generally considered to be more “democratic”. Furthermore, the quasi-universality of the United Nations results in the Assembly being the most representative spokesman not only of the so-called “organized international community” but of the international community itself. The Assembly appears thus to be more qualified than any existing international body to impersonate, so to speak, that international community as a whole which article 19 of part one of the draft articles¹ identifies as being at the root of the qualification of certain types of internationally wrongful acts as international crimes and to translate into concrete, ad hoc pronouncements the general definitions of international crimes emanating *in abstracto*, as indicated in article 19, from that community.⁴⁹

92. A further feature of the General Assembly which makes it particularly suitable for the purpose under consideration is the very broad range of its competence *ratione materiae*, which encompasses not only – albeit with very different powers—the main (and far more focused) area of responsibility of the Security Council, i.e. the maintenance of international peace and security, but

⁴⁹ In the measure in which the expression “international community as a whole” coincides with the expression “international community” tout court, the above-mentioned reference in article 19 of part one of the draft articles (see footnote 1 above) would be applicable to any rule of customary international law. It must be noted, however, that such might or might not be the case if the expression “international community as a whole” was understood in the sense in which it was understood by the Commission in 1976, at its twenty-eighth session. It will be recalled that the formula “international community as a whole” appearing in article 19, paragraph 2, had previously appeared in articles 53 and 64 of the Vienna Convention on the Law of Treaties (see, *inter alia*, Ago, “Droit des traités à la lumière de la Convention de Vienne: introduction”; and Combacau and Sur, *Droit international public*, pp. 159–160). The formula is explained by ILC (following the preceding Special Rapporteur, Mr. Ago’s fifth report (*Yearbook ... 1976*, vol. II (Part One), p. 3, document A/CN.4/291 and Add.1–2)): “It certainly does not mean the requirement of unanimous recognition by all the members of [the international] community, which would give each State an inconceivable right of veto. What it is intended to ensure is that a given internationally wrongful act shall be recognized as an ‘international crime’, not only by some particular group of States, even if it constitutes a majority, but by all the essential components of the international community” (para. 61 of the commentary to article 19, footnote 4 above).

Of course, the phrase “essential components of the international community” was understood to refer to the three main groupings into which the General Assembly appeared at the time to be divided. Although groupings can surely still be identified from various viewpoints within the Assembly, that particular division would now seem to be anachronistic. It will be for the Commission to reconsider the matter when it reverts to the formulation of article 19. For the time being, there is no choice but to refer simply to the “international community”.

Pertinent considerations on the role of the “international community as a whole” as a source of qualification of serious breaches as international crimes of States are formulated by Palmisano, “Les causes d’aggravation ...”, pp. 638–639, who cites other authors and quotes verbatim the relevant passage of Mr. Ago’s fifth report.

also areas of international cooperation governed by rules the most serious infringements of which correspond to the three classes of international crimes contemplated, in addition to aggression, in article 19, paragraph 3, of part one. The Special Rapporteur is referring to such areas as economic, social and cultural cooperation and such rules as those relating to self-determination, human rights, the protection of the environment, not to mention the progressive development and codification of international law. The Assembly is thus clearly competent to deal—*de lege lata* as well as *de lege ferenda*—with all four areas where serious breaches such as those characterized as crimes in article 19 may occur.

93. On the other hand, the General Assembly has no competence to make determinations in the area of State responsibility. In addition, the Assembly does not have the power to take binding decisions, except in specific areas, for example, for the purposes of Articles 5, 6, and 17, paragraph 2, of the Charter of the United Nations, and in procedural matters. Although procedural questions surely could cover the establishment of ad hoc subsidiary bodies to investigate, for example, facts possibly amounting to an international crime, mere recommendations by the Assembly would not carry sufficient weight to form the basis of an authoritative legal determination as to the existence of a crime and its attribution. The Assembly would not, therefore, seem to be—despite its relatively more representative character—the appropriate body to be made solely responsible for the determination in question.

94. Moving to the Security Council, the determination of the existence of an act of aggression, a function entrusted to the Council by the Charter of the United Nations—albeit not for establishing State responsibility—could be considered to provide the basis for the implementation by States of the consequences of the crime defined in article 19, paragraph 3 (a), of part one. A role could also be envisaged for the Council with regard to the kinds of crimes covered by article 19, paragraph 3 (b), (c) and (d), bearing in mind the Council’s competence to determine, under Article 39 of the Charter, breaches and threats to the peace, and particularly the latter. The practice of the Council reveals in fact instances of findings of threats to the peace—albeit in principle, it is true, for the exclusive purposes of Chapter VII—in the context of situations comparable to those involving crimes under article 19, paragraph 3 (b), (c) and (d), and the written or unwritten primary rules implied therein.⁵⁰

95. Without prejudice, of course, to the Security Council’s powers relating to the maintenance of international peace and security, it does not seem that the Council could, any more than the General Assembly, be made solely responsible for the basic legal determination that should be a prerequisite for the implementation by States

⁵⁰ See, for instance, Security Council resolution 688 (1991) of 5 April 1991 concerning acts of genocide by the Iraqi Government against the Kurdish population; and resolutions 757 (1992) of 30 May 1992 and 787 (1992) of 16 November 1992 relating to the situation in the former Yugoslavia, where massive human rights violations have been committed.

of the consequences of crimes. That determination pertains appropriately to the application of the law of international responsibility rather than the maintenance of international peace and security.⁵¹

96. Despite the interaction between these two crucial areas of inter-State relations, requiring the Security Council solely to proceed to the basic determination in question would be at least as problematic as asking the General Assembly singly to discharge that same function. The Council might appear better equipped to do so in view of the binding force of its decisions, but it would be less suitable than the Assembly because of its restricted membership and the specificity of its competence *ratione materiae*.

97. Whatever the considerations respectively applicable to the General Assembly and the Security Council, the main difficulty resides for both in the political nature of their composition and role:

(a) Both bodies operate with a high degree of discretion. They act neither necessarily nor systematically in all the situations that would seem to call for the exercise of their competence. They operate, instead, in a selective and at times very selective way;

(b) Neither body is bound to use uniform criteria in situations which may seem quite similar. Consequently, situations of the same kind and gravity can be treated differently or not treated at all;

(c) The very nature of their determinations seems to exclude any duty on their part to motivate their choices (in the form of decision, action or inaction) from the viewpoint of international law;

⁵¹ This distinction was stressed by the Special Rapporteur at the forty-fourth session of the Commission when he contested his predecessor's formulation of article 4 of part two of the draft articles where the law of State responsibility seemed to be unduly subordinated to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security (see *Yearbook ... 1992*, vol. I, 2277th meeting, and *ibid.*, vol. II (Part Two), p. 38, paras. 260–266.

The matter is closely interrelated with the distinction between the powers of the Security Council under Chapters VII and VI of the Charter of the United Nations, the latter powers being confined to mere recommendation. In this respect, see also *Yearbook ... 1992*, vol. I, 2267th meeting, in fine. See also Graefrath, *loc. cit.*, pp. 190 *et seq.*; and paragraphs 137–139 below.

Some of the complexities of the relationship between Security Council determinations and the law of State responsibility are considered by, *inter alia*, Gaja, “Réflexions sur le rôle du Conseil de sécurité dans le nouvel ordre mondial”; Bowett, “The impact of Security Council decisions on dispute settlement procedures”; and Gowlland-Debbas, “Security Council enforcement ...”, especially pp. 61–73.

As noted by the Government of Switzerland with respect to a well-known problem arising within the framework of the topic entitled “Draft Code of Crimes against the Peace and Security of Mankind”, “To suggest that decisions of the Council, a political organ if ever there was one, should serve as a direct basis for national courts when they are called upon to establish individual culpability and determine the severity of the penalty does not seem to be in keeping with a sound conception of justice” (see the thirteenth report of the Special Rapporteur on the topic (document A/CN.4/466 and Corr.1), para. 40).

(d) The discretionary and possibly arbitrary character of their choices is further aggravated by the fact that, in the absence of legal motivation, no contemporary or subsequent verification of the legitimacy of actual choices and no comparison between such choices are possible.⁵²

98. From the above features it is clear that neither the involvement of the General Assembly nor that of the Security Council could satisfy the most elementary requirements of a legal determination as to the existence and attribution of an internationally wrongful act, let alone of an international crime of State. Much as concession must be made to the unique structure of the inter-State system, any ascribing of responsibility should presuppose, as shown by the history of the law of national societies:

(a) Subjection to the rule of law, at the procedural as well as substantive levels;

(b) Continuity, systematization and impartiality—or non-selectivity—with regard to the infringements of the law.⁵³

99. The Special Rapporteur also briefly considered, in his fifth report,² whether recent practice might not indicate that the scope of the Security Council's competence had undergone an evolution with regard precisely to the “organized reaction” to certain types of particularly serious international delinquencies. However, that practice could only be viewed as having endowed the Council with a competence in the area of State responsibility for crimes if it could be convincingly established that it was a juridically decisive practice. Such a conclusion would at all events be very problematic to reach *de lege lata*;⁵⁴ and it does not appear that a solution of the kind would be appropriate as a matter of progressive development of the law of international organization.⁵⁵

(b) *Political and judicial roles combined*

100. The features of ICJ, the General Assembly and the Security Council considered in the preceding paragraphs seem thus to suggest that none of those bodies could properly discharge by itself, individually, the delicate function of determining the existence of an international

⁵² The problem of the lack of control over United Nations political organs—and in particular over the Security Council—has been considered by many scholars. See, for instance, Franck, “The ‘powers of appreciation’: who is the ultimate guardian of UN legality?”; Sciso, “Può la Corte internazionale di giustizia rilevare l’invalidità di una decisione del Consiglio di sicurezza?”; Gaja, “Réflexions sur le rôle ...”, pp. 314–317; Bowett, *loc. cit.*, pp. 97 *et seq.*; Gowlland-Debbas, “The relationship between the International Court of Justice and the Security Council in the light of the *Lockerbie* case”; Bedjaoui, *The new world order and the Security Council: testing the legality of its acts*, passim; and Condorelli, “La Corte internazionale di giustizia e gli organi politici delle Nazioni Unite”. See also the literature on the *Lockerbie* case (footnote 10 above).

⁵³ See the fifth report of the Special Rapporteur (footnote 2 above), p. 48, para. 211.

⁵⁴ *Ibid.*, paras. 212–213.

⁵⁵ *Ibid.*, p. 60, paras. 257 *et seq.*; and p. 57, paras. 243–245.

crime of State and its attribution as prerequisites for the implementation of the consequences contemplated in the relevant articles of the draft articles on State responsibility. A different solution must, therefore, be devised: and that solution seems to be dictated by the respective features of the three main United Nations bodies.

101. On the one hand, the General Assembly and the Security Council are too exclusively political to be entrusted with such an eminently juridical function as that of determining the existence and attribution of an international crime. On the other hand, ICJ, while endowed with the necessary juridical capacity, is not endowed with the equally indispensable specific competence; and it would be inappropriate, as explained, to confer upon it an unconditional, direct competence with respect to crimes, that would inevitably develop into an unwanted generalized compulsory jurisdiction with regard to delicts as well. The only solution seems to lie in a combination of the political element with the judicial element in such a manner as to avoid the drawbacks of both an exclusively political and an exclusively judicial determination. It could be a political assessment, by the Assembly or the Council, of the allegation of the accusing State (or States) aimed at determining if the allegation is serious enough to justify the serious concern of the international community; such a political pronouncement would then open the way to a possible involvement of ICJ.

102. As regards the political body's role, it should consist in the adoption of a resolution by a qualified majority. For the General Assembly, the Special Rapporteur is thinking of a two-third majority of the members present and voting. For the Security Council, two possibilities could be envisaged as a matter of principle. The first theoretical possibility would be to require a mere two-third majority, without further qualification. Such a solution would call into question the principle of the unanimity of the permanent members and could only be considered within the framework of a revision of the Charter of the United Nations. The second possibility would be to provide that, in conformity with the principle set forth in Article 27 of the Charter, "a party to a dispute shall abstain from voting". This alternative seems to be a fair and realistic one.

103. The nature of the ICJ pronouncement could be envisaged in different ways of unequal juridical appeal. One possibility would be to involve the judicial body in its consultative capacity. Any Member State of the United Nations party to the convention on State responsibility alleging that a crime has been or is being committed would be entitled to submit the matter to the General Assembly or the Security Council. Either political body would debate the matter and, upon finding that the allegation of the accusing State (or States) is serious enough to justify the involvement of the international community, would decide to submit the issue to ICJ for an advisory opinion. A negative pronouncement of the Court would put the matter to rest (without prejudice, of course, to issues relating to the existence, attribution or consequences of a delict). A positive pronouncement of the Court ac-

cepted by the requesting body would allow any State party to the convention on State responsibility to implement the provisions relating to the legal consequences of a crime as set forth in part two of the draft articles.

104. Another possibility would be to involve the judicial body in its contentious function. The debate of the General Assembly or the Security Council following upon an allegation of crime would conclude not with a request for an ICJ advisory opinion but with the adoption of a resolution finding that the allegation deserved serious consideration by the international community. The adoption of such a resolution by a qualified majority of either political body—in the sense explained—would enable, on the strength of the convention on State responsibility, any participating Member State (including the alleged "criminal") to bring the matter to ICJ for it to decide on the existence of a crime and its attribution. In other words, the resolution of the Assembly or the Council would, by virtue of the convention on State responsibility, create among the participating Member States, the "jurisdictional link" necessary for ICJ to have compulsory jurisdiction.

105. A number of reasons seem to militate in favour of the second alternative.

106. First, the seriousness of an allegation of crime and the gravity of the eventual consequences suggest that it would not be appropriate to rely, for the basic determination in question, upon a consultative opinion.

107. Much as one may consider the ICJ pronouncements as essentially equivalent in authority, regardless of whether they are labelled advisory opinion or judgment, there are marked differences.⁵⁶ One difference lies in the extent to which issues of fact are of importance for all consultative opinions as they are in all contentious cases.⁵⁷ Another, more important, difference lies in the fact that, while the Court's pronouncement in a contentious case normally settles the issue or issues in the sense that it decides the merits of a dispute in its entirety—thus operating, in a way, as the decisive utterance on the issue or issues at stake—the Court's pronouncement in an advisory case is normally intended to give guidance on an issue for the addressee ultimately to act upon the is-

⁵⁶ See Benvenuti, *L'accertamento del diritto mediante i pareri consultivi della Corte internazionale di Giustizia*, passim.

⁵⁷ PCIJ has taken the view that in the case of a consultative procedure, it was not barred from considering questions of fact. It has however noted at the same time that "under ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are" (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 28). ICJ has confirmed this stand in the case of *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 28 *et seq.* The opinion that questions of fact remain, in principle, outside the consultative function of ICJ is expressed by Vallat, "The competence of the United Nations General Assembly", p. 216; and Morelli, "Controversia internazionale, questione, processo", p. 13.

sue.⁵⁸ A further difference lies in the fact that the advisory procedure does not involve, as a rule, fully-fledged contentious proceedings between litigant States.

4. AN ICJ DECISION ON EXISTENCE/ATTRIBUTION AS A PREREQUISITE FOR THE IMPLEMENTATION BY STATES OF THE CONSEQUENCES OF AN INTERNATIONAL DELICT

108. In the light of such considerations, the Special Rapporteur would be inclined to believe that the legal determination as to the existence and attribution of an international crime should be the result of a contentious procedure before ICJ which would be initiated by any one of the *omnes* injured States following the political body's resolution and would give accusers and accused the possibility of thoroughly confronting each other within the framework of full and direct adversary proceedings.

109. A further and apparently decisive reason to make an ICJ judgment a prerequisite for the implementation by States of any legal consequences of an international crime derives from the features of the post-countermeasures dispute settlement procedure presumably to be envisaged for crimes in part three of the draft articles. In view of the high degree of gravity of crimes, the Special Rapporteur plans to propose, for the relevant provision of part three, not just conciliation or arbitration (as was done for delicts) but a direct compulsory jurisdiction of ICJ over any disputes arising from the implementation of the legal consequences of a crime (namely, post-countermeasure disputes relating to a crime). Considering further that the present proposals envisage a preliminary pronouncement of ICJ upon the existence/attribution of a crime as a prerequisite for the lawful implementation of any consequences thereof, that pronouncement could not consist of a mere consultative opinion. As the Court could be called upon (under the relevant provisions of part three) to pronounce itself by way of a judgment in the post-countermeasures phase, it would be bizarre, to say the least, if the Court found itself, in that phase, in a situation where it would be obliged either to confirm passively its previous advisory opinion or to reverse that advisory opinion in the judgment.

110. The relevant provision appears in draft article 19, paragraph 2, of part two (see section E of the present chapter, below).

111. This being said, one should bear in mind that the effects to be thus attributed by the future convention on State responsibility to resolutions of the General Assembly or the Security Council and to judgments of ICJ should be without prejudice to the Council's functions under the Charter of the United Nations and the obligations of Member States deriving therefrom. The applica-

⁵⁸ As stated by ICJ in an advisory opinion, "[t]he Court's opinion is given not to the States but to the organ which is entitled to request it" to obtain enlightenment as to the course of action it should take (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 71*).

tion of Article 51 of the Charter should also remain unaffected.

112. The relevant provision is covered by draft article 20 of part two (see section E of the present chapter, below).

5. FURTHER ISSUES

(a) *The possible involvement of ICJ under instruments other than the future convention on State responsibility*

113. The provision whereby ICJ would have compulsory jurisdiction (as amongst the participating States of a future convention on State responsibility) to determine the existence and attribution of a crime once a General Assembly or Security Council resolution in the sense indicated (para. 102 above) had been adopted, would not, in the Special Rapporteur's view, exclude the possibility that the compulsory jurisdiction of ICJ for the same purpose might be instituted otherwise. It could in fact derive, for example, from a multilateral instrument among participating Member States characterizing a particular wrongful act as an international crime of State. Compulsory jurisdiction of the Court (namely, jurisdiction involving the possibility of unilateral application) is contemplated in the Convention on the Prevention and Punishment of the Crime of Genocide (art. IX), the International Convention on the Elimination of All Forms of Racial Discrimination (art. 22), the Convention on the Elimination of All Forms of Discrimination against Women (art. 29) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 30). The International Convention for the Elimination and Punishment of the Crime of Apartheid (art. XII) is less clear. Furthermore, an ICJ competence could also derive, although less plausibly, from a bilateral dispute settlement instrument envisaging the ICJ compulsory jurisdiction in such terms that either party could seize ICJ with the claim that the other party has committed or is committing an international crime of State. Three interrelated questions would arise if any such "jurisdictional links" were used:

(a) *Quid juris*, for the purposes of the convention on State responsibility, where any State or States availed themselves of a jurisdictional link arising, for example, from one of the above-mentioned multilateral conventions in order to bring to justice an alleged wrongdoer?

(b) Should the applicant State or States be bound to comply, for the purposes of the convention on State responsibility, with the requirement of a (successful) prior recourse to the General Assembly or Security Council?

(c) What would be, following such a judicial initiative taken outside the framework of the convention on State responsibility, the position of the "third" *omnes* States participating in the said convention?

114. The first question should be answered, in the Special Rapporteur's view, in the sense that, if the conven-

tion on State responsibility were to provide, as proposed, that an ICJ finding of international crime fulfils the condition for the implementation of the consequences of that crime by the *omnes* injured States, an ICJ judgment to that effect should be considered to fulfil that condition, irrespective of the legal basis of the Court's jurisdiction. The fact that under the convention on State responsibility the authority of ICJ to decide the issue of the existence/attribution of an international crime would be subjected to the prerequisite of a United Nations political resolution should not restrict in any way the possibility that that ICJ function be validly performed on the basis of any titles of jurisdiction under Article 36 of the Court's Statute other than the convention on State responsibility.

115. As a logical consequence, the second question should be answered in the sense that, in case ICJ were seized on the basis of a jurisdictional link originating from an instrument other than the convention on State responsibility, it would not be necessary to go through the preliminary political phase before the General Assembly or the Security Council. The requirement of an Assembly or Council resolution is designed (see para. 89 above) to avoid the provision of the convention on State responsibility relating to the Court's role with respect to international crimes resulting in the Court's compulsory jurisdiction being extended to issues other than the existence/attribution of an international crime (e.g. the existence/attribution and consequences of a delict). Obviously, once the Court were endowed with compulsory jurisdiction on the basis of an instrument other than the convention on State responsibility, that requirement would become superfluous.

116. As to the third question, it seems appropriate, in the Special Rapporteur's view, that an ICJ finding of international crime be considered as fulfilling the condition for the *ab omnibus tertiis* implementation of the special consequences of crimes, whatever the source of the ICJ competence to deal with the question of existence/attribution. All the Member States participating in the convention on State responsibility would thus be entitled to avail themselves of an ICJ judgment based on a jurisdictional link unrelated to the convention on State responsibility and deriving, for example, from the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or the International Convention on the Elimination of All Forms of Racial Discrimination. However, the extension to *omnes tertios* would of course only apply to the part of the ICJ judgment covering the existence/attribution of an international crime. It would not extend to any parts of that judgment concerning only the State or States having seized the Court on the strength of a jurisdictional link unrelated to the convention on State responsibility. Any part of the Court judgment relating either to the existence/attribution or the consequences of a possible mere delict or the consequences of the crime itself would not extend beyond the parties between which the proceedings were initiated. In other words, only the original applicant State or States, together with the defendant allegedly wrongdoing State or States, would be subject, in con-

formity with Article 59 of the ICJ Statute, to any parts of the Court's judgment other than the part relating to the existence/attribution of an international crime.

117. A problem could of course arise with regard to the position of "third" States in any ICJ proceedings initiated by one or more States on the strength of a jurisdictional link originating in an instrument other than the convention on State responsibility. Under that convention, as explained, any participating Member State would, following the adoption of the political body's resolution, be entitled to initiate proceedings before the Court and to participate therein. As "third" States vis-à-vis the case brought to ICJ on the basis of a jurisdictional link deriving from a source other than the convention on State responsibility, those States would not be entitled in principle to participate in the Court proceedings. This situation should therefore be covered by some special rule in the draft. The most appropriate solution would be to provide that:

(a) In the hypothesis under consideration, any "third" State—namely any Member State of the United Nations participating in the convention on State responsibility other than the State or States which seized ICJ on the basis of a jurisdictional link unrelated to the said convention—shall be entitled to participate fully, by unilateral application, in the Court proceedings relating to existence or attribution of the crime, such States to participate as principals and not as intervening parties under Articles 62 and 63 of the ICJ Statute;

(b) Once ICJ has ruled positively on the existence and attribution of a crime, the condition for the implementation of the special consequences of the crime shall be deemed to be fulfilled ipso facto for any Member State participating in the convention on State responsibility, notwithstanding the absence of a prior political pronouncement by the General Assembly or the Security Council.

(b) *The respective roles of the General Assembly, the Security Council, ICJ and omnes States*

118. No difficulties would seem to arise from the fact that accusing States under draft article 19, paragraph 1, of part two (see section E of the present chapter, below) may seize either the General Assembly or the Security Council or both at the same time. As the Special Rapporteur sees it, there would be here a case of concurrent competence between the two bodies. For the initiative of the accusing State to be successful, it would suffice that one or the other body reach an affirmative conclusion. Considering, anyway, that the resolution of the political body is only intended to open the way to a pronouncement by ICJ (further to an application by one or more States), any divergence between the Assembly and the Council would be settled by the Court's decisive—positive or negative—judgment on existence and attribution.

119. A formula combining a resolution from a political body (General Assembly or Security Council), an ICJ judgment and the *omnes* injured States' implementation

of the legal consequences of a crime is the best—or the least unsatisfactory—that can be offered at the present stage of development of the so-called “organized international community”, with a view to a civilized approach to the problem of the reaction to international crimes of States. The function of the political body is the closest possible approximation to a preliminary investigation of the degree of credibility of allegedly injured States’ charges, failing which it would be improper to let the matter be brought to the judge. It is, in other words, the closest possible approximation—although a very remote one—to the prosecutorial function.⁵⁹ In its turn, the ICJ pronouncement following a fully-fledged contentious procedure is the closest possible approximation to a proper and fair trial of the case insofar as the basic conditions of existence and attribution are concerned. That the subsequent, ultimate implementation of the articles on the legal consequences of the crime would have to remain in the hands of injured States—*omnes* States—is an inevitable consequence of the continuing low degree of institutionalization of the inter-State system. This snag should not however be seen by the Commission as a reason not to pursue imaginatively the course of action it embarked upon in 1976, when it adopted article 19 of part one.¹

120. Of course, the involvement of a hopefully large number of States in the reaction to a crime may be a source of differences, controversies and even dispute. Although such difficulties may also arise in the case of delicts (whenever the wrongful act consists of a violation of an *erga omnes* obligation), they are likely to be more serious and frequent in the case of crimes. The only remedy conceivable at present is either reliance on the possibilities of coordination afforded by the General Assembly, the Security Council or other international bodies exercising competence in the relevant area, or reliance on possible ad hoc arrangements among the *omnes* injured States, or any groups thereof. This difficult problem is tentatively covered by draft article 18 (c)-(g) of part two (see section E of the present chapter, below).

D. Concluding remarks

1. OBJECTIONS TO ARTICLE 19 OF PART ONE¹

121. The moment has now come to consider the proposed solution, in the light of the objections which have been raised so far, to the inclusion, in the draft on State responsibility, of the notion of international crimes of States.

⁵⁹ In the language of Zimmern, the political body’s function—surely neither judicial nor conclusive—would be, according to draft article 19, to set up a “hue and cry” (*The League of Nations and the Rule of Law, 1918–1935*, p. 451). The resolution—not even a recommendation of that body—would merely identify a State as suspected of an alleged crime (as the old League of Nations Assembly was to do in the case of aggression), leaving it to all States to pursue the matter: the lawful follow-up—prior to any implementation of consequences—would be to bring the allegation before ICJ for a decision on the existence of a crime.

122. Those objections are based on a number of interrelated and partially overlapping arguments. One set of arguments is that States are by nature susceptible neither of criminal liability nor of penal sanction, penal liability and sanction being appropriate only for individuals. This set of arguments is based upon the maxim *societas delinquere non potest*.⁶⁰ Closely related is the argument that the inter-State system is endowed neither with a prosecutorial institution nor with a court of criminal law with compulsory jurisdiction for State crimes vis-à-vis any State.

123. To begin with, the first set of arguments in the Special Rapporteur’s fifth report discussed the weight of the maxim *societas delinquere non potest* as applied to States as participants in international relations and subjects of international law. In the first place, it is not quite correct to say that legal persons are not susceptible—*mutatis mutandis*—to more than merely civil liability and sanction. Secondly, States are not quite the same thing as juristic persons of national law, anyway. As international persons they look more like factual collective bodies than juristic persons; and they like to call themselves “powers”: a term unknown to the law and practice of both private corporate bodies and public subdivisions of States, including member states of federal States.⁶¹ Thirdly, and most importantly, States frequently behave in such manner as to breach legal and moral obligations that are so essential for the peace, survival and welfare of other States and peoples that their breach is considered universally as materially and morally far more serious than the gravest delinquencies committed by private individuals, groups or corporations.

124. As regards the argument that liability for exceptionally serious international breaches should be envisaged only for individuals, the Special Rapporteur appreciates, despite the serious reservations which have been recently raised by Governments over important elements of the draft Code of Crimes against the Peace and Security of Mankind, the role that such an instrument could play, if adopted, in curbing violations of fundamental international obligations. Apart from the fact, however, that the draft Code expressly provides that prosecution of an individual “does not relieve a State of any responsibility” (art. 5), thus leaving open the question of the State’s liability,⁶² the gravest among the individual crimes contemplated in the draft Code are envisaged as ascribable to individuals holding authoritative positions at the summit of a State or close thereto.⁶³ It follows that, in the most

⁶⁰ See the fifth report of the Special Rapporteur (footnote 2 above), pp. 54–58, paras. 250 *et seq.*

⁶¹ *Ibid.*, p. 59, para. 253.

⁶² Paragraph (2) of the commentary to article 5 of the draft Code of Crimes against the Peace and Security of Mankind refers expressly to the commentary to article 19 of part one of the draft articles on State responsibility, which excludes that the punishment of individuals who are organs of the State exhaust “the prosecution of the international responsibility incumbent upon the State ...” (*Yearbook ... 1991*, vol. II (Part Two), p. 99).

⁶³ See, for example, paragraph (4) of the commentary to part two of the draft Code of Crimes against the Peace and Security of Mankind (*ibid.*, p. 101).

important cases, criminal proceedings under the draft Code will heavily involve the State within whose establishment the accused individuals operated. Unless the State's establishment manages to disassociate itself convincingly from the accused parties, the individual crime will easily appear to be so closely connected with the reprehensible conduct of other organs that the individual crime will be recognized as a crime of State of the same or very similar denomination. Two factors may frequently concur in making such an outcome inevitable. One is that the infringed rule is basically identical in both cases, as is also the dimension of the wrongful act or acts, i.e. the actions or omissions constituting the "objective" or "external" element of the crime. The other factor relates to the so-called "internal" or "psychological" element, namely the wilful intent (*dolus*).⁶⁴ Even assuming that the draft Code soon becomes a juridical reality despite the many hurdles that should be overcome for its ratification and implementation (with or without an international criminal court), the notion of the criminal responsibility of the individual at the international level does not significantly reduce the *raison d'être* of article 19 of part one of the draft articles on State responsibility and the part two and three provisions that are necessary for a proper implementation of that article.

125. Be that as it may of individual *delicta juris gentium* and the draft Code of Crimes against the Peace and Security of Mankind, it must be acknowledged that breaches of the kind of obligations referred to in article 19, paragraph 3, of part one of the draft articles on State responsibility have now for some time attracted general condemnation on the part of the international community and international forums. Examples of wrongful acts so condemned have been given (see paras. 78-84 above). They indicate that all the wrongful acts in question are generally viewed as: (a) infringing *erga omnes* rules of international law, possibly of *jus cogens*; (b) being injurious to all States; (c) justifying a generalized demand for cessation/reparation; and (d) eventually justifying a generalized reaction in one form or another on the part of States or international bodies. It would seem therefore highly appropriate that something be done by the Commission in order to bring such reaction under some measure of more specific legal control within the draft articles on State responsibility.⁶⁵

126. Article 19 of part one, as adopted on first reading by the Commission at its twenty-eighth session, represented a preliminary step in that direction. A second step was article 5 of part two,⁵ as adopted on first reading by the Commission at its thirty-seventh session, which enti-

ties all States to demand cessation/reparation and eventually to resort to countermeasures.

127. Draft articles 15-20 of part two (see section E of the present chapter, below), lay down the rules which the Special Rapporteur deems indispensable in order to specify the conditions, modalities and limits of the said generalized reaction. Those draft articles are meant to provide the legal control of that reaction within the framework of the law of State responsibility to which the matter properly belongs (see paras. 137-139 below).

128. Coming now to the second set of objections, namely to the "institutional" problem, it is of course undeniable that the inter-State system—or, for that matter, the rather undefined or ill-defined "international community" (of men, of nations, of peoples or of States)—is not endowed, and is not likely to be endowed soon, with such institutions as a public prosecutor's department and a court of criminal jurisdiction (not to mention an effective enforcement machinery). It is, however, simplistic to argue on that basis against the singling out of some internationally wrongful acts as calling for a more severe legal condemnation. The inter-State system is indeed still a very inorganic one. But isn't this argument applicable to all areas of international relations and international law?²⁵

129. The inter-State system is not less inorganic—to remain in the area of State responsibility—with regard to the consequences of delicts. The whole process, starting with the decision as to the existence and attribution of a delict and continuing with demands of cessation and reparation and eventual resort to countermeasures, is in principle—namely, under general international law—in the hands of States. The only exceptions derive from the regretfully infrequent and mainly bilateral conventional arrangements for "third party" settlement procedures. A few more exceptions would result from the provisions proposed in the fifth report of the Special Rapporteur²—for the articles of part three of the draft articles that have been sent to the Drafting Committee⁶⁶—and from the Special Rapporteur's draft article 12 of part two.¹³

130. Moving to an even more crucial chapter of international law, the institutional gap is even more evident—and dramatic—in the area of the maintenance of international peace and security. Despite the remarkable innovations embodied in Chapter VII of the Charter of the United Nations, the international community appears not to be so "organized" in this area after all. The Security Council has not succeeded so far in placing directly at its disposal the armed forces indispensable for a really effective action of its own. Although security measures are recommended or decided upon by the Council—a restricted body which can hardly be considered to represent the entire international community—they are carried out by States, and, at that, only by some States. To recognize this reality as reflective of the balance of power in the inter-State system is one thing; to speak of an "organization" of collective security is quite another. For good or evil, the maintenance of international peace and security

⁶⁴ It is indeed hard to imagine how the combination of actions/omissions and intent would not coalesce, at one and the same time, into a wrongful act of the individual and of the State, and presumably a crime of both. Only exceptionally would the crime of an individual involve a mere delict on the part of the State.

⁶⁵ See Spinedi's valuable writings on the subject, particularly the comprehensive introductory study in the volume on the symposium held in Florence in 1984 (see footnote 26 above); and "Contribution à l'étude de la distinction entre crimes et délits internationaux".

⁶⁶ See *Yearbook ... 1993*, vol. II (Part Two), p. 35, para. 205.

is in the hands of the major Powers just as it was a century ago: but this, surely, would not be a good reason to do away with collective security as administered through the only body available, however imperfect.

131. A different situation exists of course in some special areas such as the protection of human rights. However, the most effective international institutions in the area of human rights do not really operate at the level of inter-State relations. They operate rather, so to speak, at an infra-State level as common organs of the States participating in each human rights system. Inter-State relations in a proper sense remain, even in this area, essentially inorganic.

132. It follows, in the view of the Special Rapporteur, that the inter-State system or the "international community" does not seem to be any less organized, in the area of the legal control or coordination of reactions to crimes of States than in other areas. In this area as in any other areas, States are still the main actors. It is for States to accuse and it is for States to demand cessation/reparation from a wrongdoing State and to resort eventually to countermeasures. So far, nothing is different from the successive phases in the handling of a delict, i.e. determination of existence and attribution, demand of cessation/reparation and eventual countermeasures.

133. If the greater severity of the legal consequences of crimes calls for some measure of institutional control, it does not necessarily follow that that control should be so broad and intrusive as to abolish the role of States. Existing institutions offer neither a public prosecutor's department nor a court of full criminal jurisdiction, nor an organized enforcement mechanism. They offer nevertheless good possibilities of reducing the arbitrariness of the *omnes* injured States' unilateral or collective reactions. The procedure described in the preceding paragraphs and envisaged in draft article 19 of part two (see section E of the present chapter, below) is intended precisely to perform that function.

134. The Special Rapporteur deems it indispensable to stress, at this point, two essential features of the solution proposed in the present report.

2. THE PROPOSED SOLUTION AND THE MAIN EXISTING INSTRUMENTS ON INTERNATIONAL ORGANIZATION

135. One essential feature is that the proposed two-phased procedure does not involve any modification of the two main existing instruments of international organization. The Special Rapporteur is referring to the Charter of the United Nations and the ICJ Statute. By envisaging a General Assembly or Security Council resolution as a precondition of ICJ jurisdiction under Article 36 of the ICJ Statute, the future convention on State responsibility would affect neither the Charter nor the Statute.

136. As regards the Charter of the United Nations, it would not be the first time that an international treaty other than the Charter itself requires specific action on the part of the General Assembly or the Security Council for the

treaty to produce given effects of its own. Familiar examples are, for the Assembly, article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide and articles VI and VIII of the International Convention on the Elimination and Punishment of the Crime of Apartheid. It follows that the proposed solution does not imply any institutional modification in the existing structure of the so-called "organized international community". A future convention on State responsibility would merely put to use, on its own juridical strength, the existing political and judicial organs of the United Nations.

3. THE INTERNATIONAL LAW OF STATE RESPONSIBILITY AND THE UNITED NATIONS COLLECTIVE SECURITY SYSTEM

137. The second essential feature concerns the relationship of the proposed solution with the collective security system embodied in the Charter of the United Nations. Two distinct systems would coexist. On the one hand there would be the political role performed under the Charter by the Security Council and the General Assembly—but mainly by the former—with regard to the maintenance of international peace and security. On the other hand, there would be the role entrusted by the convention under elaboration to either political body—and to ICJ—in the area of State responsibility. In the area of collective security—namely, the reaction to any violations of Article 2, paragraph 4, of the Charter—there are the purely political functions performed respectively by the Council and the Assembly, functions that in principle are not meant to interfere with the law of State responsibility and its application. In the area of State responsibility for international crimes, would be found, on the strength of the convention on State responsibility, the preliminary political evaluation by the Assembly or the Council of the seriousness of the accusing State's or States' allegation. Such evaluation would eventually be followed by the decisive pronouncement of ICJ as the condition required by the convention for the implementation by *omnes* States of the consequences of an international crime.⁶⁷

138. The Charter of the United Nations system of collective security and the international responsibility system of the future convention on State responsibility would thus operate independently in conformity with their respective essential features. In the area of security, where discretionary power and urgency of action are of the essence, the decision would ultimately rest solely with the Security Council in its restricted membership. But in the area of State responsibility for very serious breaches of fundamental international obligations, where the judicial application of the law is instead of the essence, the decision, prior to that of the *omnes* States

⁶⁷ The importance of the role of ICJ with regard to the crime of genocide is stressed, for example, by the Government of the United Kingdom of Great Britain and Northern Ireland in its recent comments (see the thirteenth report of the Special Rapporteur for the draft Code of Crimes against the Peace and Security of Mankind (document A/CN.4/466 in the present volume), para. 60).

themselves, must rest ultimately with ICJ. As regards the preliminary role of either political body, absolute impartiality is obviously unattainable. A relatively high degree of impartiality can however be expected from the General Assembly due to the two-thirds majority requirement, and from the Council due to the mandatory abstention of the parties in the dispute. The area pertains to Chapter VI of the Charter and not to Chapter VII.⁵⁰ It could thus be hoped that, at least for the purposes of State responsibility for international crimes, no State, in either body—as before ICJ—would be more equal than others.

139. The Special Rapporteur trusts that the above considerations will reduce the objections to the notion of State crimes based upon the lack of a prosecutorial institution and a criminal court. Those objections appear to beg the question. The question is whether States will be willing to accept article 19 of part one of the draft articles and its minimal implications set forth in the present report. As in other areas of progressive development and codification of international law, it is for the Commission to take the initial technical step. It will hopefully be an imaginative step.

E. Articles 15 to 20 of part two of the draft articles on State responsibility

140. The Special Rapporteur proposes the following draft articles 15 to 20 below for part two:

Article 15

Without prejudice [In addition] to the legal consequences entailed by an international delict under articles 6 to 14 of the present part, an international crime as defined in article 19 of part one entails the special or supplementary consequences set forth in articles 16 to 19 below.

Article 16

1. Where an internationally wrongful act of a State is an international crime, every State is entitled, subject to the condition set forth in paragraph 5 of article 19 below, to demand that the State which is committing or has committed the crime should cease its wrongful conduct and provide full reparation in conformity with articles 6 to 10 *bis*, as modified by paragraphs 2 and 3 below.

2. The right of every injured State to obtain restitution in kind as provided in article 7 shall not be subject to the limitations set forth in subparagraphs (c) and (d) of paragraph 1 of the said article, except where restitution in kind would jeopardize the existence of the wrongdoing State as an independent member of the international community, its territorial integrity or the vital needs of its people.

3. Subject to the preservation of its existence as an independent member of the international community and to the safeguarding of its territorial integrity

and the vital needs of its people, a State which has committed an international crime is not entitled to benefit from any limitations of its obligation to provide satisfaction and guarantees of non-repetition as envisaged in articles 10 and 10 *bis*, relating to the respect of its dignity, or from any rules or principles of international law relating to the protection of its sovereignty and liberty.

*Article 17*⁶⁸

1. Where the internationally wrongful act of a State is an international crime, every State whose demands under article 16 have not met with an adequate response from the State which has committed or is committing the crime is entitled, subject to the condition set forth in paragraph 5 of article 19 below, to resort to countermeasures under the conditions and restrictions set forth in articles 11, 13 and 14 as modified by paragraphs 2 and 3 of the present article.

2. The condition set forth in paragraph 5 of article 19 below does not apply to such urgent, interim measures as are required to protect the rights of an injured State or to limit the damage caused by the international crime.

3. The requirement of proportionality set forth in article 13 shall apply to countermeasures taken by any State so that such measures shall not be out of proportion to the gravity of the international crime.

Article 18

1. Where an internationally wrongful act is an international crime, all States shall, subject to the condition set forth in paragraph 5 of article 19 below:

(a) Refrain from recognizing as legal or valid, under international or national law, the situation created by the international crime;

(b) Abstain from any act or omission which may assist the wrongdoing State in maintaining the said situation;

(c) Assist each other in carrying out their obligations under subparagraphs (a) and (b) and, insofar as possible, coordinate their respective reactions through available international bodies or ad hoc arrangements;

(d) Refrain from hindering in any way, by act or omission, the exercise of the rights or powers provided for in articles 16 and 17;

(e) Fully implement the *aut dedere aut judicare* principle, with respect to any individuals accused of crimes against the peace and security of mankind the

⁶⁸ The formulation of this article depends in some measure on the formulations of articles 11, 12 and 13 (of part two) as finalized by the Drafting Committee (see footnotes 5 and 13 above).

commission of which has brought about the international crime of the State or contributed thereto;

(f) Take part, jointly or individually, in any lawful measures decided or recommended by any international organization of which they are members against the State which has committed or is committing the international crime;

(g) Facilitate, by all possible means, the adoption and implementation of any lawful measures intended to remedy any emergency situations caused by the international crime.

2. Subject to the conditions set forth in paragraph 5 of article 19 below, the State which has committed or is committing an international crime shall not oppose fact-finding operations or observer missions in its territory for the verification of compliance with its obligations of cessation or reparation.

Article 19

1. Any State Member of the United Nations Party to the present Convention claiming that an international crime has been or is being committed by one or more States shall bring the matter to the attention of the General Assembly or the Security Council of the United Nations in accordance with Chapter VI of the Charter of the United Nations.

2. If the General Assembly or the Security Council resolves by a qualified majority of the Members present and voting that the allegation is sufficiently substantiated to justify the grave concern of the international community, any Member State of the United Nations Party to the present Convention, including the State against which the claim is made, may bring the matter to the International Court of Justice by unilateral application for the Court to decide by a judgment whether the alleged international

crime has been or is being committed by the accused State.

3. The qualified majority referred to in the preceding paragraph shall be, in the General Assembly, a two-thirds majority of the members present and voting, and in the Security Council, nine members present and voting including permanent members, provided that any members directly concerned shall abstain from voting.

4. In any case where the International Court of Justice is exercising its competence in a dispute between two or more Member States of the United Nations Parties to the present Convention, on the basis of a title of jurisdiction other than paragraph 2 of the present article, with regard to the existence of an international crime of State, any other Member State of the United Nations which is a Party to the present Convention shall be entitled to join, by unilateral application, the proceedings of the Court for the purpose of paragraph 5 of the present article.

5. A decision of the International Court of Justice that an international crime has been or is being committed shall fulfil the condition for the implementation, by any Member State of the United Nations Party to the present Convention, of the special or supplementary legal consequences of international crimes of States as contemplated in articles 16, 17 and 18 of the present part.

Article 20

The provisions of the articles of the present part are without prejudice to:

(a) Any measures decided upon by the Security Council of the United Nations in the exercise of its functions under the provisions of the Charter;

(b) The inherent right of self-defence as provided in Article 51 of the Charter.

CHAPTER II

Settlement of disputes relating to the legal consequences of an international crime

141. As indicated in the third,⁶⁹ fourth⁷⁰ and fifth⁷¹ reports of the Special Rapporteur and in the present report (para. 109 above), the proposed draft articles for part three, as submitted at the forty-fifth session⁷² only cover the settlement of disputes following the adoption of countermeasures against a State which committed a wrongful act of the kind characterized as delict in article 17 of part one.¹ Only for such disputes do the proposed draft articles 1-6 of part three envisage the procedures of conciliation and arbitration (with a possible role for ICJ in case of failure to establish an arbitral procedure or alleged breach of fundamental rules of arbitral procedure by the arbitral tribunal). The said draft articles do not cover the disputes possibly arising following the adoption of countermeasures against a State which has committed or is committing a crime.

142. Considering the gravity of international crimes of States, the procedure which commends itself for any disputes arising between two or more States following the adoption of countermeasures as a consequence of an international crime is judicial settlement before ICJ. Such procedure should notably be envisaged as a compulsory one, in the sense that it could be initiated by unilateral application by any one of the parties to the dispute, including, of course, the State which has committed or is committing the international crime. The parties should be at liberty, however, to opt for arbitration.

143. As regards the scope of the competence of ICJ at this (post-countermeasures) stage, it should be less broad than that of the conciliation and arbitration procedures envisaged in draft articles 1 and 3 of part three.

144. As stated in the relevant draft articles and in the fifth report of the Special Rapporteur⁷³ the competence

of the two procedures envisaged in draft articles 1 and 3 of part three should embrace not only issues relating to the application of the rules relating to the regime of countermeasures (such as those arising under articles 11-14 of part two⁵), but also any issues which may arise in the application of any provisions of the draft articles on State responsibility, including those of articles 1-35 of part one and those of articles 6-10 *bis* of part two.

145. Such an extension of the scope of the “third party” procedure would not be appropriate for the competence of ICJ at present in question.

146. Considering that ICJ would have already pronounced itself by a judgment (as envisaged in paragraphs 108-111 above and in draft article 19 of part two (see chapter 1, section E, above) upon the existence/attribution of the international crime, the Court’s competence in the post-countermeasures phase should not extend to that issue. It should cover the issues of fact or law relating to the legal consequences—substantive or instrumental—of the international crime. This would encompass any issues arising in the application of any provisions of articles 6-19 of part two. The competence of ICJ should thus not extend, in principle, to any issues arising under articles 1-35 of part one.

147. The relevant draft article of part three—namely, article 7—should read as follows:

1. Any dispute which may arise between any States with respect to the legal consequences of a crime under articles 6 to 19 of part two shall be settled by arbitration on either party’s proposal.

2. Failing referral of the dispute to an arbitral tribunal within four months from either party’s proposal, the dispute shall be referred unilaterally, by either party, to the International Court of Justice.

3. The competence of the Court shall extend to any issues of fact or law under article 19 of part two other than the question of existence and attribution previously decided.

⁶⁹ See *Yearbook ... 1991*, vol. II (Part One), pp. 18-22, document A/CN.4/440 and Add. 1, paras. 52-62.

⁷⁰ See *Yearbook ... 1992*, vol. II (Part One) (footnote 13 above), pp. 13-21, paras. 24-51.

⁷¹ See *Yearbook ... 1993*, vol. II (Part One) (footnote 2 above), pp. 15 *et seq.*, paras. 41-61.

⁷² See footnote 14 above.

⁷³ See *Yearbook ... 1993*, vol. II (Part One) (footnote 2 above), pp. 20-21, paras. 72-74.

**DRAFT CODE OF CRIMES AGAINST
THE PEACE AND SECURITY OF MANKIND**

[Agenda item 4]

DOCUMENT A/CN.4/466*

**Thirteenth report on the draft Code of Crimes against the Peace and Security of Mankind,
by Mr. Doudou Thiam, Special Rapporteur**

[Original: French]
[24 March 1995]

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United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)	<i>Official Records of the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 25 November–20 December 1988</i> , vol. I (United Nations publication, Sales No. E.94.XI.5).
International Convention against the Recruitment, Use, Financing and Training of Mercenaries (New York, 4 December 1989)	<i>Official Records of the General Assembly, Forty-fourth Session, Supplement No. 49</i> , resolution 44/34, annex.

Introduction

1. In his twelfth report on the draft Code of Crimes against the Peace and Security of Mankind,¹ the Special Rapporteur announced his intention of limiting the list of such crimes to offences whose characterization as crimes against the peace and security of mankind was hard to challenge.

2. This report will attempt to keep that promise. It will doubtless be a difficult and delicate task, given the opposing tendencies that exist within the Commission: an expansive tendency that favours as comprehensive a Code as possible and a restrictive tendency that wants the scope of the Code to be as narrow as possible.

3. Proposing a definitive list of the offences to be included poses something of a dilemma. If the Special Rapporteur follows the maximalist tendency, he runs the risk of reducing the draft Code to a mere exercise in style, with no chance of becoming an applicable instrument. Conversely, if he follows the restrictive tendency, he could end up with a mutilated draft.

4. Having studied the comments and observations made by Governments,² the Special Rapporteur is proposing a more restricted list than that adopted on first reading. This is what the vast majority of Governments want. In order for an internationally wrongful act to become a crime under the Code, not only must it be extremely serious but the international community must decide that it is to be included. Extreme seriousness is too subjective a criterion and leaves room for considerable uncertainty. Other factors, notably technical and political ones, are involved in the drafting and adoption of a Code of Crimes against the Peace and Security of Mankind.

5. From a technical standpoint, the diversity of legal systems complicates the task of defining an international offence.

6. From a political standpoint, any codification exercise must, in order to be successful, be supported by a clearly expressed political will. In the present case, this means not just one political will but the convergence of several political wills. Since this convergence of wills has proved difficult to achieve on a large number of draft articles, the Special Rapporteur has been forced to reduce the list proposed on first reading.³

7. The draft articles submitted to Governments met with a varied reception. There was strong opposition to some of them on the part of several Governments, while others were the subject of reservations or criticisms as to their form or their substance.

8. The draft articles that were strongly opposed were the following: 16 (Threat of aggression); 17 (Intervention); 18 (Colonial domination and other forms of alien domination); and 26 (Wilful and severe damage to the environment).

9. The Special Rapporteur believes that the Commission should beat a retreat and abandon these draft articles for the time being. There was little support for the draft articles on the threat of aggression and intervention because Governments found them vague and imprecise. They failed to meet the standards of precision and rigour required by criminal law.

10. The draft articles on colonial domination and other forms of alien domination and wilful and severe damage to the environment were equally unpopular with Governments that expressed an opinion on them. Although article 19 of the draft articles on State responsibility⁴ characterizes as international crimes both colonial domination and other forms of alien domination and serious damage to the human environment, for the time being these draft articles do not seem to have convinced Governments. It will be necessary to wait until developments in international law confirm or reverse the tendency to consider these acts as crimes.

11. That leaves the draft articles on which there were reservations, namely: apartheid (art. 20); the recruitment, use, financing and training of mercenaries (art. 23); international terrorism (art. 24); and illicit traffic in narcotic drugs (art. 25).

12. Several observations were made about apartheid (art. 20):

(a) One Government said that it had no substantive objections but proposed dropping the word "apartheid" and replacing it by the words "institutionalized racial discrimination";

¹ *Yearbook ... 1994*, vol. II (Part One), pp. 97 *et seq.*, document A/CN.4/460 and Corr.1.

² *Yearbook ... 1993*, vol. II (Part One), pp. 59 *et seq.*, document A/CN.4/448 and Add.1.

³ The list proposed on first reading was the following: aggression (art. 15); threat of aggression (art. 16); intervention (art. 17); colonial domination and other forms of alien domination (art. 18); genocide

(art. 19); apartheid (art. 20); systematic or mass violations of human rights (art. 21); exceptionally serious war crimes (art. 22); recruitment, use, financing and training of mercenaries (art. 23); international terrorism (art. 24); illicit traffic in narcotic drugs (art. 25); and wilful and severe damage to the environment (art. 26). For the text of the draft articles provisionally adopted on first reading by the Commission, see *Yearbook ... 1991*, vol. II (Part Two), pp. 94 *et seq.*

⁴ For the text of articles 1–35 of part one of the draft articles adopted on first reading by the Commission, see *Yearbook ... 1980*, vol. II (Part Two), pp. 30–34.

(b) Two Governments felt that apartheid came under the systematic or mass violations of human rights covered by draft article 21 and that there was no need to devote a specific article to it;

(c) Two other Governments took the view that since apartheid had been dismantled in the one country where it had been applied, it no longer had a place in the draft articles.

13. The Special Rapporteur believes that even if the word "apartheid" is dropped, there is no guarantee that the phenomenon to which it refers will not reappear. As a result, the proposal to replace the word "apartheid" by the words "institutionalization of racial discrimination" is not without interest. However, rather than propose a new draft article on apartheid, the Special Rapporteur will abide by whatever position the Commission takes.

14. Regarding draft article 23 (Recruitment, use, financing and training of mercenaries), some Governments considered this phenomenon neither widespread nor sufficiently serious to be included in the draft Code. Besides, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries has been signed by only a handful of countries.

15. The Special Rapporteur thinks that these criticisms are groundless. The phenomenon could well re-emerge in some parts of the world, particularly the developing world, and disrupt peace and security. He believes, however, that the acts covered by the draft article could be prosecuted as acts of aggression and that there may, as a result, be no need to devote a separate article to them.

16. On the other hand, the Special Rapporteur believes that the Commission should retain the draft article on international terrorism (art. 24), with some changes. For instance, it should be recognized that not only agents or representatives of a State may commit terrorist acts, but also private individuals acting as members of a group, movement or association. The draft article proposed by the Special Rapporteur for the second reading takes this possibility into account.

17. This leaves draft article 25 (Illicit traffic in narcotic drugs), which prompted some questions. One Government asked what was to be gained by including in the draft Code an activity which was viewed as criminal by the great majority of States, and effectively prosecuted as such by most of them.

18. Governments which asked this question are perhaps unaware that it was at the request of other Governments that the Commission was instructed to prepare a draft statute for an international criminal court. Drug traffickers have formed powerful organizations which can threaten the stability and security of some States. Those who question the appropriateness of targeting narcotic drug trafficking in the draft Code would do well to consider the following observation by the Government of Switzerland (see para. 141 below).

19. The considerations summarized above prompted the Special Rapporteur to reduce substantially the draft articles adopted on first reading. The offences that remain are thus the following:

- (a) Aggression;
- (b) Genocide;
- (c) Crimes against mankind;
- (d) War crimes;
- (e) International terrorism;
- (f) Illicit traffic in narcotic drugs.

20. This reduces the number of offences from twelve to six. The present report will deal with those six offences. There may be some for whom even this list will be too long and who will say that the content of the Code must be pared down still further. That will be for the Commission to decide.

21. However, one last observation is in order. It will have been noted that Governments did not respond to the request that they propose a penalty for each crime. The reason for this is that it is difficult to determine a specific penalty for each crime. In one of his reports on applicable penalties, the Special Rapporteur proposed that, instead of fixing a penalty for each offence, a scale of penalties should simply be established, leaving it up to the courts concerned to determine the penalty applicable in each case.

22. In fact, all the offences covered in the Code are considered to be extremely serious and it would be difficult to stipulate different penalties for offences which are uniformly considered to be extremely serious. Only the courts can determine what penalty would be just, given the circumstances of each case and the personality of the accused.

23. This has, moreover, been the method followed by the charters or statutes of international criminal courts. According to article 27 of the Charter of the Nürnberg International Military Tribunal,⁵ "The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just". Similarly, according to article 16 of the Charter of the International Military Tribunal for the Far East (Tokyo Tribunal),⁶ "The Tribunal shall have the power to impose upon an accused, on conviction, death or such other punishment as shall be determined by it to be just".

⁵ Annexed to the London Agreement of 8 August 1945 on the Prosecution and Punishment of Major War Criminals of the European Axis Powers.

⁶ Published in *Documents on American Foreign Relations* (Princeton University Press, 1948), vol. VIII, 1 July 1945–31 December 1946, pp. 354 *et seq.*

24. Closer to home, article 24 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia since 1991⁷ provides:

The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

25. Lastly, article 47 of the draft statute for an international criminal court prepared by the Commission at its forty-sixth session⁸ provides that:

“1. The Court may impose on a person convicted of a crime under this Statute one or more of the following penalties:

“(a) A term of life imprisonment, or of imprisonment for a specified number of years;

“(b) A fine.

“2. In determining the length of a term of imprisonment or the amount of a fine to be imposed, the Court may have regard to the penalties provided for by the law of:

“(a) The State of which the convicted person is a national;

“(b) The State where the crime was committed;

“(c) The State which had custody of and jurisdiction over the accused.”

26. The flexibility is to be noted of these various provisions, which give the courts a certain latitude, albeit within certain established limits, of course.

27. This is the course that the Special Rapporteur had proposed. Such an approach does not conflict with the principle of *nullum crimen sine lege* because the Statute itself guides the courts and indicates the minimum and maximum penalties.

28. It is now for the Commission, given the silence of Governments on the matter of applicable penalties, to choose which course to follow.

29. If it decides to establish in the statute itself the penalties applicable to each crime, this method could come up against the difficulty of reaching an agreement, within the Commission, on appropriate penalties. If such an agreement is not reached, it will be necessary to resort to one of the methods outlined above.

30. It is regrettable that the draft statute for an international criminal court, as recently prepared by the Commission, determined the applicable penalties when this should normally have been done in the draft Code. The Commission will have to take this situation into account when it comes to deal, in the draft Code, with the problem of the penalties applicable to crimes against the peace and security of mankind.

⁷ Hereinafter referred to as the International Tribunal for the Former Yugoslavia. Reference texts are reproduced in *Basic Documents, 1995* (United Nations publication, Sales No. E/F.95.III.P.1).

⁸ *Yearbook ... 1994*, vol. II (Part Two), pp. 26 *et seq.*, para. 91.

Draft articles³

PART II

CRIMES AGAINST THE PEACE AND
SECURITY OF MANKIND⁹*Article 15. Aggression*(a) *Text adopted*

31. Draft article 15, as provisionally adopted on first reading, reads as follows:

1. An individual who as leader or organizer plans, commits or orders the commission of an act of aggression shall, on conviction thereof, be sentenced [to ...].

2. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

3. The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression, although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

4. Any of the following acts, regardless of a declaration of war, constitutes an act of aggression, due regard being paid to paragraphs 2 and 3:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein;

(h) Any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter.

[5. Any determination by the Security Council as to the existence of an act of aggression is binding on national courts.]

6. Nothing in this article shall be interpreted as in any way enlarging or diminishing the scope of the Charter of the United Nations including its provisions concerning cases in which the use of force is lawful.

7. Nothing in this article could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

(b) *Observations of Governments**Australia*

32. The Government of Australia takes the view that draft article 15 encompasses, in addition to wars of aggression, unjustified acts of aggression short of war. This goes beyond existing international law which criminalizes wars of aggression only. While the international community would identify acts of aggression short of wars of aggression as illegal and hold the delictual State responsible for its illegality, it does not follow that the international community is willing to recognize that individuals in the delictual State are guilty of international crimes. Australia considers that the implications of criminalizing individual acts in these circumstances should be further considered.

33. A further difficulty arises for Australia from the reference in draft article 15 to the Security Council. The definition of aggression both includes (according to paragraph 4 (h) of the article) "any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter" and excludes (para. 3) acts which the Council determines not to be acts of aggression because of other relevant circumstances. The relationship between the draft Code and the Council is an exceptionally difficult problem, as the Commission has noted. Under constitutional systems based on the separation of judicial and executive power, a central element in an offence could not be left to be conclusively determined by an international executive agency such as the Security Council.

Belarus

34. While welcoming the inclusion in draft article 15 of responsibility for the planning of aggression, the competent bodies of Belarus consider that the list of criminal acts should also include the preparation of aggression,

⁹ For comments and observations of Governments, see *Yearbook ... 1993*, vol. II (Part One), pp. 59-109, document A/CN.4/448/Add.1.

particularly since planning is only one of the elements of preparation.

35. According to the Government of Belarus, with regard to the distinction made in the draft article between the functions of the Security Council and those of the judicial authorities, it should be noted that the distinction can be viewed only as a temporary measure. If the Council's determination as to the existence of an act of aggression is to have binding force on national courts, what is needed is not only a legal formulation of this obligation in an international treaty, but also the existence and observance of some juridical procedure (for example, a requirement for the preliminary establishment of a commission of investigation), which would guarantee the objectivity of the Council's decision. Clearly this decision can in no way prejudge the question of the guilt of a particular individual in committing aggression.

36. Belarus also notes that if an international criminal court is established within the United Nations, the question of the delimitation of competence between it and the Security Council would be studied separately.

United States of America

37. The Government of the United States notes that the Code's definition of aggression is taken from the General Assembly's Definition of aggression in its resolution 3314 (XXIX). The Assembly, however, did not adopt this definition for the purpose of imposing criminal liability, and the history of this definition shows that it was intended only as a political guide and not as a binding criminal definition.

Paraguay

38. The Government of Paraguay states that, in answer to the request of the Commission, it would like to make a few comments on the provisions of the draft Code. Some, for example the one concerning draft article 15, relate simply to form or legislative technique. Draft article 15 states—as do others—that an individual who commits one of the crimes specified in the draft Code “shall, on conviction thereof, be sentenced ...”. The phrase “on conviction thereof” is clearly redundant, for a person cannot be sentenced until he has been tried and found guilty.

United Kingdom of Great Britain and Northern Ireland

39. The United Kingdom has grave doubts concerning draft article 15. According to the British Government, most of this article is a repetition of the Definition of aggression contained in General Assembly resolution 3314 (XXIX). That resolution was intended to assist the General Assembly and the Security Council by clarifying a key concept in the Charter of the United Nations, but one which has been left undefined. The United Kingdom agrees entirely with those members of the Commission who considered that a resolution intended to serve as a guide for the political organs of the United Nations is inappropriate as the basis for criminal prosecution before

a judicial body. It is patently insufficient for the commentary to suggest that this criticism is met by failing to mention the resolution by name.¹⁰ The wording of the resolution needs careful adaptation in order to prescribe clearly and specifically those acts which attract individual criminal responsibility. Paragraph 4 (h) offends against the principle of *nullum crimen sine lege*, as well as operating with potential retroactive effect in contravention of draft article 10.

Switzerland

40. The Government of Switzerland considers that the proposed definition of aggression rests mainly—and with perfect justification—on that contained in General Assembly resolution 3314 (XXIX). That, however, is a text intended for a political organ. Moreover, under the terms of Article 39 of the Charter of the United Nations, it is the Security Council which is responsible for determining the existence of any threat to the peace, breach of the peace, or act of aggression. The question, therefore, is whether the national judge should be bound by the Council's determinations. In some respects, this would appear desirable. Indeed, it is hard to see how a national judge could characterize an act as aggression, if the Council, which bears the primary responsibility for peace-keeping, had not found it to be so. On the other hand, everyone knows that the Council can be paralysed by the exercise of the veto. Decisions of the courts would therefore be subordinate to those of the Council. It is not certain that the security of law would benefit therefrom. To suggest that decisions of the Council, a political organ if ever there was one, should serve as a direct basis for national courts when they are called upon to establish individual culpability and determine the severity of the penalty does not seem to be in keeping with a sound conception of justice. Accordingly, it would be just as well not to include paragraph 5 which appears in square brackets.

(c) *Specific comments*

1. EXPLANATORY REMARKS

41. With the exception of paragraphs 1 and 2, draft article 15 was the subject of numerous criticisms by Governments, which observed that:

(a) Paragraph 3, on evidence of aggression, does not seem to belong in a definition of aggression;

(b) The enumeration of acts of aggression given in paragraph 4 is not exhaustive;

(c) Moreover, the Security Council may conclude that “a determination that an act of aggression has been committed would not be justified in the light of ... circumstances” (para. 3);

¹⁰ Draft article 15 was previously adopted as draft article 12. For the commentary, see *Yearbook ... 1988*, vol. II (Part Two), pp. 71–73.

(d) Paragraph 4 (h) states that, in addition to the acts listed, any other acts may be “determined by the Security Council as constituting acts of aggression under the provisions of the Charter”;

(e) Paragraph 5 makes national courts subordinate to the Security Council, which is a political organ;

(f) Paragraphs 6 and 7, on the scope of the Charter of the United Nations and on the self-determination, freedom and independence of peoples, are political provisions and do not belong in a legal definition.

42. These criticisms, echoing many others made on the occasion of earlier attempts to define aggression, prompt the Special Rapporteur to ask the following question: “Is a legal definition of the concept of aggression possible?”

43. Mr. Jean Spiropoulos, the previous Special Rapporteur on the draft Code of Offences against the Peace and Security of Mankind, asked himself the same question in 1951. The conclusion he came to was that “the notion of aggression is a notion *per se*, a primary notion, which, by its very essence, is not susceptible of definition ... A ‘legal’ definition of aggression would be an *artificial construction* which, applied to concrete cases, could easily lead to conclusions which might be contrary to the ‘natural’ notion of aggression”.¹¹

44. This was also the position taken by another specialist in international criminal law, who wrote that

the concept of aggression ... had yet to be legally defined in international law.

In fact, the enumerative definition found in the London treaties of 1933 (the so-called Litvinov-Politis definition), when put to the test, had revealed lacunae and had failed to cover all the cases of aggression that had arisen in the international arena.

Since then, all efforts made within the League of Nations, and subsequently under the auspices of the United Nations, to arrive at a satisfactory definition of aggression had failed. The experts of different international organizations entrusted with the task had reached the conclusion that the concept of aggression was, in fact, legally undefinable, meaning that it did not lend itself to an analytical definition; no matter how detailed that definition might be, it would never be exhaustive.¹²

45. Indefatigable, the international community pursued its efforts, which culminated in General Assembly resolution 3314 (XXIX) on the definition of aggression. However, this resolution was adopted by the Assembly without a vote.

46. Nowadays, many Governments doubt whether this resolution can serve as the basis for a legal definition of aggression or as the justification for a judicial decision.

47. In these circumstances, the Commission has three options: it can refer to aggression without defining it, it can limit itself to a general definition or it can accompany the general definition by a non-limitative enumeration.

48. This last method has often been adopted in international conventions defining international crimes, for instance, in the Martens clause of the preamble to the Hague Convention IV of 1907 and article 6 (b) of the Charter of the Nürnberg International Military Tribunal⁵ on violations of the laws or customs of war, states that such violations shall include, “but not be limited to”, murder, ill-treatment, etc.

49. The same approach was taken only recently in the Statute of the International Criminal Tribunal for the Former Yugoslavia⁷ and was also used in the draft Code adopted by the Commission at its sixth session in 1954,¹³ which defined such offences as “inhuman acts such as ...”.

2. NEW TEXT PROPOSED BY THE SPECIAL RAPPORTEUR

50. Recognizing the impossibility of enumerating all acts that would constitute aggression, the Special Rapporteur proposes the following general definition:

“Article 15. Aggression

“1. An individual who as leader or organizer is convicted of having planned or ordered the commission of an act of aggression shall be sentenced [to ...].

“2. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”

3. COMMENTARY

51. What remains is to answer an important question raised by one Government, namely: are acts of aggression or wars of aggression to be criminalized?

52. According to that Government, the distinction between an act of aggression and a war of aggression is based on the fact that an act of aggression is less serious than a war of aggression and does not have the same legal consequences. An act of aggression is simply a wrongful act which results in the international responsibility of the State which committed it, whereas a war of aggression results in the criminal liability of the leaders of that State.

¹¹ *Yearbook ... 1951*, vol. II, document A/CN.4/44, p. 69, paras. 165–166.

¹² Stefan Glaser, *Droit international pénal conventionnel* (Brussels, Bruylant, 1970), p. 61.

¹³ The draft Code adopted by the Commission (*Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693)*), pp. 150–152, para. 54) is reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18.

53. It is questionable whether the distinction between the concepts of act of aggression and war of aggression is clear-cut. Are not some acts of aggression, such as the invasion or annexation of territory or the blockading of the ports of a State, sufficiently serious to constitute crimes? Further complicating what is, intrinsically, already an extremely complex issue should be avoided.

Article 19. Genocide

(a) Text adopted

54. The text of draft article 19, provisionally adopted on first reading, reads as follows:

1. **An individual who commits or orders the commission of an act of genocide shall, on conviction thereof, be sentenced [to ...].**

2. **Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:**

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

(b) Observations of Governments

Australia

55. While Australia has no difficulties with the substance of draft article 19, which is based entirely on the definition in article II of the Convention on the Prevention and Punishment of the Crime of Genocide, the issue of the applicable penalty requires further attention by the Commission.

56. The Government of Australia believes that the penalty to be specified in draft article 19, paragraph 1, may well be inconsistent with the Convention on the Prevention and Punishment of the Crime of Genocide, whose article V requires States parties to “provide effective penalties for persons guilty of genocide”.

Ecuador

57. The Government of Ecuador believes that paragraph 2 (d) of draft article 19 should be clarified. As currently drafted, it is vague and could create misunderstanding and confusion between purely social birth control programmes and crimes of genocide.

United States of America

58. The Government of the United States notes that the crime of genocide is already defined by the Convention

on the Prevention and Punishment of the Crime of Genocide, to which the United States and many other States are parties. United States ratification of the Convention was based on several understandings. In particular, the United States indicated that it understands that the term “intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such”, as used in article II of the Convention, means the “specific intent to destroy, in whole or substantial part, a national, ethnic, racial or religious group as such” by the acts prohibited in the Convention. The draft Code’s definition, in contrast, fails to establish the mental state needed for the imposition of criminal liability.

Paraguay

59. The Government of Paraguay notes that the crime of genocide was defined in the Convention on the Prevention and Punishment of the Crime of Genocide and that the definition remains unchanged in the present draft article. It might be advisable that paragraph 2 (e) of the draft article be expanded to cover adults as well as children.

United Kingdom of Great Britain and Northern Ireland

60. According to the United Kingdom, the Commission should consider the relationship between the draft Code and article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, which provides for the compulsory jurisdiction of ICJ in the case of disputes between contracting parties relating, *inter alia*, to the responsibility of a State for genocide.

(c) Specific comments

1. EXPLANATORY REMARKS

61. Many amendments have been proposed to both the form and the substance, but the Special Rapporteur considers it preferable to stay close to the Convention on the Prevention and Punishment of the Crime of Genocide, since genocide is the only crime on which the international community is in very broad agreement.

2. NEW TEXT PROPOSED BY THE SPECIAL RAPPORTEUR

62. The Special Rapporteur therefore proposes the following new text:

“Article 19. Genocide

“1. An individual convicted of having committed or ordered the commission of an act of genocide shall be sentenced [to ...].

“2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

“(a) Killing members of the group;

“(b) Causing serious bodily or mental harm to members of the group;

“(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

“(d) Imposing measures intended to prevent births within the group;

“(e) Forcibly transferring children of the group to another group.

“3. An individual convicted of having engaged in direct and public incitement to commit genocide shall be sentenced [to ...].

“4. An individual convicted of an attempt to commit genocide shall be sentenced [to ...].”

Article 21. Systematic or mass violations of human rights

(a) *Text adopted*

63. Draft article 21, provisionally adopted on first reading, reads as follows:

An individual who commits or orders the commission of any of the following violations of human rights:

- **Murder;**
- **Torture;**
- **Establishing or maintaining over persons a status of slavery, servitude or forced labour;**
- **Persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale; or**
- **Deportation or forcible transfer of population shall, on conviction thereof, be sentenced [to ...].**

(b) *Observations of Governments*

Australia

64. Australia notes the stated intention of the Commission that only the most serious international delicts be considered as crimes. This is consistent with the philosophical basis of international criminal law and the expressed attitude of States on the matter.

65. There are, however, some problems with draft article 21 in its current form. In particular, Australia has concerns about the lack of definition of the elements of the crimes set out in this draft article. It notes the view of the Commission that, as the definitions are included in other international instruments, it is unnecessary to repeat them in the draft Code. However, not all the crimes are so defined. There is, for example, no agreed definition of persecution in any international instrument.

66. Reliance on other instruments for definitions of the crimes in draft article 21 could also cause difficulties. For example, the definition of torture in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment limits the crimes to acts committed by public officials or persons acting in an official capacity. In contrast, the *chapeau* to article 21 indicates that responsibility for any of the enumerated crimes extends to any individual committing the offence.

67. Australia notes in this regard that draft articles 15, 19, 20, 22 and 23 include definitions of offences despite the fact that definitions are to be found in other international instruments.

68. Draft article 21 is also limited in its scope in that it does not (as in the case with draft articles 15 and 16) allow for “any other acts” (art. 15, para. 4 (*h*)) or “any other measures” (art. 16, para. 2). Australia agrees with the commentary of the Commission that the practice of systematic disappearance of persons is worthy of special reference in the context of the draft Code.¹⁴ It is not certain that persecution on social, political, racial, religious or cultural grounds would cover the practice of systematic disappearances.

Austria

69. The Government of Austria notes that the relation between the provisions of draft article 21 and those of draft article 22 (concurrent or cumulative crimes) asks for further clarification. If article 21 should only be applicable in times of peace, this should be emphasized.

Brazil

70. In the view of the Government of Brazil, draft article 21, although it is entitled “Systematic or mass violations of human rights”, could be read as implying that individual cases of murder or torture would be crimes against the peace and security of mankind. It seems necessary, therefore, to clarify the scope of the limitative expression “in a systematic manner or on a mass scale”, in order to indicate that the draft Code will only cover facts of international relevance committed or not with the toleration of the State power.

Bulgaria

71. The Government of Bulgaria proposes that in draft article 21 the expression “persecution on social, political, racial, religious or cultural grounds” be supplemented by the expression “including inhuman and degrading treatment based on such grounds”.

United States of America

72. The Government of the United States is of the view that draft article 21 is too vague to impose criminal

¹⁴ See *Yearbook ... 1991*, vol. II (Part Two), p. 104, para. (10) of the Commentary on article 21.

liability. The crime of “persecution on social, political, racial, religious or cultural grounds” in particular is so vague that it could mean almost anything. For example, one definition of “persecute” is “to annoy with persistent or urgent approaches, to pester”.¹⁵ It should not be an international crime for one political party to “annoy” or “pester” another political party, yet under the plain meaning of the draft Code that could be an international crime. This draft article also fails to fully consider the effect of the International Covenant on Civil and Political Rights, which spells out the specific human rights recognized by the vast majority of the international community. The draft article also appears to embrace common crimes, such as murder. The United States does not believe that it would be useful or even sensible to make every murder an international crime. It notes further that deportation of persons may under many circumstances be lawful; this current formulation is thus overly broad.

Paraguay

73. In the view of the Government of Paraguay, the crime covered in draft article 21 is similar to the crime of genocide (draft article 19), as can be seen by comparing the provisions of the two articles. However, this article does not mention the underlying motive for the crime of genocide, and it refers to systematic or mass violations of human rights. The differences do not seem to be fundamental.

United Kingdom of Great Britain and Northern Ireland

74. The United Kingdom believes that attention must plainly be paid to systematic or mass violations of human rights in any code of crimes under international law. Two requirements must be met before an act qualifies as “systematic or mass violations of human rights”: the exceptional seriousness of the act and its systematic manner or mass scale. The express list of acts is welcome, but draft article 21 is incomplete and unsatisfactory. The Commission, in its commentary,¹⁶ makes clear that definitions of the terms used, such as torture or slavery, are to be found in existing international conventions. Even assuming that national courts would be able to identify the relevant source, the definitions contained therein are not free from controversy. Indeed, as the commentary indicates, there may be doubt whether the definition of torture contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment should be limited to the acts of officials. As currently drafted, the article contains no precise definition of criminal conduct nor any clear unifying concept.

(c) Specific comments

1. EXPLANATORY REMARKS

75. One Member State notes that the list of acts constituting crimes against humanity is too limited, as it does not include the term “other inhumane acts”.

76. This comment is valid. It is impossible to provide a complete list of acts constituting such crimes. The Charter of the Nürnberg Tribunal⁵ (art. 6 (c)), the Charter of the Tokyo Tribunal⁶ (art. 5 (c)) and Law No. 10 of the Allied Control Council¹⁷ (art. II, para. 1 (c)) used the term “other inhumane acts”.

77. More recently, the Statute of the International Tribunal for the Former Yugoslavia⁷ refers also, in the definition of crimes against humanity, to “other inhumane acts” (art. 5 (i)).

78. Concerning torture, one Member State comments that the draft articles adopted on first reading do not provide a definition of this concept and are confined to referring in the commentary to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, the scope of application of this Convention is limited to acts committed by agents or representatives of a State.

79. The Special Rapporteur recognizes that the comment regarding possible perpetrators of crimes against humanity is valid and that individuals must also be covered. As to the definition of torture, the Special Rapporteur placed in brackets the overly long definition contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in the new proposed text. The Commission must decide whether or not to retain it.

80. Another comment relates to the word “persecution”, for which no definition is given. It should be recalled that this word is used in the three basic texts relating to the charters of the international military tribunals which defined crimes against humanity. It is also used in judgements of the international tribunals which had to judge crimes against humanity following the Second World War.

2. NEW TEXT PROPOSED BY THE SPECIAL RAPPORTEUR

81. The Special Rapporteur therefore proposes the following new text:

“Article 21. Crimes against humanity

“An individual who, as an agent or a representative of a State or as an individual, commits or orders the commission of a crime against humanity shall, on conviction thereof, be sentenced [to ...].

“A crime against humanity means the systematic commission of any of the following acts:

“– Wilful killing;

¹⁵ See *Webster's Ninth Collegiate Dictionary*.

¹⁶ See *Yearbook ... 1991*, vol. II (Part Two), p. 104.

¹⁷ Law relating to the punishment of persons guilty of war crimes, crimes against peace and humanity, enacted at Berlin on 20 December 1945 (Allied Control Council, *Military Government Legislation*, No. 3 (Berlin, 31 January 1946)).

“– Torture [i.e., intentionally inflicting on a person pain or acute physical or mental suffering for the purposes of, *inter alia*, obtaining information or confessions from him or from a third person, punishing him for an act which he or a third person has committed or is suspected of committing, intimidating or exerting pressure on him, intimidating or exerting pressure on a third person, or for any other reason grounded in some form of discrimination.

“This text does not include pain or suffering resulting solely from lawful punishment or inherent in or caused by such punishment.”;

“– Reduction to slavery;

“– Persecution;

“– Deportation or forcible transfer of populations;

“– All other inhumane acts.”

3. COMMENTARY

82. In the new text of draft article 21, the Special Rapporteur preferred to use the title “Crimes against humanity” rather than the title adopted on first reading, which was “Systematic or mass violations of human rights”.

83. The term “crimes against humanity” is, in fact, an established term which has been enshrined in the legal lexicon, since it is used even in domestic law. Since the end of the Second World War this term has existed in numerous legal instruments.¹⁸ Still more recently it has been used in the Statute of the International Criminal Tribunal for the Former Yugoslavia (art. 5).⁷

84. If the current draft article abandoned the term “crimes against humanity”, questions might arise as to the reasons for such a reversal. Would the Commission have a good reason for replacing this phrase with “systematic or mass violations of human rights”? It appears doubtful.

85. In proposing this latter term, the Commission wished to emphasize two aspects of such crimes which it deemed very important, namely, their systematic and their massive nature.

86. However, one of these two aspects (the mass element) is too controversial. Those who hold that a crime against humanity is characterized by its massive nature rely on the fact that the charters of the above-mentioned tribunals define crimes against humanity as acts directed against the civilian population or any civilian population.

¹⁸ Charter of the Nürnberg International Military Tribunal (art. 6 (c)) (see footnote 5 above); Charter of the Tokyo Tribunal (art. 5 (c)) (see footnote 6 above); Law No. 10 of the Allied Control Council (art. II, para. 1 (c)).

They believe that, because of their large numbers of victims, such crimes are necessarily mass crimes.

87. However, contrary to this argument, many authors and even a good number of judicial precedents hold that a crime against humanity is not necessarily a crime of a massive nature. They note that some acts referred to in the texts are not necessarily mass crimes: murder, torture and rape, as referred to in Law No. 10 of the Allied Control Council, can as easily be directed against individual victims as collective victims.

88. According to Meyrowitz, “Nothing supports the claim that such crimes which, in common law, are deemed to have occurred where there is only a single victim, are not apt to constitute crimes against humanity”;¹⁹ even an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution.

89. Similarly, Georges Sawicki, in the report of Poland to the eighth International Conference for the Unification of Penal Law held in Brussels in July 1947, wrote that crimes against humanity “usually occur *en masse*. Yet this is not the characteristic which distinguishes this type of crime from an ordinary crime. ... The mass element is an accessory, although not an incidental, feature”.²⁰

90. This controversy occurs also at the level of jurisprudence. The argument as to massive nature was upheld chiefly by the United States military tribunals. Thus, in one trial the defendants were accused of having “knowingly participated in a system of cruelty and injustice extending throughout the country ... violating the laws of war and of humanity”.²¹ The judgement stated that isolated cases of atrocities and persecution were to be excluded from the definition.

91. However, that was not the opinion of the tribunals in the British zone which, on the contrary, stated that the mass element was not essential to the definition, in respect of either the number of acts or the number of victims. In general, the argument upheld by these tribunals was that what counted was not the mass aspect, but the link between the act and a cruel and barbarous political system, specifically, the Nazi regime.

92. After an extensive review of the jurisprudence of the tribunals in the British zone, Meyrowitz concluded: “The tribunals in fact decided that what renders an offence a crime against humanity is neither the number

¹⁹ Henri Meyrowitz, *La répression par les tribunaux allemands des crimes contre l'humanité et de l'appartenance à une organisation criminelle, en application de la loi no. 10 du Conseil de contrôle allié* (Paris, Librairie générale de droit et de jurisprudence, 1960), p. 280.

²⁰ *Acts of the Conference* (Paris, Pedone, 1949), p. 136; cited in Meyrowitz, *ibid.*, p. 254, footnote 15.

²¹ See *Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10 (Nürnberg, October 1946–April 1949)* (15-volume series of summary records of trials conducted by United States military tribunals) (Washington, D.C., United States Government Printing Office, 1950), vol. III, case No. 3 (*The Justice Case*), p. 985; cited in Meyrowitz, *ibid.*, pp. 252–253.

nor the nature of the victims, but the fact that the offence is linked to systematic persecution of a community or a section of a community. An inhumane act committed against a single individual can also constitute a crime against humanity.”²² Meyrowitz based this conclusion in particular on a clarification from the British Military Government (Zonal Office of the Legal Adviser) dated 15 October 1948, stating that an individual crime can constitute a crime against humanity “if the motive for this act resides, in whole or in part, in such systematic persecution”.²³

93. It follows from the foregoing that the notion that a crime against humanity must be of a massive nature is controversial and that “the characterization of crimes against humanity should in fact be interpreted as including, *alongside* acts directed against individual victims, acts of participation in mass crimes”.²³

94. On the other hand, the systematic nature of crimes against humanity, far from being a subject of dispute, constitutes a necessary condition. For this reason, the Special Rapporteur deemed it necessary to replace the title of draft article 21 provisionally adopted on first reading with the title “Crimes against humanity”; far from being a subject of dispute, it has been adopted by Member States, which have incorporated it into their domestic law.

Article 22. Exceptionally serious war crimes

(a) Text adopted

95. Draft article 22 provisionally adopted on first reading reads as follows:

1. An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced [to ...].

2. For the purposes of this Code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts:

(a) Acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons [, in particular wilful killing, torture, mutilation, biological experiments, taking of hostages, compelling a protected person to serve in the forces of a hostile Power, unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities, deportation or transfer of the civilian population and collective punishment];

(b) Establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;

(c) Use of unlawful weapons;

(d) Employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment;

(e) Large-scale destruction of civilian property;

(f) Wilful attacks on property of exceptional religious, historical or cultural value.

(b) Observations of Governments

Austria

96. The Government of Austria believes that the expression in square brackets in draft article 22, paragraph 2 (a), should be retained. The fact that the enumeration is only descriptive is sufficiently emphasized by the words “in particular”.

United States of America

97. The Government of the United States is of the view that draft article 22 seeks to punish “exceptionally serious war crimes”, a term which is tautologically defined as “an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of, *inter alia*, acts of inhumanity ...”. This article is too vague and fails to consider and specifically incorporate the relevant provisions of the many international conventions specifically dealing with the law of armed conflict.

98. The vague prohibition on the “unlawful use of weapons” does not reflect the complex realities of warfare or the international legal mechanisms established to regulate its conduct. Moreover, the United States thinks it unwise to include only “exceptionally serious war crimes” and ignore other breaches of the laws of war that are also of great concern to the peace and security of mankind.

Paraguay

99. The Government of Paraguay notes that there are already many international conventions on war crimes, and these are referred to in the commentary on draft article 22.²⁴ It is legitimate to ask whether there is any need to have yet another category of crime, namely exceptionally serious war crimes, and whether degree of seriousness is a sound criterion to use in defining an offence for which other characterizations already exist. Degree of seriousness is, however, a valid criterion to use in determining the severity of the punishment.

United Kingdom of Great Britain and Northern Ireland

100. The United Kingdom is of the view that in opting for a “middle-ground solution”, reconciling competing trends within the Commission, the Commission risks pro-

²² Meyrowitz, *ibid.*, p. 281.

²³ *Ibid.*, p. 255.

²⁴ See *Yearbook ... 1991*, vol. II (Part Two), pp. 104–107.

liferating the categories of war crimes without any attendant benefit. If the Commission were to retain draft article 22, the United Kingdom would prefer to see a provision which accords with existing characterizations of war crimes, replacing “exceptionally serious war crimes” with “grave breaches of the Geneva Conventions”, for example.

Switzerland

101. The Government of Switzerland believes that in international humanitarian law, there are now two categories of violations: on the one hand, there are “grave breaches” which have already been enumerated (arts. 50, 51, 130 or 147, depending upon which of the four Geneva Conventions of 12 August 1949 is being consulted, and article 85 of Protocol I Additional to the Geneva Conventions which also refers to article 11 of the same Protocol); these are also called war crimes; on the other hand, there are all the other violations of international humanitarian law.

102. The Commission, faithful to the principle that only extremely serious acts should be included in the Code, proposes to introduce a third category, that of “exceptionally serious war crimes”, which would therefore encompass especially serious breaches. Accordingly, it should be realized that, once the Code is in force, war crimes not enumerated in this provision may, as a result of draft article 22, be subject only to a relatively light penalty.

103. In addition, the Government of Switzerland finds it hard to understand why the Commission characterized large-scale destruction of civilian property (para. 2 (e)) as an “exceptionally serious war crime”, but not attacks against the civilian population or demilitarized zones, or perfidious use of the protective emblems of the Red Cross and the Red Crescent.

104. It would, therefore, be advisable for the Commission to reconsider the impact which this provision is liable to have on international humanitarian law, before adopting it on second reading.

(c) *Specific comments*

1. EXPLANATORY REMARKS

105. The comments from Governments unanimously express reservations concerning this new concept of exceptionally serious war crimes.

106. After extensive reflection, the Special Rapporteur has found these reservations to be valid, mainly because it is difficult in practice to establish an exact dividing line between the “grave breaches” defined in the Geneva Conventions of 12 August 1949 and Additional Protocol I and the “exceptionally grave breaches” stipulated in the draft Code adopted on first reading by the Commission.

2. NEW TEXT PROPOSED BY THE SPECIAL RAPPORTEUR

107. The Special Rapporteur therefore proposes to amend the title and content of the draft article to read as follows:

“Article 22. War crimes

“An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced [to ...].

“For the purposes of this Code, a war crime means:

“1. Grave breaches of the Geneva Conventions of 1949, namely:

“(a) Wilful killing;

“(b) Torture or inhuman treatment, including biological experiments;

“(c) Wilfully causing great suffering or serious injury to body or health;

“(d) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

“(e) Compelling a prisoner of war or a civilian to serve in the forces of a hostile Power;

“(f) Wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

“(g) Unlawful deportation or transfer or unlawful confinement of a civilian;

“(h) Taking civilians as hostages.

“2. Violations of the laws or customs of war, which include, but are not limited to:

“(a) Employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

“(b) Wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

“(c) Attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings;

“(d) Seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

“(e) Plunder of public or private property.”

3. COMMENTARY

108. In the new draft article 22, the method of defining war crimes is based directly on the Statute of the International Criminal Tribunal for the Former Yugoslavia.⁷

109. This method distinguishes grave breaches which, as in the Geneva Conventions of 12 August 1949 and Additional Protocol I, form an exhaustive list, from other violations of the laws or customs of war, which form a non-exhaustive list.

110. This new draft article 22 should make it possible to conclude the lengthy debate in the Commission between supporters of an exhaustive list of war crimes and supporters of a non-exhaustive list.

*Article 24. International terrorism**(a) Text adopted*

111. The text of draft article 24 provisionally adopted on first reading is the following:

An individual who is an agent or representative of a State commits or orders the commission of any of the following acts:

- **Undertaking, organizing, assisting, financing, encouraging or tolerating acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public shall, on conviction thereof, be sentenced [to ...].**

*(b) Observations of Governments**Australia*

112. Australia has difficulties with the wording of draft article 24. It notes in particular that the definition is not expressed to include an element of violence. Is therefore the offence intended to encompass non-physical acts of terror such as propaganda? Further, it is uncertain whether the agents or representatives need to be acting in their official capacity. The absence of intention or motive from the definition also needs explanation.

Austria

113. The Government of Austria proposes that draft article 24 should be amended as follows, which would also allow a definition of the term “terrorist activities”:

“1. An individual who, as an agent or representative of a State, commits or orders the commission of any of the following acts:

– Undertaking, organizing, assisting, financing, encouraging or tolerating terrorist activities against another State,

“shall be sentenced [to ...].

“2. Terrorist activities are acts directed at persons or property of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public.”

Belarus

114. The Government of Belarus believes that in draft article 24, the category of perpetrators of crimes of international terrorism, should be expanded. The draft Code cannot disregard the scale of acts of international terrorism committed by terrorist organizations and groups which are not necessarily linked to a State, and the threat posed by such acts to the peace and security of mankind. In any event, the participation of a State cannot be a criterion for defining terrorism as a crime against the peace and security of mankind.

Brazil

115. The Government of Brazil is of the view that there is an international element in the crime of terrorism meaning that the crime may only be punished in accordance with the draft Code when it is committed or ordered by an agent or representative of a State against another State.

United States of America

116. In the view of the Government of the United States, draft article 24 purports to punish international terrorism, even though there is no generally accepted definition of terrorism and no adequate definition of terrorism is given by the draft Code. It attempts to define terrorism through the use of a tautology. The draft Code defines terrorism as the “undertaking, organizing, assisting, financing, encouraging or tolerating [by the agents or representatives of a State of] acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public”. This definition is patently defective because “terror” is not defined.

117. Moreover, given the unsuccessful history of past attempts to achieve a universally acceptable general definition of terrorism, the United States is sceptical about the possibility of reaching consensus on such a provision, no matter how it is drafted. In response to the difficulty in reaching consensus on a general definition of terrorism, the international community has instead concluded a series of individual conventions that identify specific categories of acts that the entire international community condemns, regardless of the motives of the perpetrators, and that require the parties to criminalize the specified conduct, prosecute or extradite the transgressors and cooperate with other States for the effective implementation of the duties in these conventions. As listed in General Assembly resolution 44/29, these conventions cover aircraft sabotage, aircraft hijacking, attacks against officials and diplomats, hostage-taking, theft or unlawful use of nuclear material, violence at airports and certain attacks on or against ships and fixed platforms. By focusing upon specific types of actions that are inherently

unacceptable, rather than on questions of motivation or context as the draft Code does, the existing approach has enabled the international community to make substantial progress in the effort to use legal tools to combat terrorism.

118. Another fundamental problem with draft article 24 is that it limits the crime of terrorism to acts committed by individuals acting as “agents or representatives of a State”. In fact, many terrorist acts are committed by individuals acting in their private capacity. The United States cannot accept a definition of terrorism that excludes acts committed by persons who are either not acting as agents of a State, or whose affiliation with a State cannot be definitively proved in a court of law.

Paraguay

119. The Government of Paraguay underlines that draft article 24 covers terrorism, not as committed by individuals or private groups, but by agents or representatives of a State, cases of which the international community knows to exist today.

Nordic countries

120. In the view of the Nordic countries, the scope of draft article 24 is too narrow from a substantive point of view. It is difficult to understand why only cases where the terrorist is “an agent or representative of a State” should be covered. The other crimes included in the draft Code are not subject to such a limitation provided that individuals can contravene these provisions without acting on behalf of a State. The majority of the crimes that could conceivably fall within this article are of such a nature that they are generally covered by national criminal legislation as well as specific conventions. There is, therefore, reason to presume that in many cases, conflicting penal provisions are to be found in national criminal law.

United Kingdom of Great Britain and Northern Ireland

121. The United Kingdom regrets that the Commission has, as in the draft Code adopted at its sixth session in 1954,¹³ limited the scope of draft article 24 to State-sponsored terrorism. International terrorism is no longer confined to the acts of agents or representatives of States. In attempting to distinguish between international and “internal” terrorism, the Commission has overlooked the important category of non-State-sponsored terrorism directed at States, which properly belongs in a definition of international terrorism. The United Kingdom would therefore urge the Commission to reconsider the definition of terrorism, including the present omission of “internal” terrorism. The latter is in practice more of a problem for many States than international terrorism. The Commission should also consider the relationship of this article with international crimes omitted from the draft Code, such as hijacking and hostage-taking, which might fall within the present definition of international terrorism.

Switzerland

122. To the Government of Switzerland, it would appear that the elements constituting the crime of international

terrorism might not, depending on circumstances, be clearly distinguished from those constituting intervention, defined as the act of intervening in the internal or external affairs of a State by fomenting subversive or terrorist activities. Does the act, when carried out by agents of a State, of financing or training armed bands for the purposes of sowing terror among the population and thus encouraging the fall of the Government of another State come under either provision?

(c) *Specific comments*

1. EXPLANATORY REMARKS

123. Most Member States criticized the notion of limiting possible perpetrators of the crime of international terrorism to agents or representatives of a State. They believe that terrorism can also be committed by individuals acting on behalf of private groups or associations. This criticism is both relevant and valid.

124. One Government, sceptical about the possibility of reaching consensus on a general definition of terrorism, believes that the international community should continue to conclude specific conventions, such as the conventions covering hostage-taking, attacks against officials and diplomats, etc.

125. While such an approach is, of course, conceivable, it does not preclude a search for the common features of these various forms of terrorism and an effort to derive common rules applicable to their suppression and punishment. While it may be difficult to arrive at a general definition of terrorism, it is not impossible. The Convention for the Prevention and Punishment of Terrorism contains a definition of this concept; there should be an attempt to improve it.

2. NEW TEXT PROPOSED BY THE
SPECIAL RAPPORTEUR

126. The Special Rapporteur proposes that the draft article adopted by the Commission on first reading should be amended to read as follows:

“Article 24. International terrorism

“1. An individual who, as an agent or a representative of a State, or as an individual, commits or orders the commission of any of the acts enumerated in paragraph 2 of this article shall, on conviction thereof, be sentenced [to ...].

“2. The following shall constitute an act of international terrorism: undertaking, organizing, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create a state of terror [fear or dread] in the minds of public figures, groups of persons or the general public in order to compel the aforesaid State to grant advantages or to act in a specific way.”

3. COMMENTARY

127. The new draft article 24 includes individuals as perpetrators of international terrorism, whether acting alone or belonging to private groups or associations.

128. The draft article clarifies the aim sought by terrorism, which is to seek advantage or influence the action or political orientation of a government or change the constitutional form of a State.

129. The aim of terrorism is not to cause terror. Terror is not an end in itself but a means. Some commentaries express regret at the tautology that arises from using the word “terror” to define terrorism. This is why the Special Rapporteur used the words “fear” and “dread” in brackets. However, this lexical criticism is truly minor.

Article 25. Illicit traffic in narcotic drugs(a) *Text adopted*

130. The text of draft article 25 provisionally adopted on first reading reads as follows:

1. **An individual who commits or orders the commission of any of the following acts:**

– **Undertaking, organizing, facilitating, financing or encouraging illicit traffic in narcotic drugs on a large scale, whether within the confines of a State or in a transboundary context**

shall, on conviction thereof, be sentenced [to ...].

2. **For the purposes of paragraph 1, facilitating or encouraging illicit traffic in narcotic drugs includes the acquisition, holding, conversion or transfer of property by an individual who knows that such property is derived from the crime described in this article in order to conceal or disguise the illicit origin of the property.**

3. **Illicit traffic in narcotic drugs means any production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to internal or international law.**

(b) *Observations of Governments**Australia*

131. Australia strongly supports international action to deal with illicit trafficking in narcotic drugs and psychotropic substances. Accordingly, Australia has been an active participant in the negotiation of multilateral conventions which promote both national and international action against drug trafficking.

132. Australia acknowledges the concerns underlying draft article 25. It believes, however, that more detailed work needs to be done on a number of issues, including the relationship of the draft article with existing conventions, in particular, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

133. The enumerated acts constituting crimes under draft article 25 are inconsistent with those listed in the above-mentioned Convention. Article 3 thereof describes a lengthy series of acts which are to be established as offences under domestic law. Although many of these appear to have been omitted from draft article 25 on the ground that they are not of sufficiently serious nature to attract international criminal sanctions, others should perhaps be included.

134. The enforcement of any article dealing with drug trafficking would depend heavily on effective provisions on extradition of alleged offenders, mutual legal assistance between States in support of their prosecution and money laundering.

135. Consideration also needs to be given to the relationship between the jurisdiction of national legal systems to deal with drug offences and any proposed international jurisdiction under the draft Code.

136. It is unclear to Australia why the phrase “psychotropic substance” is used only in paragraph 3, when the whole draft article is intended to cover the subject.

Austria

137. In the view of the Government of Austria, it remains to be seen if the crime in draft article 25 should be inserted in the present code of crimes. It is doubtful whether illicit trafficking in narcotic drugs is a crime against the peace and security of mankind. Furthermore, the consequences linked with its insertion in the Code (i.e. the non-prescriptibility) do not seem desirable from a political point of view.

Brazil

138. The Government of Brazil believes that the absence of an international element with regard to the crime in draft article 25 is not justifiable.

United States of America

139. The Government of the United States notes that draft article 25 provides that trafficking in narcotic drugs is “illicit” if it is “contrary to internal or international law”. It is unclear whether the reference to internal law is meant to refer only to the law of the State in which the individual is located (in which case it has little point) or whether it is meant to include the internal law of any State that is a party to the Code (in which case it would be amazingly broad).

United Kingdom of Great Britain and Northern Ireland

140. The United Kingdom notes that the draft Code adopted by the Commission at its sixth session in 1954¹³ omitted drug-related crimes, along with piracy, traffic in women and children, counterfeiting and interference with submarine cables. The United Kingdom would have wished for a more detailed analysis of these crimes with a view to ascertaining whether they constitute crimes

against the peace and security of mankind. It is the opinion of the United Kingdom that drug trafficking, though an international crime, is a borderline case for inclusion in a code as a crime against the peace and security of mankind. It may be asked what is to be gained by including in the Code an activity which is viewed as criminal by the great majority of States, and effectively prosecuted as such by most of them.

Switzerland

141. In the view of the Government of Switzerland, the question arises as to whether the inclusion in the draft Code of a provision on international drug trafficking is warranted. After all, such traffic can be regarded as a common crime, motivated mainly by greed. Such an approach, however, disregards an evolution which has revealed ever closer links between international drug trafficking and local or international terrorism. It is not without good reason that people commonly speak of "narcoterrorism". Apart from the harmful effects it has on health and well-being, international drug trafficking has a destabilizing effect on some countries and is therefore an impediment to harmonious international relations. In this connection, international drug trafficking indeed appears to be a crime against the peace and security of mankind. The Commission is therefore correct to include, in the draft Code, a provision criminalizing such traffic, whether it is carried out by agents of a State or simply by individuals.

(c) *Specific comments*

1. EXPLANATORY REMARKS

142. The Special Rapporteur explained in the introduction to the present report the reasons why he believed it necessary to retain in the draft Code the reference to illicit traffic in narcotic drugs on a large scale or in a transboundary context.

143. The phrase "on a large scale ... or in a transboundary context" refers not only to international illicit traffic in narcotic drugs, but also to domestic traffic on a large scale. It should not be forgotten that many small States are unable to prosecute perpetrators of such traffic where it is carried out on a large scale in their own territory. They would like there to be an international jurisdiction with competence to try offences of this type.

2. NEW TEXT PROPOSED BY THE SPECIAL RAPPORTEUR

144. The proposed new text simplifies the one adopted on first reading by the Commission and reads as follows:

"Article 25. Illicit traffic in narcotic drugs

"1. An individual who commits or orders the commission of illicit traffic in narcotic drugs on a large scale or in a transboundary context shall, on conviction thereof, be sentenced [to ...].

"2. Illicit traffic in narcotic drugs means undertaking, organizing, facilitating, financing or encouraging any production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to internal or international law.

"3. For the purposes of paragraph 2, facilitating or encouraging illicit traffic in narcotic drugs includes the acquisition, holding, conversion or transfer of property by an individual who knows that such property is derived from the crime described in this article in order to conceal or disguise the illicit origin of the property."

**INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES
ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW**

[Agenda item 5]

DOCUMENT A/CN.4/468

Eleventh report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur

[Original: Spanish]
[25 May 1995]

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Source

International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969)	United Nations, <i>Treaty Series</i> , vol. 973, p. 3.
and the Protocols thereto of 1976, 1984 and 1992 modifying the Convention (London, 19 November 1976, 25 May 1984 and 27 November 1992)	IMO (Sales No. 457.85.15.E) and <i>International Environmental Law: Multilateral Treaties</i> , Anni Lukács and R. Michels, eds. (London, The Hague, Boston, Kluwer Law International, 1995), vol. III.
Convention on Long Range Transboundary Air Pollution (Geneva, 13 November 1979)	United Nations, <i>Treaty Series</i> , vol. 1302, p. 118.
Convention on the Regulation of Antarctic Mineral Resource Activities (Wellington, 2 June 1988)	<i>International Legal Materials</i> (Washington, D.C.), vol. XXVII (1988), p. 868.
Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) (Geneva, 10 October 1989)	United Nations publication (Sales No. E.90.II.E.39).

Source

Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 4 October 1991)	<i>International Legal Materials</i> (Washington, D.C.), vol. XXX No. 6 (November 1991), p. 1461.
Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992)	<i>Ibid.</i> , vol. 31, No. 6 (November 1992), p. 1313.
Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992)	ECE, <i>Environmental Conventions</i> (United Nations publication, 1992), p. 119.
Convention on Biological Diversity (Rio de Janeiro, 5 June 1992)	UNEP, <i>Convention on Biological Diversity</i> (Environmental Law and Institution Programme Activity Centre, June 1992).
United Nations Framework Convention on Climate Change (New York, 9 May 1992)	United Nations, <i>Treaty Series</i> , vol. 1771, p. 107.
Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993)	Council of Europe, <i>European Treaty Series</i> , No. 150.

Introduction

1. The Commission provisionally adopted three paragraphs of article 2¹ on the use of terms in the draft articles, designating them (a), (b) and (c). The first paragraph refers to the risk of causing significant transboundary harm, the second defines “transboundary harm” and the third gives a definition of “State of origin”. The designation of the various paragraphs of article 2 should be changed. Paragraph (a) would become paragraph 1; paragraph (b) would become paragraph 2; and paragraph 3 would contain a definition of “harm” and would be subdivided into three subparagraphs on: (a) harm to persons; (b) harm to property; and (c) harm to the environment. This would be followed by a paragraph 4 defining environment, and a paragraph 5 on entitlement to remedial action for harm to the environment.

¹ For the text of draft articles 1 2 (b)–(c), 11–14 *bis* [20 *bis*], 15–16 *bis* and 17–20, provisionally adopted by the Commission, see *Yearbook ... 1994*, vol. II (Part Two), pp. 158 *et seq.*

² *Yearbook ... 1992*, vol. II (Part One), pp. 70 *et seq.*, document A/CN.4/443, appendix.

2. In his eighth report,² the Special Rapporteur made some progress in considering the issue of *harm*, as a contribution to article 2. He refers to what was said in that report as an introduction to the issue of harm, which he proposes to develop here. The Special Rapporteur has nothing to add to the comments made in that report on the subject of harm to persons or things, except for some drafting changes to the proposed article. Of these, the most important is the inclusion of the concept of loss of earnings, since this would make the text clearer. It should also be made clear, although it is perhaps implicit, that subparagraphs (a) and (b) also apply to harm to persons or things caused by environmental degradation, in order to make a clearer distinction between harm caused individually to persons and things, even if caused by environmental degradation, and harm to the environment *per se*. In the first case, the person entitled to remedial action is the person harmed, either directly or through environmental degradation. In the second case, harm to the environment *per se* is harm caused to the community when environmental values are harmed and as a result the community is deprived of use services and non-use services, as will be seen below.

CHAPTER I

Harm to the environment

3. On the other hand, some comments—and even a new text—should be added concerning harm to the environment, a concept which is vital to the issue under discussion. In this connection, the “Green Paper on Remedying Environmental Damage” says:

A legal definition of damage to the environment is of fundamental importance, since such a definition will drive the process of determining the type and scope of the necessary remedial action—and thus the costs that are recoverable via civil liability. Legal definitions often clash with popularly held concepts of damage to the environment, yet are necessary for legal certainty.³

4. Harm to the environment has been included in some international conventions, drafts and judgements, such as article 2, paragraph 7 (*d*), of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, confirmed by article 1 (*c*) of the Convention on the Transboundary Effects of Industrial Accidents; article 1, paragraph 2, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, and Directive 85/337 of the Council of the European Communities of 27 June 1985 on environmental impact assessment of certain public and private projects;⁴ article 8, paragraph 2 (*a*), (*b*) and (*d*) of the Convention on the Regulation of Antarctic Mineral Resource Activities; and article 9, paragraphs (*c*) and (*d*), of the Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels, to which must be added the directives proposed by the Economic Commission for Europe Task Force on Responsibility and Liability regarding Transboundary Water Pollution and the draft protocol on liability to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (art. 2 (*a*), iii-v)⁵ being prepared by a working group appointed by the parties to that Convention. Paragraph 16 of Security Council resolution 687 (1991) of 3 April 1991 is of particular interest:

Iraq ... is liable under international law for any direct loss, damage—including environmental damage and the depletion of natural resources—or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait;

The issue has also been the subject of studies and has been included in some documents drafted by study groups and working groups, for instance, in article 48 of the draft international covenant on environment and development of the International Union for the Conservation of Nature and Natural Resources and in the research project conducted by the Universities of Siena and Parma

and sponsored by the National Research Council. Furthermore, harm to the environment has become punishable under the domestic laws of a number of countries, such as Brazil, Finland, Germany, Norway, Sweden and the United States of America.

A. Definition of environment

5. After further reflection, based on some of the work mentioned in the preceding paragraph, the Special Rapporteur considered the possibility of incorporating a definition of environment into the draft articles, since there is at present no universally accepted concept of environment: elements considered to be part of the environment in some conventions are not in others. The definition of environment will thus determine the extent of the harm to the environment; and the broader the definition, the greater will be the protection afforded to the object thus defined, and vice versa.

6. Such a definition does not necessarily have to be scientific and, until now, the definitions that have been tried have simply enunciated the various elements considered to be part of the environment. According to the “Green Paper on Remedying Environmental Damage”:

Regarding the definition of environment, some argue that only plant and animal life and other naturally occurring objects, as well as their interrelationships, should be included. Others would include objects of human origin, if important to a people’s cultural heritage.³

A restricted concept of environment limits harm to the environment exclusively to natural resources, such as air, soil, water, fauna and flora, and their interactions. A broader concept covers landscape and what are usually called “environmental values” of usefulness or pleasure produced by the environment. Thus, one speaks of “service values” and “non-service values”; for instance, the former would include a fish stock that would permit a service such as commercial or recreational fishing, while the latter would include the aesthetic aspects of the landscape, to which populations attach value and the loss of which can cause them displeasure, annoyance or distress. It is difficult to put a value on these if they are harmed. Lastly, the broadest definition also embraces property forming part of the cultural heritage.

1. THE RESTRICTED CONCEPT OF ENVIRONMENT

7. The Convention on the Regulation of Antarctic Mineral Resource Activities, in its article 1, paragraph 15, defines the Antarctic environment when it attempts to describe harm to the environment:

Damage to the Antarctic environment or dependent or associated ecosystems” means any impact on the living or non-living components of that environment or those ecosystems, including harm to atmos-

³ Commission of the European Communities, “Communication from the Commission to the Council and European Parliament and to the Economic and Social Council—Green Paper on Environmental Liability”, final report COM (93) 47 (Brussels, 14 May 1993), p. 10, sect. 2.1.7.

⁴ *Official Journal of the European Communities*, No. L.175, 28th year (5 July 1985), p. 40.

⁵ UNEP/CHW.3/4.

pheric, marine or terrestrial life, beyond that which is negligible or which has been assessed and judged to be acceptable pursuant to this Convention.

This text indirectly defines environment through harm to the environment and has two distinct elements: one relating to the Antarctic environment and its “dependent or associated ecosystems”, which the text limits to “living or non-living components of that environment or those ecosystems”, including atmospheric, marine and terrestrial life; and the other relating to the threshold: the text refers to damage “beyond that which is negligible” or which has been “assessed and judged to be acceptable pursuant to this Convention”. In the first instance, the concept of protected environment appears to be restricted to ecosystems and natural resources such as air, soil and water, including the living components of sea, land or air. To clarify the aforesaid concept, it is said in article 2 (“Use of terms”) that for the Convention on Biological Diversity, “ecosystem means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit”.

8. A number of other international instruments mix elements characteristic of the environment with others that are not clearly defined or do not belong in a general concept of environment. Article 1 (a) of the Convention on Long-range Transboundary Air Pollution, in defining air pollution, refers to “deleterious effects” on living resources and ecosystems, human health and material property, as well as interference with amenities and other legitimate uses of the environment. Obviously, living resources and ecosystems and also amenities and other legitimate uses are either components of the environment or else environmental values that may or may not be turned into amenities. “Material property” and “human health”, on the other hand, do not seem to form part of the same concept. As shall be seen, material property without any additional quality such as that of belonging to “cultural heritage”, could not be considered to be related to the environment; nor, logically, could human health.

9. The United Nations Framework Convention on Climate Change, in defining the “adverse effects of climate change”, explains that they are “changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare” (art. 1). The Vienna Convention for the Protection of the Ozone Layer uses similar language, except that it does not mention socio-economic systems or human welfare. There again, the former Convention includes elements of a strict concept of environment mixed with other, extraneous ones, namely, socio-economic systems and human health.

10. As far as international practice is concerned, the proposal by the Commission of the European Communities for a Community directive on damage caused by wastes defines harm to the environment as significant

and persistent interference with the environment caused by a change in the physical, chemical or biological conditions of water, soil and/or air where this is not considered damage to property.

2. BROADER CONCEPTS

11. Article 2, paragraph 10, of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment contains a non-exhaustive list of components of the environment which includes “natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape”. The Convention on the Transboundary Effects of Industrial Accidents refers to the adverse consequences of industrial accidents on “(i) human beings, flora and fauna; (ii) soil, water, air and landscape; (iii) the interaction between the factors in (i) and (ii); material assets and cultural heritage, including historical monuments” (art. 1 (c)). The Convention on the Protection and Use of Transboundary Watercourses and International Lakes says that “effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors” (art. 1, para. 2).

12. The Governing Council of the UNCC, established by the Security Council in its resolution 687 (1991) of 3 April 1991 in connection with Iraq’s liability for damage caused in the Gulf war, considers certain elements subject to compensation when, in paragraph 35 of its decision of 28 November 1991, revised on 16 March 1992, it says that payments will be available with respect to direct environmental damage and the depletion of natural resources:

This will include losses or expenses resulting from:

(a) Abatement and prevention of environmental damage, including expenses directly relating to fighting oil fires and stemming the flow of oil in coastal and international waters;

(b) Reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment;

(c) Reasonable monitoring and assessment of the environmental damage for the purposes of evaluating and abating the harm and restoring the environment;

(d) Reasonable monitoring of public health and performing medical screenings for the purposes of investigation and combating increased health risks as a result of the environmental damage; and

(e) Depletion of or damage to natural resources.⁶

⁶ See document S/AC.26/1991/7/Rev.1.

It is noteworthy that subparagraphs (c) and (d) refer to costs which are not negligible and which normally are not included in definitions of harm, although they may of course be granted by a court as part of the damage caused by the degradation of the environment.

3. FACTORS TO BE EXCLUDED

13. All the above could benefit from being set out more methodically. To begin with, the Special Rapporteur thinks the definition of environment should exclude those factors that are already included in the traditional definitions of harm, such as anything that causes physical harm to persons or to their health, whether directly or as a result of environmental damage, since these are protected by the traditional concept of harm and do not require additional protection. This was the idea suggested by the Special Rapporteur in draft article 24 proposed in the sixth report, which separated harm to the environment from resulting harm to persons or property in the affected State.⁷ It is the same sense as can be found in the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, article 2, paragraph 7 of which excludes from the definition of environmental damage set forth in subparagraph (c) loss of life or personal injury and loss of or damage to property, which are dealt with, respectively, in subparagraphs (a) and (b).

14. Some doubt exists as to whether to include certain other factors or elements in the concept of “environment”. One of these is the reference to a kind of “cultural environment”, which covers monuments and other structures of value as expressions of the cultural heritage of a group of people. The Special Rapporteur does not mean to detract from this value by suggesting that such structures should not be included in the concept of “environment” for the purposes of compensation. It should be excluded, first of all, because of the risk of broadening the concept of environment indefinitely by introducing disparate concepts; although there is no need for a rigorously scientific definition of the human environment—which may not even exist—an effort should be made to find a definition which contains a unitary criterion, such as the natural environment. Secondly, there is a perhaps more convincing argument that such property is already protected through the application of traditional concepts of damage, obviating the need to include them in the definition of environment. Nonetheless, the Special Rapporteur considers that a court faced with the difficult task of evaluating the amount of compensation to award for damage to a monument of great cultural value is unlikely to find any criterion to help it in the concept of environmental damage. Damage to a monument may or may not be the result of the degradation of the natural environment, but it should be compensated in any case, as soon as the cause has been duly determined.

15. The characteristic aspects of the landscape appear to be values rather than components of the natural environment and therefore should not be included in its definition. While it is true that these physical characteristics are not created by human beings, such characteristic aspects are in some sense “culturized” objects, since they are worth something insofar as they embody the aesthetic “baggage” of a given population. Rather than a component of the environment, such as water or soil, they appear to be a treasured value or aspect of the environment which would otherwise be deprived of international protection. Their destruction, therefore, would give rise to uncompensated damage.

16. As for human health, the Special Rapporteur feels that it should in no way be included as part of the environment, nor should damage to health, either directly or through harm to the environment, be considered environmental damage. Of course, a specific feature of a certain environment, such as a health spa or a sulphurous mud bath, might be its healthful effect on human beings. It is this service value which should be compensated if it is lost.

B. Harm to the environment

17. Having tentatively but not exhaustively defined the elements of the environment, the Special Rapporteur turned to what was meant by harm to the environment. He drew attention to two questions in that regard: first, who is the party injured by environmental damage and, secondly, of what does this harm consist?

18. On the question of the injured party, it is clear that damage is harm caused to someone. Thus it is always damage to someone, to a person or to a human group; it cannot occur in a vacuum. For jurists, the difficulty arises when the subject of harm to the environment per se is discussed, as if the adverse effect on the environment were sufficient to constitute a juridical injury, whether or not natural or juridical persons exist who might be harmed by it. Confusion also arises if account is taken of the extremist position of some environmentalists, who consider environmental protection as an end in itself, and who believe that species and natural resources should be respected for their “intrinsic” value, i.e. independently of their valuation by human beings.

19. A closer look should be taken of the notion of the “intrinsic” value of the environment, which has been gaining some ground. Article 3 of the Protocol on Environmental Protection to the Antarctic Treaty recognizes and attempts to protect “the intrinsic value of Antarctica, including its wilderness and aesthetic values ...”. A similar mention is also made in the Convention on Biological Diversity, in the first paragraph of the preamble, which reads as follows: “[The Contracting Parties,] Conscious of the intrinsic value of biological diversity ...”. According to the *Diccionario de la Lengua Española* of the Real Academia Española, intrinsic means “essential”, and the *Concise Oxford Dictionary* defines intrinsic as “belonging naturally; inherent, essential, esp. intrinsic value”.

⁷ See *Yearbook ... 1990*, vol. II (Part One), pp. 105 *et seq.*, document A/CN.4/428, annex.

Roget's International Thesaurus, under the entry for "intrinsic", includes the word "characteristic". The Special Rapporteur considers that this latter definition, in particular, is the real meaning of "intrinsic" as used in these legal instruments, and in any case the words "essential" and "inherent" do not mean that the adverse effects on the environment per se constitute a form of harm which is independent of human beings. It is difficult to understand who could be harmed by the loss of the ecological or aesthetic values of Antarctica if there were no human beings on the planet to appreciate them.

20. The effects of a causal chain normally do not come under the aegis of law until they are felt by a person in the legal system in question, in this case by a State or another international subject. In such cases, the law usually protects the injured person and prescribes reparation. It is at this point that the adverse effect becomes a juridical injury. Looked at closely, harm to the environment is not differentiated in any way from harm to the person or property of a juridical person, in whose favour there arises a right to reparation: the person is compensated because the change in the environment produced by a certain conduct harms him, since he loses one or more of the values provided to him by this environment. In brief, what is called harm to the environment per se is a change in the environment which causes people loss, inconvenience or distress, and it is this injury to people which the law protects against in the form of compensation. In any case, as mentioned above, harm to the environment per se would injure a collective subject, such as a community, which in any case would be represented by the State.

21. The values in question, whose loss gives rise to a juridical injury, produce, as mentioned above, environmental services which may or may not be used. These are called use services and non-use services. As noted above, the former include the commercial or recreational use of the environment, such as the use of a watercourse for fishing, the recreational use of water for swimming, sailing, water-skiing or racing, or the use of snow in the mountains for similar sports. Non-use services might include the characteristic features of a landscape or even so-called "existence values", which are certain features of the environment for which the community would be prepared to pay simply in order to preserve them for themselves or for future generations. Obviously, some losses of service can easily be subject to compensation; for example, commercial fishing would suffer a loss if an incident of river or lake pollution appreciably reduced the fish population. In other cases, it is more difficult to perceive the damage and even more so to evaluate it, such as when the loss of a recreational area causes moral inconvenience or frustration. However, the principle that harm which does not entail economic loss should be compensated is not a new absolute in law, as can be seen in the universal acceptance, in domestic and international law, of compensation for moral injury, which is as difficult to evaluate in monetary terms as ecological harm.

22. The second matter is to determine who is injured by ecological harm, since the environment does not belong to anyone in particular but to the world in general, or to

the community. Under the law of the United States of America (the Comprehensive Environmental Response, Compensation and Liability Act 1980,⁸ the Clean Water Act of 1977⁹ and the Oil Pollution Act of 1990¹⁰), the United States Congress empowered government agencies with management jurisdiction over natural resources to act as trustees to assess and recover damages: [t]he public trust is defined broadly to encompass "natural resources" and "belonging to, managed by, held in trust by, appertaining to or otherwise controlled by" Federal, state or local governments or Indian tribes. Under international law, a State whose environment is damaged is also the party most likely to have the right to take legal action to obtain compensation, and this right may also be granted to non-governmental welfare organizations.

C. Reparation

23. By way of introduction to the topic of reparation for environmental harm, the Special Rapporteur notes that in the field of wrongful acts, the meaning of reparation in international law is expressed in the *Chorzów Factory*¹¹ rule, i.e. reparation must wipe out all the consequences of the wrongful act and re-establish the situation which would, in all probability, have existed if that act had not been committed. This reparation is obtained by the methods which international law has regarded as suitable, namely, restitution in kind, equivalent compensation, satisfaction and assurances of non-repetition, combined so that all aspects of the harm are covered.¹² In brief, reparation is an obligation imposed by secondary rules as a consequence of the violation of a primary rule, and its content, forms and degrees have been shaped by international custom, as expressed by PCIJ in the *Chorzów Factory* case; the Commission is currently attempting to codify this practice under the leadership of the Special Rapporteur on State responsibility, Mr. Arangio Ruiz.

24. In the case of liability *sine delicto*, on the other hand, the damage is produced by an act which is not prohibited by law. Therefore, the compensation is ascribed to the operation of the primary rule: it is not a reparation imposed by the secondary rule as a consequence of the violation of a primary obligation, but rather a payment imposed by the primary rule itself. As a result, it does not necessarily have to meet all the criteria of the *restitutio in integrum* imposed by international custom for responsibility for a wrongful act. There does not appear to be a clear international custom with respect to the content,

⁸ United States Code, 1994 edition, vol. 23, title 42, chap. 103, arts. 9601 *et seq.*

⁹ *Ibid.*, vol. 17, title 33, chap. 26, art. 1321.

¹⁰ *Ibid.*, chap. 40, arts. 2701 *et seq.*

¹¹ *Factory at Chorzów, Merits, Judgment No. 13*, 1928, *P.C.I.J., Series A, No. 17*.

¹² Cessation is not included because, in liability *sine delicto*, it does not seem to be appropriate, since its essential feature is precisely that the activity which produces the damage is lawful and continues through the payment of the appropriate compensation. Moreover, for ILC, and erroneously in the Special Rapporteur's view, cessation does not constitute part of the concept of reparation.

form and degrees of payment corresponding to the damage in responsibility *sine delicto*, but there are some indications that it is not necessarily following the same lines as the Chorzów rule. *Restitutio in integrum* is not being as rigorously respected in this field as in that of wrongful acts, as illustrated by the existence of thresholds below which the harmful effects do not meet the criterion of reparable damage, as well as the imposition, in legislative and international practice, of ceilings on compensation. Both the upper and lower limitations, which were imposed for practical reasons, create a category of non-recoverable harmful effects.

25. The Chorzów Factory rule, however, obviously serves as a guideline, although not a strict benchmark, in the field of responsibility *sine delicto* as well, because of the reasonableness and justice it embodies. It is true that there are differences between the circumstances of the damage produced by wrongful conduct and harm produced by legal conduct, and that these might well be treated differently from a legal standpoint; however, this distinction is drawn mainly for practical reasons, such as in order to fix an upper limit on the amounts insured, in the case of the ceiling, or to acknowledge the fact that all human beings today are both polluters and victims of pollution in the case of the lower threshold. It is evident, however, that the law must seek reparation, as far as possible, for all damages. Thus, in the conventions on nuclear material and oil pollution, an attempt was made to go beyond the ceiling by establishing funds to help approach full restitution in circumstances where compensation might reach extremely high amounts.

26. Conventions on civil liability seem to have ignored certain forms of reparation such as *restitutio naturalis* in order to focus exclusively on the allocation of a sum of money as a primary payment. In environmental damage, however, the most common form of payment seems to be almost the same thing as *restitutio naturalis*, as represented by the restoration of the damaged elements of the environment, such as reintroducing into an ecosystem members of an endangered or destroyed species which can be restored because enough members of the species exist elsewhere. Equivalent compensation, on the other hand, would primarily be directed, in the case of total destruction of a certain component, to the introduction of an equivalent component, and only if that were not possible to an eventual monetary compensation. As interpreted in the cases covered by United States legislation (see para. 22 above), monetary compensation would also be appropriate when the restoration of a certain component occurs naturally, from the time during which this resource was dying out until its full restoration.¹³

27. The method generally selected to meet this goal is restoration, or re-establishment of the damaged or destroyed resources. This is a reasonable approach, since what is most important here is to return to the status quo ante; in principle, ecological values prevail over eco-

nomical values to such an extent that, unlike what happens in other fields, some domestic laws specify that the compensation which may be granted to the injured parties in certain cases should be used for ecological purposes as well.¹⁴ The cost of restoration or replacement of elements of the environment gives a good measure of the value of the loss. This usually varies when the costs, especially of restoration, are unreasonable in relation to the usefulness of the damaged resources, which confirms the idea that the predominance of ecological purposes is overruled only by the unreasonableness of costs. It is usually easier, however, to replace a resource, for example to reintroduce into one ecosystem from another ecosystem, a species of fish or other animal which was destroyed or suffered a loss in population because of an incident.

28. Restoration or replacement is thus the best form of reparation. Identical restoration may be impossible, however, in which case most modern trends allow for the introduction of equivalent elements. Some sources contend that an identical reconstruction may not be possible, of course. An extinct species cannot be replaced. Pollutants emitted into the air or water are difficult to retrieve. From an environmental point of view, however, there should be a goal to clean up and restore the environment to the state which, if not identical to that which existed before the damage occurred, at least maintains its necessary permanent functions. Even if restoration or clean-up is physically possible, it may not be economically feasible. It is unreasonable to expect the restoration to a virgin state if humans have interacted with that environment for generations. Moreover, restoring an environment to the state it was in before the damage occurred could involve expenditure disproportionate to the desired results. In such case it might be argued that restoration should only be carried out to the point where it is still cost-effective. Such determinations involve difficult balancing of both economic and environmental values. Article 2, paragraph 8, of the Convention on Civil Liability for Damages Resulting from Activities Dangerous to the Environment defines "measures of reinstatement" as "any reasonable measures aiming to reinstate or restore damaged or destroyed components of the environment, or to introduce, where reasonable, the equivalent of these components into the environment. Internal law may indicate who will be entitled to take such measures". One possibility is that the measures in question might be taken by anyone, and, provided that they are reasonable, should be compensated.

29. The conventions generally stop there, i.e. with compensation for measures of restoration or replacement that have actually been taken or will be taken; in the latter case, compensation is used to pay for them. What

¹³ According to this legislation, even when restoration activities are undertaken, trustees may determine and seek recovery for interim losses in resource value.

¹⁴ The Comprehensive Environmental Response, Compensation and Liability Act requires trustees to spend all damages, apart from their assessment cost, recoupment, on restoring, replacing or acquiring the equivalent of the natural resources damaged or destroyed; the Clean Water Act allows recovery for costs or expenses incurred in the restoration or replacement of natural resources damaged or destroyed. The Oil Pollution Act also requires that recoveries be spent for restoration, rehabilitation, replacement or acquisition of the equivalent of the damaged natural resources.

happens in the cases where restoration is impossible or when the costs of restoration are unreasonably high? In the eighth report on the topic, the Special Rapporteur quotes Rest as follows:

The ... situation can be illustrated by the example of the Exxon Valdez case, as in this case it was impossible to clean up the oil-polluted seabed of the Gulf of Alaska because of the factual situation, the Exxon Corporation insofar saved the clean-up costs. This seems to be unjust. According to the Guidelines [of the Economic Commission for Europe Task Force on Responsibility and Liability regarding Transboundary Water Pollution], the polluter could perhaps be obliged to grant *equivalent compensation*, for instance, by replacing fish or by establishing a nature park.¹⁵

The Special Rapporteur recalls that paragraph 1 of draft article 24 (Harm to the environment and resulting harm to persons or property)⁷ presented in his sixth report had covered this situation, providing that “if it is impossible to restore these conditions in full [i.e. the status quo ante], agreement may be reached on compensation, monetary or otherwise, by the State of origin for the deterioration suffered”.

30. The Convention on the Regulation of Antarctic Mineral Resource Activities adopts a similar solution in article 8, paragraph 2 (a), providing that an “operator shall be strictly liable for damage to the Antarctic environment or dependent or associated ecosystems arising from its Antarctic mineral resource activities, including payment in the event there has been no restoration to the status quo ante”. What is important in terms of compensation is that the court determines that these payments must be used for ecological purposes.

31. The International Fund for Compensation for Oil Pollution Damage established in the framework of the International Convention on Civil Liability for Oil Pollution Damage has taken a restrictive position, however. The Fund pays compensation for pollution damage caused outside the ship. The first claim, which arose from the sinking of the *Antonio Gramsci* near Ventspils, in the former Soviet Union, on 27 February 1979, raised the question of whether this definition included environmental harm or damage to natural resources, as advocated by the Soviet Union and others. The Fund’s Assembly considered that the evaluation of the compensation payable by the Fund could not be made on the basis of abstract quantifications of the damage calculated in accordance with theoretical models.¹⁶ In the more recent case of the *Patmos*, a Greek tanker damaged off the Calabrian coast in 1985, the Fund originally rejected the Government of Italy’s claim on the grounds of lack of

documentation on the nature of the damage or the bases on which the amount of the claim had been calculated. The Government of Italy took the case to the Italian courts; it was rejected in the first instance but accepted on appeal. In 1989 the Messina Appeals Court interpreted the Convention as referring to the environmental damage as everything which alters, causes deterioration in or destroys the environment in whole or in part. The Court held that the environment must be considered as a unitary asset, separate from those assets of which the environment is composed (territory, territorial waters, beaches, fish, etc.); the right to the environment belonged to the State, in its capacity as representative of the collectivities; the damage to the environment harmed immaterial values and consisted of the reduced possibility of using the environment; and the damage could be compensated on an equitable basis, which must be established by the Court on the grounds of an opinion of experts. The Court held that the definition of “pollution damage” as laid down in article 1, paragraph 6, of the International Convention on Civil Liability for Oil Pollution Damage was wide enough to include damage to the environment of the kind described above.

32. All the liability conventions also include in the definition of harm the costs of preventive and safety measures, and any damage or loss caused by these measures. They refer to preventive measures taken after an incident to minimize or prevent its effects; these measures are defined in all the conventions as “reasonable measures taken by any person following the occurrence of an incident to prevent or minimize the damage”. If the Commission prefers to use another expression rather than “preventive” for such ex post measures, perhaps “response measures” could be used, as the Special Rapporteur had suggested in his tenth report on the topic.¹⁷ In principle, the Special Rapporteur tends to favour calling them “preventive”, as in all the conventions, and making the appropriate clarification either in the text or in the commentary.

33. The 1992 amendment to the International Convention on Civil Liability for Oil Pollution Damage apparently includes ex ante prevention measures, i.e. those taken before any oil spill has taken place, among the measures whose cost is recoverable, provided that there has existed a clear and present danger of pollution damage. It would appear, however, that this compensation refers to cases where, for example, the affected State or a number of persons in the affected State are forced to take certain defensive measures owing precisely to the failure of the ex ante preventive measures on the part of the operator or their total absence.

D. Assessment of harm to the environment

34. Assessment of harm to the environment raises very serious problems. Following the trend to attempt to en-

¹⁵ A. Rest, “New tendencies in environmental responsibility/liability law: the work of the UN/ECE Task Force on Responsibility and Liability regarding Transboundary Water Pollution”, *Environmental Policy and Law*, vol. 21, Nos. 3-4 (July 1991), p. 137; quoted in *Yearbook ... 1992*, vol. II (Part One), p. 72, document A/CN.4/443, chap. II, appendix, para. 10.

¹⁶ It should be noted that the USSR had assessed the damage in accordance with an abstract model. See Maria Clara Maffei, “The compensation for ecological damage in the *Patmos* case”, *International Responsibility for Environmental Harm*, Francesco Francioni and T. Scovazzi, eds., pp. 381-394.

¹⁷ See *Yearbook ... 1994*, vol. II (Part One), pp. 132-133, document A/CN.4/459, chap. I.

sure reparation for all types of damage, which is certainly reasonable, some national laws have gone quite far in their methods of evaluation, as will be seen below. Restoration does not seem to present problems of assessment, except when costs widely exceed reasonable costs in relation to the usefulness of this form of restitution in kind. The Court will have to determine when this restoration exceeds a reasonable amount, and accordingly, evaluate the services temporarily or permanently lost as a result of the environmental damage. It may also happen that restoration is impossible, or only partially feasible, as seen earlier, in which case the problem also arises of assessing the services of which the publicas—represented by the State—is deprived, to the extent that the restoration falls short of full restoration. This assessment is usually extremely difficult.

35. The difficulty lies in knowing whether the competent court should lean towards compensation of the directly quantifiable damages, such as restoration costs, or use abstract theoretical models to quantify the loss caused by environmental damage. The norms of international law are not well developed in this regard, nor are national norms. In the United States of America, restoration of damaged environment has been described as a fledgling activity shot through with uncertainty and controversy.

36. Alternative methods of assessment include: the market price of the environmental resource; the economic value attributed to the environmental resource (such as landscape costing methods or “hedonic” pricing, as discussed below); or contingent assessment methods to measure the willingness of individuals to pay for environmental assets such as clean air or water or the preservation of endangered species. These problems of assessment arise in the United States with respect to the Comprehensive Environmental Response, Compensation and Liability Act⁸ and the Oil Pollution Act¹⁰ in relation to the competence of certain public authorities to bring an action for damage to natural resources caused by the introduction of hazardous substances or the spilling of oil, respectively. As a market price may not exist, or may not reflect the real value of the resource, for example in the case of endangered species, some economists have tried to calculate the use value of certain public natural

resources (i.e. the value based on the actual use of a resource, for example, for fishing) using the cost of travel or the hedonic price. Travel costing methods use the amounts spent by individuals to visit and enjoy resources as a basis for the calculation. Hedonic pricing methods take the market value added to the value of private ownership of certain amenities and seek to transpose these values to public resources with comparable values. For non-use values, such as the value an individual may place on the preservation of an endangered species, although the species may never actually be seen, a contingent valuation methodology has been developed to measure the value by asking persons how much they would be willing to pay, for example through a tax increase, to protect a natural resource from harm. Critics of this methodology suggest that a method which does not reflect a real economic behaviour and which gives inflated values cannot be relied on. It has also been said that the value of resources which are collectively significant for the society cannot be reduced to what a group of individuals is willing to pay.

37. It is easy to understand, in view of the difficulties of the alternative assessment methods discussed above, the aforementioned trend in international practice to limit reparation of environmental damage to the payment of costs of restoration, the replacement of damaged or destroyed resources or the introduction of equivalent resources where the court deems this to be reasonable. The quantification of costs provided by contingent valuation methodologies is too unreliable and perhaps inappropriate for a draft that aspires to become a global convention, with courts that are part of different cultures having such disparate attitudes towards the environment. However, if restoration or replacement of resources cannot be partially or fully accomplished, and real harm to the environment has occurred, it does not seem reasonable for the damage to be totally uncompensated. The court should perhaps have some leeway to make an equitable assessment of the damage in terms of a sum of money, which would be used for ecological purposes in the damaged region, perhaps in consultation with the State of origin or with public welfare bodies, without having to resort to such complicated alternative methods. Finally, it should be noted that the courts grant compensation for moral damage, which is as difficult to assess as environmental harm. How can anguish or suffering be measured?

CHAPTER II

Proposed texts and commentaries

38. The Special Rapporteur proposes the following text for the definition of harm:

“Harm” means:

(a) Loss of life, personal injury or impairment of the health or physical integrity of persons;

(b) Damage to property or loss of profit;

(c) Harm to the environment, including:

(i) The cost of reasonable measures taken or to be taken to restore or replace destroyed or damaged natural resources or, where reasonable, to introduce the equivalent of these resources into the environment;

(ii) The cost of preventive measures and of any further damage caused by such measures;

- (iii) **The compensation that may be granted by a judge in accordance with the principles of equity and justice if the measures indicated in subparagraph (i) were impossible, unreasonable or insufficient to achieve a situation acceptably close to the status quo ante. Such compensation should be used to improve the environment of the affected region;**

The environment includes ecosystems and natural, biotic and abiotic resources, such as air, water, soil, fauna and flora and the interaction among these factors;

The affected State or the bodies which it designates under its domestic law shall have the right of action for reparation of environmental damage.

39. In the commentary on harm to the environment, a distinction must be drawn between harm to the environment per se, which is an injury inflicted on the community where the right of action belongs to the State or to the bodies which it designates under its domestic law, and harm to individual natural or moral persons through environmental deterioration, as for example where someone is made ill by water pollution and must be hospitalized, or the typical case of a hotel owner who loses customers because of the deterioration of the region in which the hotel is located (industrial smoke, unpleasant odours, polluted water, etc.). The comment should note that this last-mentioned type of harm is covered in paragraph 3 (a) and (b).

40. In addition, in the commentary on subparagraph (c) (i), it should be pointed out that one of the meanings of "reasonable" applied to restoration and re-

placement measures, or measures introducing an equivalent, is that the costs of these measures should not be excessively disproportionate to the usefulness resulting from the measure.

41. For example, in the *Commonwealth of Puerto Rico v. SS Zoe Colocotroni* case,¹⁸ which refers to the oil spill off the coast of Puerto Rico in 1973, it was decided in the United States of America by the Court of Appeals, First Circuit, that the national legislation provided that the Federal Government and states were authorized to recover costs or expenses incurred in the restoration of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance. At first instance, the District Court awarded damages based, *inter alia*, on the cost of replacing, through biological supply laboratories, the millions of tiny aquatic organisms destroyed by the spill. The Court of Appeals vacated the District Court's decision in this respect and held that the appropriate primary standard for determining damages in such a case was the cost reasonably to be incurred by the sovereign or its designated agency to restore or rehabilitate the environment in the affected area to its pre-existing condition, or as close thereto as was feasible without grossly disproportionate expenditures. Factors to be taken into account would include technical feasibility, harmful side effects, compatibility with or duplication of such regeneration as was naturally to be expected, and the extent to which efforts beyond a certain point would become either redundant or disproportionately expensive. The Court of Appeals also recognized that there might be circumstances where direct restoration of the affected area would be either physically impossible or so disproportionately expensive that it would not be reasonable to undertake such a remedy.

¹⁸ U.S. Court of Appeals, 628 F. 2d 652 (1st Cir. 1980).

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Liability regimes relevant to the topic “International liability for injurious consequences arising out of acts not prohibited by international law”:
survey prepared by the Secretariat

[Original: English]
[23 June 1995]

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Abbreviations

CAA	Clean Air Act of 1970 (United States of America)
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act 1980 (United States of America)
CIV	International Convention concerning the Carriage of Passengers and Luggage by Rail (1961)
CRTD	Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (1989)
CWA	Clean Water Act of 1977 (United States of America)
FWPCA	Federal Water Pollution Control Act (United States of America)
IOPC	International Oil Pollution Compensation Fund
1969 Convention on Civil Liability	International Convention on Civil Liability for Oil Pollution Damage (1969)
OPA	Oil Pollution Act of 1990 (United States of America)
Paris Convention	Convention on Third Party Liability in the Field of Nuclear Energy (1960)
SARA	Superfund Amendments and Reauthorization Act of 1986 (United States of America)
Vienna Convention	Vienna Convention on Civil Liability for Nuclear Damage (1963)

Multilateral instruments cited in the present report

Source

- International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Seagoing Vessels (Brussels, 25 August 1924) League of Nations, *Treaty Series*, vol. CXX, p. 125.
- Convention for the Unification of Certain Rules relating to Damage caused by Aircraft to Third Parties on the Surface (Rome, 29 May 1933) (not in force) M. O. Hudson, *International Legislation* (Washington, D.C.), vol. VI (1932-1934), p. 334, No. 329.
- Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 7 October 1952) League of Nations, *Treaty Series*, vol. 310, p. 181.
- Treaty Establishing the European Economic Community (Treaty of Rome) (Rome, 25 March 1957) *Ibid.*, vol. 294, p. 3.
- Single European Act (Luxembourg and The Hague, 17 and 28 February 1986) *Official Journal of the European Communities*, No. L 169, 29 June 1987.
- International Convention relating to the Limitation of the Liability of Owners of Seagoing Ships (Brussels, 10 October 1957) N. Singh, ed., *International Maritime Law Conventions*, vol. 4, *Maritime Law* (London, Stevens, 1983), p. 2967.
- Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960) United Nations, *Treaty Series*, vol. 956, p. 251.
- and Additional Protocols (Paris, 28 January 1964 and 16 November 1982) *Ibid.*, p. 335 and recommendation C(82)181 of the OECD Council.
- Supplementary Convention to the above Convention (Brussels, 31 January 1963) United Nations, *Treaty Series*, vol. 1041, p. 374.
- Convention on the Liability of Operators of Nuclear Ships (Brussels, 25 May 1962) IAEA, *International Conventions relating to Civil Liability for Nuclear Damage*, Legal Series No. 4, rev. ed. (Vienna, 1976), p. 34.
- Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 21 May 1963) United Nations, *Treaty Series*, vol. 1063, p. 265.
- Additional Convention to the International Convention concerning the Carriage of Passengers and Luggage by Rail (CIV) of 25 February 1961, relating to the Liability of the Railway for Death of and Personal Injury to Passengers (Bern, 26 February 1966) *Ibid.*, vol. 1101, p. 83.
- Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Brussels, 27 September 1968) *Official Journal of the European Communities*, vol. 15, No. L 299 (1988), 31 December 1972, p. 32.
- International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969) United Nations, *Treaty Series*, vol. 973, p. 3.
- and the Protocols thereto of 1976, 1984 and 1992 amending the Convention (London, 19 November 1976, 25 May 1984 and 27 November 1992) IMO (Sales No. 457.85.15.E) and *International Environmental Law: Multilateral Treaties*, Anni Lucács and R. Michels, eds. (London, The Hague, Boston, Kluwer Law International, 1995), vol. III, 1969:88.
- Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (Brussels, 17 December 1971) United Nations, *Treaty Series*, vol. 974, p. 255.
- International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage (Brussels, 18 December 1971) *Ibid.*, vol. 1110, p. 57.
- Convention on International Liability for Damage Caused by Space Objects (London, Moscow and Washington, 29 March 1972) *Ibid.*, vol. 961, p. 187.

Source

- Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, Mexico, Moscow and Washington, 29 December 1972) Ibid., vol. 1046, p. 121.
- Convention on the Law Applicable to Products Liability (The Hague, 2 October 1973) Ibid., vol. 1056, p. 187.
- Convention on the Protection of the Environment (Stockholm, 19 February 1974) Ibid., vol. 1092, p. 279.
- Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki, 22 March 1974) Ibid., vol. 1507, p. 167.
- Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona, 16 February 1976) Ibid., vol. 1102, p. 27.
- Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources (London, 17 December 1976) UNEP, *Multilateral Treaties in the Field of the Environment*, Reference Series 3 (Nairobi, 1983), p. 405.
- Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment (Kuwait, 24 April 1978) United Nations, *Treaty Series*, vol. 1140, p. 133.
- United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 157, document A/CONF.62/122.
- Agreement on Third Party Liability in the Field of Nuclear Energy (Federal Republic of Germany and Switzerland) (Bern, 22 October 1986) United Nations, *Treaty Series*, vol. 1554, p. 169.
- Convention on the Regulation of Antarctic Mineral Resource Activities (Wellington, 2 June 1988) *International Legal Materials* (Washington, D.C.), vol. XXVII (1988), p. 868.
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel, 22 March 1989) United Nations, *Treaty Series*, vol. 1673, p. 57.
- Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) (Geneva, 10 October 1989) United Nations publication, Sales No. E.90.II.E.39.
- Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako, 30 January 1991) *International Legal Materials* (Washington, D.C.), vol. XXX (1991), p. 773.
- Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992) Ibid., vol. 31, No. 6 (November 1992), p. 1313.
- Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992) ECE, *Environmental Conventions* (United Nations publication, 1992), p. 119.
- Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993) Council of Europe, *European Treaty Series*, No. 150.

Introduction

1. In paragraph 5 of its resolution 49/51, the General Assembly requested the Secretariat to update the survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law, prepared by the Secretariat in 1984.¹ The present study has been prepared in response to that request.

2. Bearing in mind that ILC had already adopted on first reading² a set of articles on prevention issues, the Secretariat has, in accordance with the Special Rapporteur's wish, focused the study on liability aspects of the topic.

3. The present study reviews existing international conventions, international case law, other forms of State practice as well as available domestic legislation and domestic courts' decisions bearing on the issue of liability. For the sake of comprehensiveness, it incorporates the materials on liability included in the Survey of State practice.

4. The inclusion of materials on specific activities is without prejudice to the question whether such activities are "prohibited by international law" or not. It is useful to consider the handling of some disputes in which there was no general agreement as to the lawfulness or unlawfulness of the activities giving rise to injurious consequences.

5. The present study also includes, in addition to treaties, judicial decisions and arbitral awards and documents exchanged between foreign ministries and government officials. These documents are important sources of State practice. So are settlements through non-judicial methods which, although they are not products of conventional judicial procedure, may represent a pattern in trends regarding substantive issues in dispute. Statements made by the State officials involved as well as the content of actual settlements will be examined for their possible relevance to the substantive principles of liability.

6. The present study has not ignored the difficulties of evaluating a particular instance as "evidence" of State practice.³ Different policies may motivate the conclusion

of treaties or decisions. Some may be compromises or accommodations for extraneous reasons. But repeated instances of State practice, when they follow and promote similar policies, may create expectations about the authoritativeness of those policies in future behaviour. Even though some of the policies may not have been explicitly stated in connection with the relevant events, or may purposely and explicitly have been left undecided, continuous similar behaviour may lead to the creation of a customary norm. Whether or not the materials examined here are established as customary law, they *demonstrate* a trend in expectations and may contribute to the clarification of policies concerning some detailed principles relevant to the topic. Practice also demonstrates ways in which competing principles, such as "State sovereignty" and "domestic jurisdiction", are to be reconciled with the new norms.

7. In referring to State practice, caution must be exercised in extrapolating principles, for the more general expectations about the *degree of tolerance* concerning the injurious impact of activities can vary from activity to activity.

8. The materials examined in the present study are not, of course, exhaustive. They relate primarily to activities concerning the physical use and management of the environment, for State practice in regulating activities causing injuries beyond the territorial jurisdiction or control has been developed more extensively in this area. The study is also designed to be useful source material; hence, relevant extracts from domestic legislation, treaties, judicial decisions and official correspondence are also cited. The outline of the study has been formulated on the basis of functional problems which may appear relevant to liability issues of the topic.

9. Chapter I describes the general characteristics of liability regimes such as the issue of causality. It reviews the historical development of the concept of strict liability in domestic law and provides an overview of the development of this concept in international law.

(*Judgment, I.C.J. Reports 1969*, p. 44, para. 77). See also C. Parry, *The Sources and Evidences of International Law* (Manchester University Press, 1965), pp. 34–64.

However, in its judgment of 6 April 1955 in the *Nottebohm* case, ICJ relied on State restraint as evidence of the existence of an international norm restricting freedom of action (*Second Phase, Judgment, I.C.J. Reports 1955*, pp. 21–22).

On the importance of norm-generating properties of "incidents" Reisman observes that:

"The normative expectations that political analysts infer from events are the substance of much of contemporary international law. The fact that the people who are inferring norms from incidents do not refer to the product of their inquiry as 'international law' in no way affects the validity of their enterprise, any more than the obliviousness of Molière's Mr. Jourdain to the fact that he was speaking prose meant that he was not. Whatever it is called, law it is." (W. Michael Reisman, "International incidents: introduction to a new genre in the study of international law", *International Incidents: The Law that Counts in World Politics*, W. Michael Reisman and A.R. Willard, eds. (Princeton University Press, 1988), p. 5.)

¹ *Yearbook ... 1985*, vol. II (Part One), *Addendum*, p. 1, document A/CN.4/384.

² For the text of the draft articles provisionally adopted by the Commission, see *Yearbook ... 1994*, vol. II (Part Two), pp. 154 *et seq.*

³ For example, abstention by States from engaging in activities which, although lawful, may cause injuries beyond their territorial jurisdiction, may or may not be relevant to creating customary behaviour. PCIJ and its successor, ICJ, have observed that the mere fact of abstention without careful consideration of the motivating factors, is insufficient proof of the existence of an international legal custom. Abstention by States from acting in a certain way may have a number of reasons, not all of which have legal significance. See the judgment rendered on 7 September 1927 by PCIJ in the "Lotus" case (*Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 28). A similar point was made by ICJ in its judgment of 20 November 1950 in the *Asylum* case (*Judgment, I.C.J. Reports 1950*, p. 286), and in its judgment of 20 February 1969 relating to the *North Sea Continental Shelf* case

10. Chapter II examines the issue of the party that is liable. It describes the polluter-pays principle, operator liability and instances where States are considered liable.

11. Chapter III attempts to identify instances and conditions in which operator or State may be considered exonerated from liability.

12. Chapter IV examines the issues relevant to compensation. Such issues include the content of compensation; namely compensable injuries, forms of compensation and limitation on compensation. This chapter also examines

the authorities recognized in State practice as competent to decide on compensation.

13. Chapter V describes statute of limitations provided mostly in treaties.

14. Chapter VI reviews the requirements of insurance and other anticipatory financial schemes to guarantee compensation in case of injury.

15. Finally, chapter VII examines the issue of enforcement of judgements granted mostly by domestic courts, in respect to compensation to injured parties.

CHAPTER I

General characteristics of liability regime

A. The issue of causality

16. The concept of liability was developed in domestic law in connection with tortious acts. The evolution of the notion in domestic law reveals its policy considerations, many of which have shaped the present theory of liability and particularly the place of "fault" in accountability and payment of compensation in relation to certain activities. In order to understand fully the development of the concept of liability and to foresee its future configuration in international law, it is useful to review briefly the historical development of this concept in domestic law.

17. This is not to suggest that the development of the liability concept in international law will or should have the same content and procedures as in domestic law. The concept of liability is much more developed in domestic law and its introduction to international law cannot ignore the experience gained in this area in domestic law. The domestic law references to liability are mentioned only to provide guidelines when appropriate for understanding the concept of liability and its development.

18. Historically, one of the main concerns and most important elements in the evolution of the law of liability was the maintenance of public order by preventing individual vengeance. Under primitive law *causation* was sufficient to establish liability. Primitive law did not look so much to "the intent of the actor as [it did to] the loss and the damage of the party suffering".⁴ Two reasons have been advanced for this approach of primitive law. First, the inability or unwillingness to assume that harm

could occur unintentionally.⁵ Secondly, early common law was based on the principle that individual human beings act at their own risk and therefore are responsible for the consequence of their actions.⁶ Liability in early law, if not "absolute" was nonetheless "strict" and "scant regard was paid to the moral quality of the defendant's conduct".⁷ Gradually, the law began to pay more attention to exculpatory considerations and partially "under the influence of the moral philosophy of the Church, tended to progress in the direction of recognizing moral culpability as the proper basis of tort".⁸ This approach which tended to benefit the party causing injury rather than the injured accelerated in the nineteenth century as the result of the Industrial Revolution:

During the nineteenth century, the "moral advance" of tort law vastly accelerated. In response to doctrines of natural law and *laissez faire*, the courts attached increasing importance to freedom of action and ultimately yielded to the general dogma of "no liability without fault". This movement coincided with, and was undoubtedly influenced by the demands of the Industrial Revolution. It was felt to be in the better interest of an advancing economy to subordinate the security of individuals, who happened to become casualties of the new machine age, rather than fetter enterprise by loading it with cost of "inevitable" accidents. Liability for faultless causation was feared to impede progress because it gave the individual no opportunity for avoiding liability by being careful and thus confronted him with the dilemma of either giving up his projected activity or shouldering the cost of any resulting injury. Fault alone was deemed to justify a shifting of loss, because the function of tort remedies was seen as primarily admonitory or deterrent.⁹

⁵ Fleming, *op. cit.* (see footnote 4 above), p. 7 and footnote 29 citing Ehrenzweig, "A psychoanalysis of negligence", *Northwestern University Law Review* (Chicago, 1953), vol. 47, p. 855.

⁶ See P. H. Winfield, "The myth of absolute liability", *The Law Quarterly Review*, (London, 1926), vol. 42, p. 37, cited by Fleming, *op. cit.* (footnote 4 above), p. 7 and footnote 30.

⁷ See Fleming, *op. cit.* (footnote 4 above), p. 7.

⁸ *Ibid.*, pp. 7-8.

⁹ *Ibid.*, p. 8.

⁴ John G. Fleming, *The Law of Torts*, 5th ed. (Sydney, Melbourne, Brisbane, Perth, The Law Book Company Limited, 1977), p. 7 and footnote 27, citing *Lambert v. Bessey* (1681) T. Raymond, 421, 422.

19. This approach has been revised. Indeed, the views in the area of accidents have been changing drastically:

It is being increasingly realized that human failures in a machine age exact a large and fairly regular toll of life, limb and property, which is not significantly reducible by standards of conduct that can be prescribed and enforced through the operation of tort law. Accident prevention is more effectively promoted through the pressure exerted by penal sanctions attached to safety regulations and such extra-legal measures as road safety campaigns, the practice of insurance companies to base the rate of premiums on the insured's accident rate, improvements in the quality of roads and motor vehicles and the production processes in industry. *But** despite all these controls, accidents and injuries remain, and it is the task of the modern law of torts to deal with them. ... The question is simply, who is to pay for their cost [industrial progress], the hapless victim who may be unable to pin conventional fault on any particular individual, or those who benefit from accident-producing activity? The effect of denying compensation to the casualty is "to take much from few, and something from all, in order that a special group may pay less".¹⁰

20. Recognizing the fact that in modern life conditions, many activities may have a high toll on life and limb and property, policymakers have had to make a decision; either (a) prohibit [people from conducting] certain activities; (b) let the costs fall where the injury falls; (c) prescribe that certain activities can only be conducted under certain predetermined safety measures, or (d) tolerate the activity on condition that it pays its way regardless of the manner in which it was conducted. The first alternative was found impractical and incompatible with free democratic society and its economic and industrial policies. The second alternative was considered incompatible with the principle of equity and social justice system.¹¹

21. The third alternative was problematic because it would lead to the application of fault or negligence liability to *all* activities. While those principles could be made applicable to many activities, they could not be prescribed in respect of every activity. Such a solution would have led to proliferation of safety statutes and rules and licensing systems, and would have placed substantial pressure and costs on the State's police, administrative and enforcement agencies. It would also have overburdened the courts with complicated litigations and force the courts to determine whether or not there was fault or negligence in respect of highly technical and complex activities. This alternative would inevitably operate in favour of the person conducting the activity which caused the injury, for the injured party has the burden of proof.¹¹

22. The fourth alternative led to the creation of the concept of strict liability. The person whose activity causes the injury is held liable

not for any "particular" fault occurring in the course of the operation, but for the inevitable consequences of a dangerous activity which could be stigmatized as negligent on account of its foreseeable harmful potentialities, were it not for the fact that its generally beneficial character requires us to tolerate it in the interest of the community at large.¹¹

¹⁰ *Ibid.*, pp. 8–9.

¹¹ *Ibid.*, pp. 315–316.

B. Strict liability

1. DOMESTIC LAW

23. Many legal systems have shown a persistent tendency to recognize the concept of strict liability while maintaining liability dependent on "fault" as the general principle.¹² The civil codes of many States, including those of Belgium, France and Italy, impose strict liability upon the owner or keeper of an animal for the damage it causes, whether the animal was in his keeping or had strayed or escaped.¹³ The German Civil Code of 1900, as amended in 1908, provides for exceptions to strict liability only in the case of domestic animals used by the owner in his profession or in his business, or under his care.¹⁴

24. Strict liability is also recognized in respect of owners or keepers of animals in the Civil Code of Argentina (art. 1126), Brazil (art. 1527), Colombia (art. 2353), Greece (art. 924), Hungary (art. 353), Mexico (art. 1930), the Netherlands (art. 1404), Poland (art. 431) and Switzerland (art. 56).¹⁵

25. Strict liability for damage caused by fire is widely recognized in domestic law and the elements of fault or negligence are still essential for liability. For example, the French Civil Code, in article 1384, holds a person who possesses by whatever right all or part of a building or personal property in which a fire occurs liable vis-à-vis third persons for damage caused by such fire only if it is proved that it was attributable to his fault or to the fault of a person for whom he is responsible.

26. In domestic law, strict liability in the case of abnormally dangerous activities and objects is a comparatively new concept. The leading decision which has influenced domestic law in the United Kingdom and the United States of America, and which is thought to have given rise to the doctrine of strict liability in common law, is that rendered in the United Kingdom of Great Britain and Ireland in 1868 in the *Rylands v. Fletcher* case.¹⁶ Justice Blackburn, in the Exchequer Chamber, had stated:

¹² This concept in respect of damage caused by animals was recognized in Roman law. Under the *actio de pauperis* derived from the XII Tables, an owner was required either to compensate the victim for his loss or to make surrender of the offending animal. See F. F. Stone, "Liability for damage caused by things", *International Encyclopedia of Comparative Law*, A. Tunc, ed., vol. XI, *Torts*, part 1 (The Hague, Nijhoff, 1983), chap. 5, p. 11, para. 39.

¹³ See Stone, *loc. cit.* (footnote 12 above), p. 12, para. 42.

¹⁴ Article 833 of the German Civil Code, *ibid.*, p. 13, para. 47.

¹⁵ *Ibid.*, p. 14, paras. 51–52.

¹⁶ *The Law Reports, Court of Exchequer*, vol. I (1866), p. 265. In regard to the implication to the United States law, see William L. Prosser, *Handbook of the Law of Torts*, 4th ed. (St. Paul, West Publishing Co., 1971), pp. 545–559. See also Anderson, "The *Rylands v. Fletcher* doctrine in America: abnormally dangerous, ultrahazardous, or absolute nuisance?", *Arizona State Law Journal* (Tempe, 1978), p. 99.

We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape ...¹⁷

27. This broad language was later limited by the House of Lords, which stated that the principle applied only to a “non-natural” use of the defendant’s lands, as distinguished from “any purpose for which it might in the ordinary course of the enjoyment of land be used”.¹⁸ More than 100 subsequent decisions in the United Kingdom have followed the ruling in this case, and strict liability has been confined to things or activities that are “extraordinary”, “exceptional” or “abnormal”, to the exclusion of those that are “usual and normal”.¹⁹ This doctrine does not appear to be applicable to ordinary use of land or to such use as is proper for the benefit of the general community.²⁰ In determining what is a “non-natural use”, the British courts appear to have looked not only to the character of the thing or activity in question, but also to the place and manner in which it is maintained and its relation to its environment.²¹

28. In the United States of America, the *Rylands v. Fletcher* precedent was followed by a large number of courts, but rejected by others, among them the courts of New York, New Hampshire and New Jersey. Since the cases before the latter courts bore on customary, natural uses “to which the English courts would certainly never have applied the rule”, it was held that the *Rylands v. Fletcher* rule had been “misstated” and, as such, must be “rejected in cases in which it had no proper application in the first place”.²² The *American Restatement of the Law of Torts*, established by the American Law Institute,²³ adopted the principle of the *Rylands v. Fletcher* decision, but confined its application to ultrahazardous activities of the defendant. Section 520 enumerates factors to be considered in determining whether an activity is abnormally dangerous:

(a) Existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) Likelihood that the harm that results from it will be great;

(c) Impossibility of eliminating the risk by the exercise of reasonable care;

(d) Extent to which the activity is not one of common usage;

(e) Inappropriateness of the activity to the place where it is carried on;

(f) Extent to which its value to the community is outweighed by its dangerous attributes.

29. Ultrahazardous activities have been defined as those that necessarily involve a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care and are not a matter of common usage. This definition has been criticized on the grounds that it is narrower than the ruling in the *Rylands v. Fletcher* case and for its emphasis on the nature of the activity—“extreme danger and impossibility of eliminating it with all possible care”—rather than on its relation to its surroundings.²⁴ At the same time, the *Restatement* is broader than the ruling in the case, for it does not limit the concept to cases where the material “escapes” from the defendant’s land.

30. In domestic law, there are at least two underlying reasons for adopting strict liability. First, the limited knowledge about the increasingly developing science and technology and their effects.²⁵ Secondly, the difficulty in establishing which conduct is negligent and presenting evidence necessary to establish negligence.²⁶

31. It has also been suggested that strict liability is another aspect of negligence and the basis of both concepts rests on responsibility for creating an abnormal risk.²⁷ Negligence differs from strict liability to the extent it is primarily concerned with “an improper manner of doing things which are safe ... enough, when properly carried out”, while strict liability deals with “activities which remain dangerous despite all reasonable precaution”.²⁸ It is suggested that the explanation for this view “lies in the dilemma that, if such an activity were branded as negligent on account of its irreducible risk, it

¹⁷ *Ibid.*, p. 279.

¹⁸ *The Law Reports, English and Irish Appeal Cases before the House of Lords*, vol. III (1868), pp. 330 and 338.

¹⁹ Prosser, *Handbook ...* (footnote 16 above), p. 506 and footnotes 48, 50 and 51.

²⁰ The House of Lords halted the expansion of that doctrine in a case in which the plaintiff, a Government inspector, had been injured by an explosion in the defendant’s munitions plant. The judges in this case limited the principle of strict liability to cases in which there had been an *escape* of a dangerous substance from land under the control of the defendant, and two other judges held that the principle was not applicable to *personal injury*. This decision was a sudden departure from the holdings of the leading case; however, it is uncertain whether it has changed the trend towards the application of the principle of strict liability established by the decision in the *Rylands v. Fletcher* case (see Prosser, *Handbook ...* (footnote 16 above), p. 506, footnote 52).

²¹ W.T.S. Stallybrass, “Dangerous things and the non-natural use of land”, *Cambridge Law Journal* (London, 1929), vol. III, p. 387. See also The Law Commission, *Civil Liability for Dangerous Things and Activities* (London, 1970).

²² William L. Prosser, *Selected Topics on the Law of Torts* (Ann Arbor, University of Michigan Law School, 1954), pp. 149–152.

²³ See American Law Institute, *Restatement of the Law of Torts* (Washington, D.C., 1938), vol. III, chap. 21, sects. 519–524.

²⁴ See Prosser, *Selected Topics ...* (footnote 22 above), p. 158.

²⁵ L. F. E. Goldie elaborates on this issue by stating that in the present state of the art of new industries, no amount of foresight or feasible measures may avert injuries. See “Liability for damage and the progressive development of international law”, *International and Comparative Law Quarterly* (London), vol. 14, part 4, October 1965, p. 1203.

²⁶ *Ibid.*

²⁷ Prosser, *Selected Topics ...* (footnote 22 above), chap. 3, pp. 135 *et seq.*

²⁸ Fleming, *op. cit.* (footnote 4 above), p. 316. The assumption is that negligence is negated if all reasonable precautions are taken. See also paragraph 21 above.

would be tantamount to condemning it as unlawful”.²⁹ The core of strict liability is therefore to impose liability on lawful, not “reprehensible”³⁰ activities which entail extraordinary risk of harm to others, either because of the seriousness or the frequency of the potential harm.³¹ The activity has been permitted on the condition³² and the understanding that the activity will absorb the cost of its potential accidents as part of its overhead.³³ Apparently United States courts have endorsed the application of strict liability in relation to *abnormal*³³ activities, and have not applied it in relation to relatively common activities on the assumption that “the risky activity is fairly common, the incidence of harm and of responsibility are so evenly matched that nothing will be gained by imposing strict liability”.³³ This reasoning has been criticized by some authors on the grounds that:

Just as a major “public benefit” flowing from a hazardous activity (like nuclear power stations and other public utilities) is no longer a good reason for leaving it unburdened but rather reinforces the wisdom of distributing the loss among its beneficiaries, so the very fact that it is widespread and exposes the community to a *typical* hazard may furnish a sufficient reason for tolerating it particularly germane to such common hazards as motoring and flying.³⁴

32. The theory of strict liability has been incorporated in the Workmen’s Compensation Acts in the United States; the employer is strictly liable for injuries to his employees. The policy behind liability for employers is one of social insurance and of determining who can best carry the loss.³⁵ These laws do not cover all activities but in the last few years there has been strong advocacy in the United States for strict liability on a broader scale.

33. The strict liability of employers is also recognized in France. Under article 1 of the 1898 law concerning liability for industrial accidents to workers, the victim or his representatives are entitled to demand compensation from the employer if, in consequence of the accident, the person concerned is obliged to stop work for more than four days.

34. The rule of strict liability for ultrahazardous activities appears to be provided for in article 1384, paragraph 1, of the French Civil Code,³⁶ which stipulates:

²⁹ Ibid.

³⁰ This term is used by Fleming to distinguish between negligence and strict liability.

³¹ Ivar Strahl, “Tort liability and insurance”, *Scandinavian Studies in Law* (Stockholm), Folke Schmidt, ed., vol. 3 (1959), pp. 213–218.

³² See Robert E. Keeton, “Conditional fault in the law of torts”, *Harvard Law Review*, vol. 72, No. 3 (January 1959), p. 401, cited by Fleming, *op. cit.* (footnote 4 above), p. 316, note 13.

³³ Fleming, *op. cit.* (footnote 4 above), p. 316.

³⁴ Ibid., p. 317. See also Goldie, “Liability for damage ...” (footnote 25 above), p. 1207.

³⁵ The concept of workmen’s compensation derives from the duties under common law formerly incumbent upon the master for the protection of his servants. See Prosser, *Handbook ...* (footnote 16 above), pp. 525 *et seq.*, particularly p. 531, footnote 43.

³⁶ See H. and L. Mazeaud, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle*, 5th ed., A. Tunc, ed. (Paris, Montchrestien, 1958), vol. II, p. 342; A. von Mehren and J.R. Gordley, *The Civil Law System*, 2nd ed. (Boston, Little, 1977), p. 555; F.H.

A person is liable not only for the damage he causes by his own act, but also for that caused by the acts of persons for whom he is responsible or by things that he has under his charge.

35. Under the rules laid down by this article and first confirmed by the Cour de Cassation in June 1896, it suffices that the plaintiff show that he has damage from suffered an inanimate object in the defendant’s keeping for liability to be established.³⁷

A literal interpretation of the article [1384] undoubtedly gives a result comparable to—or rather more far-reaching than—that in *Rylands v. Fletcher*, for there is nothing in the words of the article to restrict liability to cases where defendant can be proved to have been negligent in the custody of the things, or even to things which are inherently dangerous.³⁸

36. Recognition of the principle of strict liability is also embodied in the 1964 Polish Civil Code, articles 435 to 437 of which recognize strict liability for damage caused by ultrahazardous activities.

37. Article 178 of the Egyptian Civil Code, article 231 of the Iraqi Civil Code, article 291 of the Jordanian Civil Code and article 161 of the Sudanese Civil Code all establish the strict liability of persons in charge of machines or other objects requiring special care. Article 133 of the Algerian Civil Code goes even further and recognizes the strict liability of a person in charge of any object when that object causes damage. The Austrian Civil Code (art. 1318) and the 1928 Mexican Civil Code (arts. 1913 and 1932) also recognize strict liability in respect of dangerous activities or things.

38. The principle of strict liability has been applied in regard to defective products. The policies underlying this practice were stated in the United States in the *Escola v. Coca Cola Bottling Co.* case (1944):

Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one.

Lawson, *Negligence in the Civil Law* (Oxford, Clarendon Press, 1950), pp. 46–50; R. Rodière, “Responsabilité civile et risque atomique”, *Revue internationale de droit comparé* (Paris), 11th year (1959), p. 505; B. Starck, “The foundation of delictual liability in contemporary French law: an evaluation and a proposal”, *Tulane Law Review* (New Orleans), vol. 48 (1973–1974), pp. 1044–1049.

³⁷ See also *Jand’heur v. Galeries belfortaises* (1930) (Daloz, *Recueil périodique et critique*, 1930 (Paris), part 1, p. 57). The decision in this case also established a presumption of fault on the part of the person having in his charge the inanimate object that has caused the injury.

³⁸ See Lawson, *op. cit.* (footnote 36 above), p. 44. For responsibility without fault in French law, see also Marc Ancel, “La responsabilité sans faute en droit français”, *Travaux de l’Association Henri Capitant pour la culture juridique française* (Paris, Daloz, 1947), vol. II (1946), p. 249.

Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.³⁹

39. This has become the authoritative doctrine in some of the states of the United States of America. In others, for example, New York, it has been supported by additional reasons that were not applicable in the aforementioned case. In its modified form, strict liability in respect of defective products is based on the theory that the manufacturer was in breach of an implied warranty to the plaintiff that the article had been properly made.⁴⁰ However, a leading United States specialist on the law of torts has strongly objected to this concept of “warranty” as a device that “carries far too much luggage in the way of undesirable complications, and is more trouble than it is worth”.⁴¹

40. Since 1944, in France, the Conseil d’État has developed, in the French administrative law, a general principle of liability without fault based on the theory of risk. In addition the courts have been ready to presume fault on the part of the administration. Some consider, as an alternative, the basis for no fault liability to be found in the principle of *égalité devant les charges publiques*.⁴² The principle here is that what is done in the general interest, even if it is done lawfully, may give rise to compensation if it injures a particular person.⁴³ The Conseil d’État has imposed risk theory in four categories of activities of the administration: (a) risks of assisting in the public service (similar to workmen’s compensation); (b) risks arising from dangerous operations, where a public authority creates an abnormal risk in the neighbourhood; (c) administrative refusal to execute a judicial decision;⁴⁴ and (d) State liability arising out of legislation.⁴⁵

41. In the United States, the principle of strict liability is also apparent in the Aeronautics Act of 1922.⁴⁶ That

³⁹ See *California Reports 2d Series*, vol. 24, pp. 453 and 462.

⁴⁰ See *Goldberg v. Kollman Instrument Corp.* (1963), *New York Supplement, 2d Series*, vol. 240, p. 592.

⁴¹ See Prosser, *Handbook ...* (footnote 16 above), p. 656. See also R. M. Sachs, “Negligence or strict product liability: is there really a difference in law or economics?”, *Georgia Journal of International and Comparative Law*, vol. 8 (1978), p. 259; and D. J. Gingerich, “The interagency task force ‘blueprint’ for reforming product liability tort law in the United States”, *ibid.*, p. 279.

⁴² This principle was expressed by Duguit in his *Traité de droit constitutionnel*, 3rd ed., p. 469, cited by L. Neville Brown, J. F. Garner and J.-M. Galabert, *French Administrative Law*, 3rd ed. (London, Butterworths, 1983), p. 121.

⁴³ *Ibid.*

⁴⁴ In a landmark case (*Couitéas*, Conseil d’État, 30 November 1923), cited by Brown, Garner and Galabert, *op. cit.* (footnote 42 above), the Conseil d’État refused to decide whether the Government was at fault and instead invoked the principle of equality in bearing public burdens.

⁴⁵ See the case (*Ministère des Affaires Étrangères v. Consorts Burgat*, Conseil d’État, 29 October 1976), cited by Brown, Garner and Galabert, *op. cit.*, where a landlady, because of the Government’s enactment of diplomatic immunity which applied to her tenant, was deprived of exercising her normal rights as a landlady.

⁴⁶ United States of America, *Uniform Laws Annotated*, vol. 11, pp. 159–171. This act was withdrawn in 1938 by the National Conference of Commissioners on Uniform State Laws and replaced by other

legislation, adopted in whole or in part by 24 states of the Union, provides for the “absolute liability” of the owners of aircraft for injuries to persons or property on land or water caused by the ascent, descent or flight of the aircraft or the dropping or falling of any object therefrom, unless the injury was caused in whole or in part by the negligence of the person injured, or of the owner or bailee of the property damaged. The object of the Act was to place the liability for damage caused by accidents of aircraft upon operators, and to protect innocent victims, even though the accident might not be attributable to the fault of the operator.⁴⁷

42. A number of Latin American and European countries have also adopted the principle of strict liability, often similar to the Convention for the Unification of Certain Rules relating to Damage caused by Aircraft to Third Parties on the Surface and the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface for accidents involving aircraft. Argentina, Guatemala, Honduras and Mexico are among the Latin American countries which have imposed strict liability based on the concept of risk. Among European countries doing the same are Denmark, Finland, France, Germany, Italy, Norway, Spain, Sweden and Switzerland.⁴⁸

43. The rule of strict liability has also been applied in respect of owners and operators of power sources for damage caused by the production or storage of electricity. In this area, the concept of strict liability corresponds to the notion that “electricity is a thing in one’s keeping” (France, Civil Code, art. 1384), or to the notion that “the owner is presumed to be at fault” (Argentina, Civil Code, art. 1135), or to the notions of “dangerous things” (United States of America and United Kingdom of Great Britain and Northern Ireland), or of “dangerous activities” (Italy, Civil Code, art. 2050).⁴⁹

44. Originally, nuisance meant nothing more than harm or annoyance.⁵⁰ In common law, the principle of strict liability has been applied to cases of absolute nuisance, without regard to the defendant’s intent or precautions. There has been little discussion of nuisance in the context of liability. The reasons for this have been described as follows:

One reason is that nuisance suits frequently have been in equity, seeking an injunction, so that the question is not so much one of the nature of the defendant’s conduct as of whether he shall be permitted to continue it. Even where the action is one for damages, it usually has been brought after long continuance of the conduct and repeated requests to stop it, and whatever may have been his state of mind in the

texts drafted by that body, imposing substantially the same limited absolute liability. See *Handbook of National Conference of Commissioners on Uniform State Laws* (1938), p. 318, and Uniform Aviation Liability Act, art. 11, paras. 201–202.

⁴⁷ See E. C. Sweeney, “Is special aviation liability legislation essential?”, *Journal of Air Law and Commerce* (Chicago), vol. 19, p. 166; *Prentiss et al. v. National Airlines, Inc.*, 112 *Federal Supplement*, pp. 306–312.

⁴⁸ See Stone, *loc. cit.* (footnote 12 above), pp. 45–46, paras. 178–181.

⁴⁹ *Ibid.*, pp. 48–49, paras. 193–197.

⁵⁰ See Prosser, *op. cit.* (footnote 22 above), p. 164.

first instance, the defendant's persistence after notice of the harm he is doing takes on the aspects of an intentional tort. Another reason is that in nuisance cases the threat of future harm may in itself amount to a present interference with the public right or the use and enjoyment of land, so that the possible bases of liability tend to merge and become more or less indistinguishable. Nevertheless it is quite clear that a substantial part of the law of nuisance rests upon neither wrongful intent nor negligence.⁵¹

45. It has been claimed that the concept of absolute nuisance is closely related to the rule in *Rylands v. Fletcher*. To distinguish that rule, some have claimed that it applies to conduct which is not wrongful in itself, and so will not be prohibited or enjoined in advance, but will make the defendant strictly liable if it causes actual damage; in contrast a nuisance is in itself wrongful and may always be enjoined. Others have rejected this distinction on the grounds that there are no cases or decisions to sustain it.⁵² It has also been stated that the concept of absolute nuisance and the *Rylands v. Fletcher* rule relate to one another like intersecting circles; they have a large area in common, but nuisance is the older tort and its historical development has limited it to two kinds of interference; with the public interest and with the enjoyment of land, excluding such other damage as personal injuries not connected with either. Thus the underlying principles appear to be the same in each case and are indistinguishable except by the accident of their history.⁵³

46. In the United States, there has been an evolution in policies and the direction of statutes about dealing with environmental problems. The main policy in the 1970s was formed on the expectation that the Government would enact regulatory statutes and would police and enforce such statutes. The activities of those not complying with the regulations would be banned. It was believed that this policy of setting standards and enforcing it would force industry to correct itself. Subsequently, it was realized that, though threats of Government involvement were important incentives in forcing the industry to correct environmentally unsound activities, they were insufficient by themselves to change the industry's attitude.⁵⁴ For one thing, environmental regulations are not comprehensive enough. The Government cannot identify all the environmental problems, develop regulations and provide "technologically workable and politically viable solutions".⁵⁵ Secondly, even with the substantial size of

United States Government enforcement agencies for environmental regulations, the Government cannot effectively monitor and enforce environmental regulations.⁵⁶ Thirdly, such a policy may not be economically most efficient or creative. Consequently attention was drawn towards enacting statutes that are self-executing, so to speak, creating incentives for private parties to play an important role in implementing environmental law. This policy led to enactment of a number of important federal statutes including the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),⁵⁷ the Superfund Amendments and Reauthorization Act (SARA),⁵⁸ which amended CERCLA and created the Emergency Planning and Community Right-to-Know Act (SARA, title III), the Clean Water Act⁵⁹ as amended, and the Oil Pollution Act (OPA).⁶⁰ "The effect of these new, liability-based statutes is to assign much of the responsibility for planning for a dangerous and uncertain environmental future to that segment of society most capable of finding innovative and efficient solutions: the private sector."⁶¹

47. These federal statutes have the following common characteristics, they:

(a) Impose "strict" or "absolute" liability with only limited defence available on persons made legally responsible for pollution from oil and other hazardous substances,⁶² for removal and clean-up costs, damages for injury to or destruction of natural resources, private property, and other economic interests of governmental and private parties;

(b) Limit the maximum amount of liability of the responsible party and enumerate the circumstances where limitation of liability is not available;

⁵¹ *Ibid.*, p. 166. See also Winfield, *op. cit.* (footnote 6 above), p. 37.

⁵² See Prosser, *op. cit.* (footnote 22 above), p. 172.

⁵³ *Ibid.*, p. 177. See also Winfield, "Nuisance as a tort", *The Cambridge Law Journal* (London), vol. 4 (1932), p. 195.

⁵⁴ Many American scholars argued that the policy of regulatory mechanism as the main instrument in pollution control is misguided. See, for example, Bruce A. Ackerman and R. B. Stewart, "Reforming environmental law", *Stanford Law Review* 1984-1985, vol. 37 (May 1985), pp. 1333-1365; Stephen Breyer, "Analyzing regulatory failure: mismatches, less restrictive alternatives, and reform", *Harvard Law Review* 1978-1979, vol. 92, No. 3 (January 1979), pp. 547 *et seq.*; and Robert W. Hahn and G. L. Hester, "Marketable permits: lessons for theory and practice", *Ecology Law Quarterly* (Berkeley), vol. 16, No. 2 (1989), pp. 361 *et seq.*

⁵⁵ See Adam Babich, "Understanding the new era in environmental law", *South Carolina Law Review*, vol. 41 (1990), p. 736.

⁵⁶ *Ibid.*, pp. 73-736.

⁵⁷ *United States Code*, title 42, chap. 103, sects. 9601 *et seq.* For the history of the statute see especially Frank P. Grad, "A legislative history of the Comprehensive Environmental Response, Compensation and Liability ('Superfund') Act of 1980", *Columbia Journal of Environmental Law*, vol. 8, No. 1 (1982), pp. 1 *et seq.*

⁵⁸ *United States Public Law 99-499, 100 Stat. 1615, 1652, 1692, 1774.*

⁵⁹ *United States Code*, title 33, chap. 26, sect. 1321. Act adopted in 1972 and supplemented in 1977. The text succeeding this law is the 1987 law on water quality, called the Federal Water Pollution Control Act (FWPCA) or the Clean Water Act (CWA).

⁶⁰ *Ibid.*, chap. 40, sects. 2701 *et seq.* For writings on that statute, see Russell V. Randle, "The Oil Pollution Act of 1990: its provisions, intent, and effects", *Environmental Law Reporter* (Washington, D.C.), vol. 21 (March 1991), pp. 10119-10135; Antonio J. Rodriguez and P. A. C. Jaffe, "The Oil Pollution Act of 1990", *Tulane Maritime Law Journal* (New Orleans), vol. 15, No. 1 (fall 1990), pp. 1-28; and John Strohmeyer, *Extreme Conditions: Big Oil and the Transformation of Alaska* (New York, London, Toronto, Sydney, Tokyo, Singapore, Simon and Schuster, 1993).

⁶¹ See Babich, *loc. cit.* (footnote 55 above), p. 735. Not all members of the United States Congress consider the new era of legislative trend a success. See "Domenici declares Superfund 'failure', suggests revamped liability scheme", *Inside E.P.A. Weekly Report* (Washington, D.C.), vol. 10, No. 38 (22 September 1989), p. 4.

⁶² For OPA, see section 2710 (b); for CERCLA, see section 9707 (e) (i) and for FWPCA, see section 1321 (f).

(c) Impose a duty on those who may be held liable to prove financial responsibility such as insurance or other financial guarantees; and

(d) Establish various governmentally administered funds to pay removal costs and damages when the party liable is not making payments.⁶³

48. In this latter regard, section 2702 (a) of OPA provides that, notwithstanding any other provision or rule of law, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages as specified in subsection (b) that result from that incident.⁶⁴

49. The Act defines "incident" as "any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil ..." (art. 2701, para. 14). The term "discharge" is defined as "any emission ... and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping". The term "facilities" is defined as any "structure or group of structures of equipment, or device which is used for one or more of the following purposes: transferring, processing, or transporting oil". The term "vessel" is defined broadly to include "every description of watercraft or other artificial contrivance used or capable of being used, as a means of transportation on water, other than a public vessel". And a "public vessel" is defined as a vessel owned or bareboat chartered and operated by the United States or by a foreign nation, except when the vessel is engaged in commerce.

50. CERCLA applies to all hazardous substances other than oil. The liability regime established under CERCLA is strict, joint and several. It applies to vessels and onshore and offshore facilities from which hazardous substances have been released (art. 9601, paras. 17, 18 and 28, and arts. 9603 and 9607). This scheme of liability is outlined in section 107 of the Superfund Act and financial responsibility for clean-up is outlined in section 108.

51. The Superfund provides compelling incentives for quick response to directives for removal or remedial action in section 107 (c) (3) by imposing punitive damages. That section provides that, if any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 104 or 106 of this Act, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more

than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 112 (c) of the Act. Any money received by the United States shall be deposited in the Fund.

52. The Solid Waste Disposal Act (commonly known as the Resource Conservation and Recovery Act), first enacted in 1965, has gone through a number of changes and amendments. The latest amendment was made in 1984 (Hazardous and Solid Waste Amendment)⁶⁵ to respond to administrative lapses that had been experienced under its predecessors.⁶⁶

53. The criterion in the Act is not "unreasonable risk" used in earlier environmental legislation, but to "[protect] human health and the environment" a standard which appears "on 50 occasions throughout the Act".⁶⁷ The 1984 amendment also expanded the definition of solid waste, identified administrative standards as the minimum that can only be improved upon, and provided administrative reform within the Environmental Protection Agency by establishing an ombudsman.⁶⁸ Section 6917 of the amendment established an Office of Ombudsman to receive individual complaints, grievances, and requests for information submitted by any person with respect to any programme required under the relevant provisions of the Act.⁶⁹

54. The United States Congress has been working on legislation on oil pollution since 1980. The *Exxon Valdez* spill⁷⁰ in 1989 substantially affected the substance of the 1990 OPA. A significant portion of the Act is devoted to a liability regime roughly comparable to the one imposed on responsible parties who release hazardous substances under CERCLA. Article 2702 (a) introduces the general theory of liability of the Act (see para. 48 above).

55. In 1990, Germany adopted the Environmental Liability Act, providing a civil damages remedy for wrongful death, personal injury, or property damage caused by an environmental impact.⁷¹ Under the Act, operators of certain facilities identified in the Act are strictly liable for causing such injuries. The Act increases the risk of liabil-

⁶⁵ Public Law 98-616, 98 Stat. 3221.

⁶⁶ See Rodgers Jr., op. cit. (footnote 63 above), p. 534.

⁶⁷ Ibid., p. 536.

⁶⁸ Ibid., p. 535.

⁶⁹ *United States Code*, title 42, chap. 82, sect. 6917, added in 1984.

⁷⁰ The *Exxon Valdez* accident has been referred to as the "Pearl Harbour" of United States environmental disasters. See Randle, loc. cit. (footnote 60 above), p. 10119, and Rodriguez and Jaffe, loc. cit., p. 1.

⁷¹ *Gesetz über die Umwelthaftung* (Environmental Liability Act) enacted on 7 November 1990 and effective as of 1 January 1991. Cited by William C. Hoffman, in "Germany's new Environmental Liability Act: strict liability for facilities causing pollution", *Netherlands International Law Review*, vol. XXXVIII, No. 1, 1991, p. 27, footnote 1. The information regarding the Act is based on this article.

⁶³ See Robert Force, "Insurance and liability for pollution in the United States", *Transnational Environmental Liability and Insurance*, International Bar Association Series, Ralph P. Kröner, ed. (London, Dordrecht, Boston, Graham & Trotman and International Bar Association, 1993), p. 22. See also William H. Rodgers Jr., *Environmental Law*, 2nd ed. (St. Paul, West Publishing Co., 1994), p. 685.

⁶⁴ See footnote 60 above.

ity for all enterprises capable of causing environmental injuries and has extraterritorial reach.⁷²

56. The Environmental Liability Act is a synthesis of pre-existing civil damage remedies with a broader scope. Section 1 of the Act defines its nature and scope:

If anyone suffers death, personal injury, or property damage due to an environmental impact emitted from one of the facilities named ..., then the owner of the facility shall be liable to the injured person for the damages caused thereby.⁷³

57. Liability is strict under the Act and the proof of causation suffices to establish liability. If there are multiple defendants, their liability is joint and several. A claim under the Act must establish: (a) that the defendant operates a facility named under the Act; (b) that events having an environmental impact were emitted from that facility; and (c) that environmental impact caused the injury for which a remedy is sought.⁷⁴ The amount of liability under the Act is limited to a maximum of 320 million deutsche mark. Liability for personal injury and property damage are fixed at a maximum of 160 million deutsche mark each (sect. 15 of the Act).⁷⁵

58. Proof of causation in respect of damage caused by long distance pollution is difficult under the Act. To remedy this difficulty, the Act provides for presumption of causation. Section 6 (1) of the Act provides that the element of causation will be presumed upon a *prima facie* showing that the particular facility is "inherently suited" (*geeignet*) to cause the damage.⁷⁶ The Act provides defences to the presumption of causation in subsections 2, 3 and 4 of section 6. The defences include a showing by the operator that its facility was "properly operated", meaning that all applicable administrative regulatory instructions aiming at preventing pollution were complied with. Such defences do not absolve the operator of liability if the claimant proves causation.

59. The Environmental Liability Act amended the German Civil Procedure to allow actions to be brought in the court district where the facility causing alleged injury is located unless the facility is located beyond the German territorial border. In the latter situation, the claimant

can sue in any German court and have the Act apply to the substance of the complaint (sect. 2 of the Act).⁷⁷

60. The above brief review of domestic law indicates that strict liability, as a legal concept, now appears to have been accepted by most legal systems, especially those of technologically developed countries with more complex torts laws. The extent of activities subject to strict liability may differ; in some countries it is more limited than in others. The legal basis for strict liability also varies from "presumed fault" to the notion of "risk", "dangerous activity involved", etc. But it is evident that strict liability is a principle common to a sizeable number of countries with different legal systems, which have had the common experience of having to regulate activities to which this principle is relevant. While States may differ as to the particular application of this principle, their understanding and formulation of it are substantially similar.

2. INTERNATIONAL LAW

61. The introduction and application of the concept of liability in international law, on the other hand, is relatively new and less developed than in domestic law. One reason for this late start may have been the fact that the types of activities leading to transboundary harm are relatively new. The issue did not arise with sufficient frequency to excite concern at the international level. Not many activities conducted within a State had important transboundary injurious effects. Of course, the difficulties in accommodating the concept of liability with other well-established concepts of international law, such as domestic jurisdiction and territorial sovereignty, should also not be ignored. In fact, the development of strict liability in domestic law, as explained earlier, faced similar difficulties. But socio-economic and political necessity in many States led to accommodating this new legal concept with others in ways deemed to serve social policies and public order.

62. Before reviewing multilateral treaties, mention should be made of principle 22 of the Declaration of the United Nations Conference on the Environment (hereinafter called the Stockholm Declaration)⁷⁸ and principle 13 of the Rio Declaration on Environment and Development (hereinafter called the Rio Declaration)⁷⁹ in which States are encouraged to cooperate in developing further international law regarding liability and compensation for adverse effects of environmental damage caused by activities with their jurisdiction or control to areas beyond their jurisdiction. These principles while

⁷² Hoffman, loc. cit. (footnote 71 above), p. 28, footnote 2, citing M. Kloepfer, *Umweltschutz, Textsammlung des Umweltrechts der Bundesrepublik Deutschland* (1989).

⁷³ Ibid., p. 32.

⁷⁴ Ibid. p. 33.

⁷⁵ Ibid., pp. 32–33.

⁷⁶ Section 6, subsect. 1, of Germany's Environmental Liability Act reads:

"If a facility is inherently suited under the circumstances to cause the resulting damage, then it shall be presumed that this facility caused the damage. Inherently suitedness in a particular case is determined on the basis of the course of business, the structures used, the nature and concentration of the materials used and released, the weather conditions, the time and place of the commencement of the damage, as well as all other conditions which speak for or against a finding of causation." (Ibid. p. 35, footnote 43.)

⁷⁷ Ibid., p. 38.

⁷⁸ *Report of the United Nations Conference on the Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), part one, chap. I.

⁷⁹ *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (A/CONF.151/26/Rev.1 (Vol. I, Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

lacking legal commitment by States, demonstrate aspirations and preferences of the international community.

(a) *Treaty practice*

63. Multilateral treaty practice touching on the issue of liability may be divided into three categories. First, civil liability conventions which address the question of liability of operators and in some circumstances of States, in terms of both substantive and procedural rules. Secondly, treaties which hold the State directly liable. Thirdly, treaties which make a general reference to liability without specifying any further the substantive or procedural rules related thereto.

64. The *first category*, multilateral treaties on liability that address the question of civil liability, is primarily concerned with navigation, oil and nuclear material. One of the very first conventions addressing the civil liability issue in the area of navigation in 1924 is the International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Seagoing Vessels. By this instrument the contracting States recognized the utility of laying down certain uniform rules relating to the limitation of the liability of owners of seagoing vessels. In accordance with article 1 of the Convention, the liability of the owner of the vessel is limited to an amount equal to the value of the vessel, the freight, and the accessories of the vessel, in respect of:

1. Compensation due to third parties by reason of damage caused, whether on land or on water, *by the acts or faults** of the master, crew, pilot, or any other person in the service of the vessel;

...

4. Compensation due by reason of a *fault** of navigation committed in the execution of a contract;.

65. In accordance with article 2, paragraph 1, of the Convention, the limitation of liability in article 1 does not apply “to obligations arising out of *acts or faults of the owner** of the vessel”.

66. The Convention seems to have introduced concepts of “fault” and of “strict liability”. Both concepts appear in article 1, which provides that the limitation of the owner of a seagoing vessel applies, *inter alia*, to *acts or faults* of the master, crew, pilot, or any other person in the service of the vessel and also to compensation due for *fault* of navigation committed in the execution of the contract. The limitation of liability, however, does not apply to compensation due in respect of obligations arising from the *acts of the owner* of the vessel. Article 2, paragraph 1, seems to import strict liability, in referring to injuries arising out of *acts* of the owner.

67. Thirty-three years later, in 1957, another treaty on the same subject was concluded. The International Convention relating to the Limitation of the Liability of Owners of Seagoing Ships also introduces the concepts of “fault” and “strict liability”, but rather differently from those in the International Convention for the Unification

of Certain Rules relating to the Limitation of the Liability of Owners of Seagoing Vessels of 1924. Under article 1 of the 1957 Convention, the owner of a seagoing ship may limit his liability in respect of:

(a) Loss of life of, or personal injury to, any person being carried in the ship, and loss of, or damage to, any property on board the ship;

(b) Loss of life of, or personal injury to, any other person, whether on land or on water, loss of or damage to any other property or infringement of any rights caused by the act, neglect or default of any person on board the ship for whose act, neglect or default the owner is responsible or any person not on board the ship for whose act, neglect or default the owner is responsible ...

68. These paragraphs seem to have imposed liability for the owners of seagoing vessels on the basis of both “fault” and “strict liability”. The limitation of liability does not apply if “the occurrence giving rise to the claim resulted from the *actual fault or privity of the owner**” (art. 1). Clearly the clause refers to “fault” and sets a rather stringent qualification for it, namely “actual fault” of the owner. The two conventions considered above do not address the question of State liability.

69. One of the main goals of the International Convention relating to the Limitation of the Liability of Owners of Seagoing Ships, in addition to the limitation of liability of the owners of ships, was to deal with jurisdictional questions. The Convention attempts to attract all suits brought in relation to a particular case to the jurisdiction in which the limitation fund is established or where pollution damage has been suffered.⁸⁰

70. Gradually, oil pollution, either as the result of general navigation or transportation of oil by ships, became a major concern. However, until 1969, there was no multilateral treaty establishing a general liability regime for oil pollution damage. In general, the rules of compensation were governed by various rules of tort law in each State.⁸¹ Some minor changes were introduced in the International Convention relating to the Limitation of the Liability of Owners of Seagoing Ships. The *Torrey Canyon* incident of 1967 provided the necessary background and political pressure for States to agree on a liability regime for oil pollution damage. The International Convention on Civil Liability for Oil Pollution Damage (hereinafter called the 1969 Civil Liability Convention) was adopted on 29 November 1969. This Convention addressed four important issues: (a) removing jurisdictional obstacles for coastal States in securing compensation; (b) harmonizing a liability regime which up to that time was based on some general rules of tort law; (c) ensuring that a polluter pays adequate compensation for damage it causes; and (d) distributing costs in view of

⁸⁰ See David W. Abecassis and R. L. Jarashow, *Oil Pollution from Ships: International, United Kingdom and United States Law and Practice*, 2nd ed. (London, Stevens & Sons, 1985), pp. 189–190 and 194.

⁸¹ *Ibid.*, p. 181.

the International Convention relating to the Limitation of the Liability of Owners of Seagoing Ships.⁸²

71. The 1969 Civil Liability Convention definition of “pollution damage” in article 1, paragraph 6, was unclear. It defines “pollution damage” as “loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures”. The interpretation of this definition was left to domestic courts which considered restoration of the environment to be included in the notion of damage.⁸³ The 1984 Protocol amending the 1969 International Convention on Civil Liability for Oil Pollution Damage (hereinafter called 1984 Protocol amending the 1969 Civil Liability Convention) clarified the meaning of pollution damage. Under the new definition, compensation is limited to “the costs of reasonable measures of reinstatement actually undertaken or to be undertaken”. The new definition also allows compensation for loss of profit arising out of impairment of the environment. Though clearer than the one in the 1969 Civil Liability Convention, this definition is rather limited in scope.⁸⁴

It still stops short of using liability to penalize those whose harm to the environment cannot be reinstated, or quantified in terms of property loss or loss of profits, or which the government concerned does not wish to reinstate. To this extent the true environmental costs of oil transportation by sea continue to be borne by the community as a whole, and not by the polluter.⁸⁵

72. The 1984 Protocol amending the 1969 Civil Liability Convention broadened the limits of liability. Once a claimant exhausts the procedure for collecting liability under the 1969 Civil Liability Convention, he may then follow the procedure for liability under the International Oil Pollution Compensation Fund established in 1971 by the International Convention on the Establishment of the International Fund for Compensation of Oil Pollution Damage. Liability under the Fund is also strict subject to limited defences. Both private claimant and shipowner can institute claims under the Fund. The Fund is financed by levying contributions from those who have received crude oil and fuel oil in the territory of contracting States. The Fund is governed by an assembly of all contracting States to the International Convention on the Establishment of the International Fund for Compensation of Oil Pollution Damage.

⁸² See Patricia W. Birnie and Alan E. Boyle, *International Law and the Environment* (Oxford, Clarendon Press, 1992), pp. 292–293, and Abecassis and Jarashow, *op. cit.* (footnote 80 above), pp. 181–182.

⁸³ See the *Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni* case (U.S. Court of Appeals, 628 F. 2d 652 (1st Cir., 1980)). See also Abecassis and Jarashow, *op. cit.* (see footnote 80 above), pp. 209–210.

⁸⁴ See Birnie and Boyle, *op. cit.* (footnote 82 above), p. 295, and Abecassis and Jarashow, *op. cit.* (footnote 80 above), pp. 237 and 277.

⁸⁵ See Birnie and Boyle, *op. cit.* (footnote 82 above), p. 296.

73. Shipowners of States not party to the 1969 Civil Liability Convention or the Fund have also devised a scheme to provide additional compensation.⁸⁶

74. As regards nuclear damage, the regimes of liability have been more diverse than in the case of oil pollution. These regimes seem to allow for greater accountability for States—a variation that may be explained by the ultrahazardous nature of nuclear activity and its possible widespread and long—lasting damage.⁸⁷ In terms of treaty regimes, however, civil liability remains the main vehicle for collection of damages.

75. Strict liability has also been provided for in the Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (hereinafter called CRTD). Article 5 of this Convention provides that “the carrier at the time of an incident shall be liable for damage caused by any dangerous goods during their carriage by road, rail or inland navigation vessel”. Paragraphs 2 and 3 of the same article also provide for joint and several liability of the carriers.

76. The same approach to liability was adopted in 1984 in the draft convention on liability and compensation in connection with the carriage of noxious and hazardous substances by sea.⁸⁸

77. Article 1 of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment adopted on 9 March 1993 by the Council of Europe sets forth the object and purpose of the Convention as follows:

This Convention aims at ensuring adequate compensation for damage resulting from activities dangerous to the environment and also provides for means of prevention and reinstatement.

78. The Convention establishes a strict liability regime for “dangerous activities”, because such activities constitute or pose “a significant risk to man, the environment

⁸⁶ See Abecassis and Jarashow, *op. cit.* (footnote 80 above), chap. 12. The Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution of 7 January 1969 applies to tanker owners and the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution of 14 January 1971 provides a fund comparable to the International Oil Pollution Compensation Fund (see ILM, vol. VIII, No. 3 (May 1969), p. 497, and vol. X, No. 1 (January 1971), p. 137, respectively).

⁸⁷ See C.W. Jenks, “Liability for ultra-hazardous activities in international law”, *Recueil des cours de l’Académie de droit international de La Haye, 1966–I* (Leyden), vol. 117 (1967), pp. 105 *et seq.*; B.D. Smith, *State Responsibility and the Marine Environment: The Rules of Decision* (Oxford, Clarendon Press, 1988), pp. 112–115; G. Handl, “Liability as an obligation established by a primary rule of international law”, *Netherlands Yearbook of International Law*, vol. XVI (1985), pp. 49 *et seq.*; and L.F.E. Goldie, “Concepts of strict and absolute liability and the ranking of liability in terms of relative exposure to risk”, *ibid.*, p. 175 *et seq.*

⁸⁸ For the draft convention—especially article 4, para. 1—see IMO, LEG/CONF.6/3.

or property". It defines in article 2 dangerous activities and dangerous substances.⁸⁹

79. As regards the *causal link* between the damage and the activity, article 10 of the Convention provides that "the court shall take due account of the increased danger of causing such damage inherent in the dangerous activity".

80. Article 8 of the Convention on the Regulation of Antarctic Mineral Resource Activities establishes the liability of the sponsoring State if that State fails to perform certain obligations.

81. This is a unique form of accountability of the sponsoring State, even though, theoretically, it arises from failure to perform obligations (responsibility for wrongful acts). The difference between this form of accountability and "responsibility" derives from the triggering element of accountability, and the consequences of accountability, both of which resemble "liability" and not classical "responsibility" doctrine. As for the triggering element, contrary to State responsibility, the failure to perform an obligation is insufficient, by itself, to entail responsibility. There should always be damage or injury, the *sine qua non* of a liability doctrine. As regards remedies, the normal ones of State responsibility, namely, cessation, restitution, damages, satisfaction, do not arise in this case. The accountability of the sponsoring State normally is limited only to that portion of liability not satisfied by the operator or otherwise, a consequence which arises under the doctrine of subsidiary liability. This may explain the reason for the use of the term "liability" of State instead of responsibility of States in the Convention on the Regulation of Antarctic Mineral Resource Activities.⁹⁰

82. Principles 8 and 9 of the Principles Relevant to the Use of Nuclear Power Sources in Outer Space adopted on 14 December 1992 by the General Assembly in its resolution 47/68 are another example illustrating the differences between the two types of accountability of

States. Principle 8 provides for State responsibility, namely that States shall bear responsibility for national activities in the use of nuclear power sources in outer space and for the conformity of such activities with these Principles. Principle 9 entitled "Liability and compensation", points to a different type of State accountability. It holds a State which launches or procures the launching of a space object and a State from whose territory or facility a space object is launched "internationally liable" for damage caused by such space objects or their component parts. When there are two or more States jointly launching such a space object, their liability is joint and several. The principle relies on and makes reference to the Convention on International Liability for Damage Caused by Space Objects.

83. Since the adoption of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, an ad hoc working group of legal and technical experts has been drafting the protocol on liability and compensation for damage resulting from transboundary movements of hazardous wastes and their disposal. The purpose of the draft protocol is to provide for a comprehensive regime for liability and for adequate and prompt compensation, including reinstatement of the environment, for damage resulting from the transboundary movement of hazardous wastes and other wastes and their disposal. The 1994 draft text of the protocol⁹¹ aims at the establishment of strict liability. The various alternatives provided in article 4 of the draft protocol all impose strict liability.

84. *The second category*, treaties addressing the question of liability, are those treaties which hold States directly liable. Currently, there is one treaty which falls completely into this category, namely, the Convention on International Liability for Damage Caused by Space Objects. This Convention is unique in the sense that it gives the choice to the injured party as to whether to pursue a claim for compensation through domestic courts or follow through a direct claim against the State. The latest proposal on a draft protocol to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal contains three alternatives on liability one of which is holding the licensing State liable for the damage caused.

85. *The third category* of treaties includes those in which a reference to liability has been made without any further clarification as to the substantive or procedural rules of liability. These treaties while recognizing the relevance of the liability principle, to the operation of the treaties, do not resolve the issue. They seem to rely on the existence in international law of liability rules, or to

⁸⁹ Article 4 of the Convention specifies exceptions where the Convention is not applicable. The Convention therefore does not apply to damage caused by a nuclear substance arising from a nuclear incident regulated by the Convention on Civil Liability in the Field of Nuclear Energy and its Additional Protocol or by the Vienna Convention on Civil Liability for Nuclear Damage; nor to damage caused by a nuclear substance if liability for such damage is regulated by internal law and that such liability is as favourable with regard to compensation as the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment. Moreover, the Convention does not apply to the extent that it is incompatible with the rules of the applicable law relating to workmen's compensation or social security schemes.

⁹⁰ For a different view see Goldie, "Transfrontier pollution: from concepts of liability to administrative conciliation", *Syracuse Journal of International Law and Commerce*, vol. 12, No. 2, winter 1985, pp.185-186. In his view, "responsibility is taken to indicate a duty, or as denoting the standards which the legal system imposes on performing a social role, and liability is seen as designating the consequences of a failure to perform the duty, or to fulfil the standards of performance required". Therefore, "liability connotes exposure to legal redress once responsibility has been established and injury arising from a failure to fulfil that legal responsibility has been established". See also by the same author, loc. cit. (footnote 87 above).

⁹¹ UNEP/CHW.3/4. A convention similar to the Basel Convention was drafted by OAU: Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa. Article 12 of this Convention deals with liability and compensation and provides that the Conference of Parties shall set up an ad hoc expert organ to prepare a draft protocol setting out appropriate rules and procedures regarding liability and compensation for damage resulting from the transboundary movement of hazardous wastes.

expect that such rules will be developed. A number of treaties belong to this category. For example, the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution provides that the contracting States shall cooperate in formulating rules and procedures for civil liability and compensation for damage resulting from pollution of the marine environment, but it does not stipulate those rules and procedures.⁹² Similar requirements are established in the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, the Convention on the Protection of the Marine Environment of the Baltic Sea Area, the Convention for the Protection of the Mediterranean Sea against Pollution, the Convention on the Transboundary Effects of Industrial Accidents and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes. The Antarctic instruments make the development of liability rules a precondition for the exploration and exploitation of mineral resources of Antarctica.

(b) *Judicial decisions and State practice outside treaties*

86. The concept of liability for damage caused by an activity beyond the territorial jurisdiction or control of the acting State appears to have been developed through State practice to a limited extent for some potentially harmful activities. Some sources refer to the concept in general terms, leaving its content and procedure for implementation to future developments. Other sources deal with the concept of liability only in a specific case.

87. In the past, liability has been considered as an outgrowth of failure to exercise “due care” or “due diligence”. In determining whether there has been a failure to exercise due diligence, the test has been that of balancing of interest. This criterion is similar to that used in determining harm and the permissibility of harmful activities, given the assessment of their impact. Liability for failure to exercise due care was established as early as 1872, in the *Alabama* case. In that dispute between the United States of America and the United Kingdom of Great Britain and Ireland over the alleged failure of the United Kingdom to fulfil its duty of neutrality during the American Civil War, both sides attempted to articulate what “due diligence” entailed. The United States argued that due diligence was proportioned to the magnitude of the subject and to the dignity and strength of the power which was to exercise it.⁹³

⁹² See article XIII of the Convention.

⁹³ The United States argued that:

“The rules of the treaty ... imposed upon neutrals the obligation to use *due diligence* to prevent certain acts. These words were not regarded by the United States as changing in any respect the obligations imposed by international law. ‘The United States’, said the Case, ‘understands that the diligence which is called for by the rules of the treaty of Washington [of 8 May 1871, by which the United Kingdom and the United States agreed to submit their dispute to arbitration] is a due diligence—that is, a diligence proportioned to the magnitude of the subject and to the dignity and

88. By contrast, the British Government argued that, in order to show lack of due diligence and invoke the liability of a State, it must be proved that there had been a failure to use, for the prevention of a harmful act, such care as Governments ordinarily employed in their domestic concern.⁹⁴

89. The tribunal referred to “due diligence” as a duty arising “in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfil the obligations of neutrality on their part”.⁹⁵ Thus, due diligence is a function of the circumstances of the activity.

90. Later State practice appears not to have dealt so much with State liability arising out of failure to exercise due care, except in the area of the protection of aliens. These categories of claims include nationalization and confiscation of foreign properties, police protection and safety of foreigners, etc. which have been excluded from this study.

91. In the claim against the Soviet Union for damage caused by the crash of the Soviet satellite *Cosmos-954* on Canadian territory in January 1978, Canada referred to the general principle of the law of “absolute liability” for injury resulting from activities with a high degree of risk.⁹⁶

92. Similarly, in the *Trail Smelter* awards, the smelter company was permitted to continue its activities. The tribunal did not prohibit the activities of the smelter; it

strength of the power which is to exercise it; a diligence which shall, by the use of active vigilance, and of all the other means in the power of neutral, through all stages of the transaction, prevent its soil from being violated; a diligence that shall in like manner deter designing men from committing acts of war upon the soil of the neutral against its will, and thus possibly dragging it into war which it would avoid; a diligence which prompts the neutral to the most energetic measures to discover any purpose of doing the acts forbidden by its good faith as a neutral, and imposes upon it the obligation, when it receives the knowledge of an intention to commit such acts, to use all the means in its power to prevent it. No diligence short of this would be ‘due’, that is, commensurate with the emergency or with the magnitude of the results of negligence.” (J. B. Moore, *International Arbitrations to which the United States has been a Party* (Washington, D.C., 1898), vol. 1, pp. 572–573.)

⁹⁴ “... it was necessary to show that there had been a ‘failure to use, for the prevention of an act which the government was bound to endeavour to prevent, such care as governments ordinarily employ in their domestic concerns, and may reasonably be expected to exert in matters of international interest and obligation’.” (Ibid., p. 610.)

⁹⁵ Ibid., p. 654.

⁹⁶ Canada argued that:

“The standard of absolute liability for space activities, in particular activities involving the use of nuclear energy, is considered to have become a general principle of international law. A large number of States, including Canada and the Union of Soviet Socialist Republics, have adhered to this principle as contained in the 1972 *Convention on International Liability for Damage caused by Space Objects*. The principle of absolute liability applies to fields of activities having in common a high degree of risk. It is repeated in numerous international agreements and is one of “the general principles of law recognized by civilized nations” (art. 38 of the Statute of the International Court of Justice). Accordingly, this principle has been accepted as a general principle of international law.” (See ILM, vol. 18, p. 907, para. 22.)

merely reduced its activities to a level at which the fumes which the smelter emitted were no longer, in the opinion of the tribunal, injurious to the interests of the United States. The tribunal established a permanent regime which called for compensation for injury to United States interests arising from fume emissions even if the smelting activities conformed fully to the permanent regime as defined in the decision:

The Tribunal is of [the] opinion that the prescribed regime will probably remove the causes of the present controversy and, as said before, will probably result in preventing any damage of a material nature occurring in the State of Washington in the future.

But since the desirable and expected result of the regime or measure of control hereby required to be adopted and maintained by the Smelter may not occur, and since in its answer to Question No. 2, the Tribunal has required the Smelter to refrain from causing damage in the State of Washington in the future, as set forth therein, the Tribunal answers Question No. 4 and decides that on account of decisions rendered by the Tribunal in its answers to Question No. 2 and Question No. 3 there shall be paid as follows: (a) if any damage as defined under Question No. 2 shall have occurred since October 1, 1940, or shall occur in the future, whether through failure on the part of the Smelter to comply with the regulations herein prescribed or notwithstanding the maintenance of the regime, an indemnity shall be paid for such damage but only when and if the two Governments shall make arrangements for the disposition of claims for indemnity under the provisions of article XI of the Convention;⁹⁷ (b) if as a consequence of the decision of the Tribunal in its answers to Question No. 2 and Question No. 3, the United States shall find it necessary to maintain in the future an agent or agents in the area in order to ascertain whether damage shall have occurred in spite of the regime prescribed herein, the reasonable cost of such investigations not in excess of \$7,500 in any one year shall be paid to the United States as compensation but only if and when the two Governments determine under article XI of the Convention that damage has occurred in the year in question, due to the operation of the Smelter, and "disposition of claims for indemnity for damage" has been made by the two Governments; but in no case shall the aforesaid compensation be payable in excess of the indemnity for damage; and further it is understood that such payment is hereby directed by the Tribunal only as a compensation to be paid on account of the answers of the Tribunal to Question No. 2 and Question No. 3 (as provided for in Question No. 4) and *not* as any part of indemnity for the damage to be ascertained and to be determined upon by the two Governments under article XI of the Convention.⁹⁷

⁹⁷ Convention of 15 April 1935 between the United States of America and Canada for the Final Settlement of the Difficulties Arising through Complaints of Damage done in the State of Washington by Fumes Discharged from the Smelter of the Consolidated Mining and Smelting Company, Trail, British Columbia.

93. The standard for imposing liability on the State under whose control an injurious condition exists is even more obfuscated in the decision of 9 April 1949 in the *Corfu Channel* case (merits). There ICJ found that Albania had known or should have known of the mines lying within its territorial waters in sufficient time to give warning to other States and their nationals. The Court found that:

In fact nothing was attempted by the Albanian authorities to prevent the disaster. These grave omissions involve the international responsibility of Albania.

The Court therefore, reaches the conclusion that Albania is responsible under international law for the explosions which occurred on October 22nd 1946, in Albanian waters, and for the damage and loss

⁹⁷ UNRIAA, vol. 3 (Sales No. 1949.V.2), p. 1980.

of human life which resulted from them, and that there is a duty upon Albania to pay compensation to the United Kingdom.⁹⁸

94. Owing to the difficult and circumstantial nature of the proof of Albania's knowledge of the injurious condition, it is unclear whether liability was based on a breach of the duty of due care in warning other international actors or on a standard of "strict liability" without regard to the concept of due care.

95. In the same judgment, ICJ made some general statements regarding State liability which are of considerable importance. In one passage, the Court stated that it was "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".⁹⁹ It should be noted that in this passage the Court was making a general statement of law and policy, not limited or narrowed to any specific case. When the Court renders a decision in a case in accordance with Article 38 of its Statute, it may also declare general statements of law. The aforementioned passages are among such statements. It may therefore be concluded that, while the Court's decision addressed the point debated by the parties in connection with the Corfu Channel, it also stressed a more general issue. It was a declaratory general statement regarding the conduct of any State which might cause extraterritorial injuries.

96. It has been argued that the *Trail Smelter* awards or the decision in the *Corfu Channel* case do not necessarily support the existence of strict liability in international law.¹⁰⁰ As regards *Trail Smelter*, according to this view, "it was not necessary for the Tribunal to decide, in an either/or sense, between strict liability and negligence as the requisite standard of care at international law". The decision in the *Corfu Channel* case, according to the same view, does not subscribe "to a theory of objective risk, if by that is meant that a State is automatically liable at international law for all the consequences of its act, whatever the circumstances may be".¹⁰¹ It has also been suggested that on the basis of this judgment "the possibility, if no more, remains ... that the defence of reasonable care might be raised by the defendant State".¹⁰²

97. In opposition to this view, it has been argued that in both of these cases, liability was imposed without proof of negligence.¹⁰³ As regards the view expressed regarding the *Corfu Channel* case (para. 96 above), attention has been drawn to the dissents by Judges Winiarski¹⁰⁴ and Badawi Pasha¹⁰⁵ in which they argued that Albania had

⁹⁸ *I.C.J. Reports 1949*, p. 23.

⁹⁹ *Ibid.*, p. 22.

¹⁰⁰ See M. J. L. Hardy, "International protection against nuclear risks", *International and Comparative Law Quarterly* (London), vol. 10, part 4, 1961, p. 751. See also by the same author, "Nuclear liability: the general principles of law and further proposals", *BYBIL, 1960* (London, New York, Toronto), 36th year, 1961, pp. 223 *et seq.*

¹⁰¹ See Hardy, "International protection ..." (footnote 100 above).

¹⁰² See Hardy, "Nuclear liability ..." (footnote 100 above), p. 229.

¹⁰³ See Goldie, *loc. cit.* (footnote 25 above), p. 1231.

¹⁰⁴ *I.C.J. Reports 1949*, pp. 49–52 and 55–56.

¹⁰⁵ *Ibid.*, pp. 64–66.

not breached any duty of care, that she had complied with existing international law standards and that the Court was imposing novel and higher standards. It has been observed that in this case the plaintiff State did not “affirmatively prove the defendant’s negligence or wilful default”.¹⁰⁶

98. In the *Lake Lanoux* case, on the other hand, the tribunal, responding to the allegation of Spain that the French projects would entail an abnormal risk to Spanish interest, stated that only failure to take all necessary safety precautions would have entailed France’s responsibility if Spanish rights had in fact been infringed.¹⁰⁷

99. In other words, responsibility would not arise as long as all possible precautions against the occurrence of the injurious event had been taken. Although the authority of the tribunal was limited by the parties to the examination of compatibility of French activities on the Carol River with a treaty, the tribunal also touched on the question of dangerous activities. In the passage quoted above, the tribunal stated: “It has not been clearly affirmed that the proposed works [by France] would entail an abnormal risk in neighbourly relations or in the utilization of the waters.” This passage may be interpreted as meaning that the tribunal was of the opinion that abnormally dangerous activities constituted a special problem,

¹⁰⁶ Goldie, loc. cit. (footnote 25 above), p. 1230. Sohn and Baxter, in 1961, evaluated the standing in international law of strict liability. They indicated as a matter of *lex ferenda*:

“The concept of absolute liability, or liability without fault, might possibly be applied to two general types of situations: The first of these would be a violation of the territory of State A by State B with resulting damage to property of life in State A, notwithstanding the fact that State B did not intend either the violation of territory or the resulting harm and that it took all possible precautions against the causing of injury. In terms of modern technology, a case of this sort might be imagined if a missile which were [*sic*] tested by State B should, without intent or negligence upon the part of State B, enter airspace of State A, fall to the ground, and cause injury there to nationals of State A. The second instance in which absolute liability might exist would be the conduct of extra-hazardous activities with resultant harm to aliens. A test of nuclear weapons over the high seas which resulted in injuries to aliens might be said to represent a case of absolute liability, despite a lack of intent to cause harm and an absence of negligence in the conduct of the testing.” (Sohn and Baxter, “Convention on the international responsibility of States for injuries to aliens” (draft No. 12 with explanatory notes) of 15 April 1961, pp. 70–71, cited by Goldie, loc. cit., p. 1231, footnote 153.)

¹⁰⁷ The tribunal stated:

“The question was lightly touched upon in the Spanish counter memorial, which underlined the ‘extraordinary complexity’ of procedures for control, their ‘very onerous’ character, and the ‘risk of damage or of negligence in the handling of the watergates, and of obstruction in the tunnel’. But it has never been alleged that the works envisaged present any other character or would entail any other risks than other works of the same kind which today are found all over the world. It has not been clearly affirmed that the proposed works would entail an abnormal risk in neighbourly relations or in the utilization of the waters. As we have seen above, the technical guarantees for the restitution of the waters are as satisfactory as possible. If, despite the precautions that have been taken, the restitution of the waters were to suffer from an accident, such an accident would be only occasional and, according to the two Parties, would not constitute a violation of article 9.” (United Nations, ILR, vol. 12 (Sales No. 63.V.3), p. 303, para. 6 of the award.)

and that, if Spain had established that the proposed French project would entail an abnormal risk of injury to Spain, the decision of the tribunal might have been different.

100. In the *Nuclear Tests* case, ICJ, in making the order of 22 June 1973, took note of Australia’s concerns that:

... the atmospheric nuclear explosions carried out by France in the Pacific have caused wide-spread radio-active fall-out on Australian territory and elsewhere in the southern hemisphere, have given rise to measurable concentrations of radio-nuclides in foodstuffs and in man, and have resulted in additional radiation doses to persons living in that hemisphere and in Australia in particular; that any radio-active material deposited on Australian territory will be potentially dangerous to Australia and its people and any injury caused thereby would be irreparable; that the conduct of French nuclear tests in the atmosphere creates anxiety and concern among the Australian people; that any effects of the French nuclear tests upon the resources of the sea or the conditions of the environment can never be undone and would be irremediable by any payment of damages; and any infringement by France of the rights of Australia and her people to freedom of movement over the high seas and superjacent airspace could not be undone.¹⁰⁸

In his dissenting opinion, Judge Ignacio-Pinto, while expressing the view that the Court lacked jurisdiction to deal with the case, stated that:

... if the Court were to adopt the contention of the Australian request it would be near to endorsing a novel conception in international law whereby States would be forbidden to engage in any risk-producing activity within the area of their own territorial sovereignty; but that would amount to granting any State the right to intervene preventively in the national affairs of other States.¹⁰⁹

He further stated that:

... [i]n the present state of international law, the “apprehension” of a State, or “anxiety”, “the risk of atomic radiation”, do not in my view suffice to substantiate some higher law imposed on all States and limiting their sovereignty as regards atmospheric nuclear tests.

Those who hold the opposite view may perhaps represent the figure-heads or vanguard of a system of gradual development of international law, but it is not admissible to take their wishes into account in order to modify the present state of the law.¹⁰⁹

¹⁰⁸ *Nuclear Tests (Australia v. France)*, *Interim Protection, Order of 22 June 1973*, I.C.J. Reports 1973, p. 104. The Court did not rule on merits of the case.

¹⁰⁹ *Ibid.*, p. 132.

CHAPTER II

The party that is liable

101. In examining the issue of liable party, reference should be made to the polluter-pays principle, a principle developed first by OECD in 1972. This principle is different from the principle of operator's liability provided for in many civil liability conventions. Therefore, the present chapter provides an overview of the polluter-pays principle and then examines the issue of the party that is liable in international law.

A. Polluter-pays principle

1. HISTORICAL DEVELOPMENT

102. The polluter-pays principle was enunciated by the OECD Council in 1972. In its recommendation C(72)128 of 26 May 1972,¹¹⁰ the OECD Council adopted the "Guiding Principles Concerning International Economic Aspects of Environmental Policies", by which:

4. The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called "Polluter-Pays Principle". This principle means that the polluter should bear the expenses of carrying out the above-mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment.

103. The polluter-pays principle holds the polluter who creates an environmental harm liable to pay compensation and the costs to remedy that harm. This principle was set out by the OECD as an economic principle and as the most efficient way of allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment. The basis of the polluter-pays principle was the "assertion that as a matter of economic policy, free market internalization of the costs of publicly-mandated technical measures is preferable to the inefficiencies and competitive distortions of governmental subsidies".¹¹¹

104. The polluter-pays principle was not set forth as a liability or a legal principle. On 14 November 1974, the OECD Council adopted recommendation C(74)223 on the implementation of the principle,¹¹² which reaffirmed in particular:

1. The polluter-pays principle constitutes for Member countries the fundamental principle for allocating costs of pollution prevention and

control measures introduced by the public authorities in Member countries;

2. The polluter-pays principle, as defined by the Guiding Principle Concerning International Economic Aspects on Environmental Policy, which take account of the particular problems possibly arising for developing countries, meant that the polluter should pay the expenses of carrying out the measures, as specified in the previous paragraph, to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution introduction and/or consumption;

105. The recommendation goes on to indicate that the uniform application of this principle by the member countries in their environmental policies is indispensable to successful implementation of the principle. It discourages States from providing any financial relief either in terms of subsidies or tax relief to their industries causing pollution. Its economic objective is to internalize the cost of environmental pollution. Internalizing, in this context, refers to the industry that causes the pollution. With the exception of a few cases, it discourages States in assisting the industry in the payment of that cost. Under this economic theory, the cost of pollution control will be borne by the users of the goods and services produced by that industry.

106. On 7 July 1989, the OECD Council adopted recommendation C(89)88¹¹³ extending the scope of the polluter-pays principle beyond chronic pollution caused by ongoing activities to cover accidental pollution. The "Guiding Principles Relating to Accidental Pollution", which are the subject of the appendix to the recommendation, provide, in paragraph 4, that:

in matters of accidental pollution risks, the polluter-pays principle implies that the operator of a hazardous installation should bear the cost of reasonable measures to prevent and control accidental pollution from that installation which are introduced by public authorities in Member countries in conformity with domestic law prior to the occurrence of an accident in order to protect human health or the environment.

107. The Guiding Principles provide that, for reasons of convenience, the operator or the administrator should bear the cost. When a third party is liable for the accident, that party reimburses to the operator the cost of reasonable measures to control accidental pollution taken after an accident (para. 6). The recommendation also provides that if the accidental pollution is caused solely by an event for which the operator clearly cannot be considered liable under national law, such as a serious natural disaster that the operator cannot reasonably have foreseen, it is consistent with the polluter-pays principle that the public authorities do not charge the cost of control measures to the operator.

108. The Council of the European Communities also adopted, in 1974, its own recommendation on the appli-

¹¹⁰ Reproduced in *OECD and the Environment* (Paris, 1986), pp. 27 *et seq.*

¹¹¹ Sanford E. Gaines, "The polluter-pays principle: from economic equity to environmental ethos", *Texas International Law Journal*, vol. 26, No. 3, summer 1991, p. 470.

¹¹² Reproduced in *OECD and the Environment* (Paris, 1986), p. 31.

¹¹³ OECD/GD(92)81.

cation of the polluter-pays principle. The Council recommendation of 3 March 1975 on the attribution of costs and the role of the public sector in environmental matters defined "polluter" as "someone who directly or indirectly damages the environment or who creates conditions leading to such damage" (annex, para. 3).¹¹⁴ This is a broad definition which has been criticized as possibly including automobile drivers, farmers, factory owners and community sewage treatment plants.¹¹⁵

109. If the class of responsible polluters cannot be clearly defined, the Council of the European Communities, in its above-mentioned recommendation, provides that when "identifying the polluter proves impossible or too difficult, and hence arbitrary, particularly where environmental pollution arises from several simultaneous causes, cumulative pollution, or from several consecutive causes, pollution chain, the cost of combating polluting should be borne at the point in the pollution chain or in the cumulative pollution process, and by the legal or administrative means which offer the best solution from the administrative and economic points of view and which make the most effective contribution towards improving the environment" (annex, para. 3).¹¹⁴

110. Thus, in the case of pollution chains, costs should be charged at the point at which the number of economic operators is least and control is easiest or else, at the point where the most effective contribution is made towards improving the environment, and where distortions to competition are avoided.

111. As regards what the polluters should pay for, the Council of the European Communities provides in its recommendation (annex, para. 5)¹¹⁴ that:

5. Polluters will be obliged to bear ...:

(a) Expenditure of pollution control measures (investment in anti-pollution installations and equipment, introduction of new processes, cost of running anti-pollution installations, etc.), even when these go beyond the standards laid down by the public authorities;

(b) The charges.

The costs to be borne by the polluter (under the "polluter-pays principle") should include all the expenditure necessary to achieve an environmental quality objective including the administrative costs directly linked to the implementation of anti-pollution measures.

The costs to the public authorities of constructing, buying and operating pollution monitoring and supervision installations may, however, be borne by those authorities.

112. The European Community has committed itself to the polluter-pays principle. That commitment appears in the Single European Act, which amended the Treaty of Rome. The Act granted the European Community for the first time the express power to regulate environmental affairs. The Act specifically refers to the polluter-pays principle as a principle governing such regulations and states that "action by the Community relating to the envi-

ronment shall be based on the principle that preventive action should be taken, that environmental damage should as a priority be rectified at the source, and that the polluter should pay" (art. 130 R, para. 2). The European Community has also been applying the polluter-pays principle to the sources of pollution. For example, the Community has approved a directive which expressly instructed member States to impose the costs of waste control on the holder of waste and/or on prior holders or the waste generator in conformity with the polluter-pays principle.¹¹⁶

113. In practice, the polluter-pays principle has not been fully implemented. OECD in 1989 indicated that subsidies are widely used by Governments to ease the economic burden of the polluter. In addition, each State member of the European Community has also developed its own interpretation of the polluter-pays principle "to justify its subsidy schemes as being compatible with the PPP [polluter-pays principle]".¹¹⁷

114. The United States of America does not officially recognize the polluter-pays principle, even though, in practice, it follows its precepts.¹¹⁸ Japan, another OECD member, appears to have ignored the polluter-pays principle as a specific policy mandate and indeed, follows a policy of strong government intervention in the industrial sector.

115. As mentioned earlier, the application of the polluter-pays principle has been extended to accidental environmental pollution which includes industrial pollution both by OECD and by the European Community.¹¹⁹

116. It should be noted, however, that the liability and compensation components of the polluter-pays principle cover only two types of costs: (a) the cost of reasonable measures to prevent accidental pollution (OECD Council recommendation C(89)88¹¹³); and (b) the cost of controlling and remedying accidental pollution.¹²⁰ The pol-

¹¹⁶ Council directive of 6 December 1984 on the control within the European Community of the transfrontier shipment of hazardous waste, *Official Journal of the European Communities*, 27th year, No. L326, 13 December 1984, pp. 31-36.

¹¹⁷ See Gaines, loc. cit. (footnote 111 above), p. 479.

¹¹⁸ *Ibid.*, p. 480. According to Gaines, there is one exception: the sewage treatment construction grants programme under the Clean Water Act gives almost no subsidies or grants for pollution control. Also in the Clean Air Act (CAA) amendments of 1990, Congress enacted a permit fee structure that adheres closely to the polluter-pays principle.

¹¹⁹ See the OECD Council recommendation C(89)88 on the application of the polluter-pays principle to accidental pollution (footnote 113 above). The Council of the European Communities' amended proposed directive on civil liability for damage caused by waste (COM (1991)219 final) is also based on principles similar to polluter-pays. See Gaines, loc. cit. (footnote 111 above), pp. 482-483.

¹²⁰ See Gaines, loc. cit. (footnote 111 above), p. 483. Gaines points out that some of the costs involved in the control of accidental pollution may be prevention-oriented, but some others may be strongly remedy-oriented. Among the costs mentioned by the OECD Guidelines on Principles relating to Accidental Pollution are, for example, costs such as those involved in rehabilitating the polluted environment. The choice and types of environmental rehabilitation take the polluter-

(Continued on next page.)

¹¹⁴ *Official Journal of the European Communities*, 18th year, No. L194, 25 July 1975, pp. 1-4.

¹¹⁵ See Gaines, loc. cit. (footnote 111 above), p. 472.

luter-pays principle does not seem to cover all the damages that are recoverable in civil liability regimes. The guiding principles expressly exclude, for instance, measures to compensate victims for the economic consequences of an accident, even if those measures are instituted by public authorities.¹²¹

117. OECD and the European Community have, to some extent, departed from the strict application of the polluter-pays principle. Due to political and economic pressures, the principle has been modified to a great extent.¹²²

2. COMPONENT ELEMENTS OF THE POLLUTER-PAYS PRINCIPLE

(a) *The right to equal access*

118. Equal access to national remedies has been considered as one way of implementing the polluter pays principle. This remedy has been endorsed by OECD and it purports to afford equivalent treatment in the country of origin to transboundary and domestic victims of pollution damage, or to those likely to be affected. The equal right of access may involve access to information, participation in administrative hearings and legal proceedings and the application of non-discriminatory standards for determining the illegality of domestic and transboundary pollution. The purpose of the right to equal access is to provide foreign claimants, on an equal footing with domestic claimants, opportunities to influence the process of initiation, authorization and operation of activities with transboundary implications for pollution damage as well as, ultimately, the litigation phase.

119. The implementation of the principle of equal access to national remedies requires that participating States remove jurisdictional barriers to civil proceedings for damages and other remedies in respect of environmental injury. For example, the courts of some States do not hear cases where the installation or the conduct leading to injury was in a foreign territory.

120. OECD Council recommendation C(76)55(Final) on equal access in matters of transboundary pollution of 11 May 1976¹²³ notes that the principles of equal right of access and non-discrimination are intended to facilitate

the solution of transfrontier pollution problems. As for the principle of equal right of access, OECD defines its purpose in the following manner: the principle is designed to make available to actual or potential victims of transfrontier pollution, who are in a country other than that where the pollution originates, the same administrative or legal procedures as those enjoyed by potential or actual victims of a similar pollution in the country where such pollution originates. The application of the principle leads, in particular, to situation where two victims of the same transfrontier pollution situated on opposite sides of a common frontier have the same opportunity to voice their opinions or defend their interests both at the preventive stage before the pollution has occurred and in the curative stage after damage has been suffered. The national and foreign victims may thus participate on an equal footing at enquiries or public hearings organized, for example, to examine the environmental impact of a given polluting activity, they may take proceedings in relation to environmental decisions which they wish to challenge without discrimination before the appropriate administrative or legal authorities of the country where the pollution originates. And they may take legal action to obtain compensation for damage or its cessation.

121. OECD recognizes that the principle of equal right of access is essentially a procedural principle, since it does affect the way in which the substance of the victim's claims will be dealt with. The principle of equal right of access has been designed primarily to deal with environmental problems occurring among neighbouring States. Geographical proximity presumes some affinity and similarity between the legal systems of the neighbouring States and some similarities between their policies for the protection of the environment. A good example is the Convention on the Protection of the Environment between member countries of the Nordic Council. The application of this principle in respect of long-distance pollution problems may not be practical or so felicitous.

122. As for the principle of non-discrimination, OECD states that it is mainly designed to ensure that the environment is given at least the same protection when pollution has effects beyond the frontier as when it occurs within the territory where it originates, all other things being equal. A particular result of application of the principle is that a polluter situated near the frontier of a country will not be subject to less severe restrictions than a polluter situated in the interior of such a country in a situation where the two polluters produce similar effects on the environment, either at home or abroad. The principle implies indeed that environmental policies shall not be consistently less strict in frontier regions by reason of the fact that it induces a State to consider on an equal footing extraterritorial ecological damages and national ecological damages. A second aim of the principle is to ensure that the victims of transfrontier pollution situated in a foreign country receive at least the same treatment as that given to victims of the same pollution who are situated in the country where the pollution originates. In concrete terms, such an approach leads to the victims of

(Footnote 120 continued.)

pays principle fairly far towards a liability concept for what polluters should pay. In the United States of America's legislation, for example, if a source of accidental pollution is responsible for restoration of the environment, that responsibility is considered a measure for compensation of damage inflicted, not a preventive or protective measure. A similar approach is evident in the natural resources section of the United States Statute that imposes liability for remedial costs of hazardous waste clean-up. For example, in the case *Ohio v. Department of the Interior*, the Court held that the cost of restoration was the preferred measure of damages (880 F.2d 432, at p. 444 (D.C. Cir. 1989)).

¹²¹ Gaines, loc. cit. (footnote 111 above), pp. 483-485.

¹²² Ibid.

¹²³ Reproduced in *OECD and the Environment*, (footnote 110 above), pp. 169-170.

transfrontier pollution receiving at least the same compensation as that given to a victim suffering the same damage under the same conditions within the national territory.

123. The principle of non-discrimination aims at harmonizing the policies of the State for the protection of the environment within or outside its territory. It also aims at ensuring, for foreigners who suffer from the damage, the same treatment as that provided under the domestic law of the State in which the damage originated for its own citizens. There is, to some extent, an analogy with the national treatment of aliens in the law of State responsibility. It may be recalled that there are two views in respect of the treatment of aliens under the international law of State responsibility. One view purports to give aliens the same treatment as the domestic law of the host State provides for its own nationals. The other view opts for a minimum standard of treatment to be granted to aliens, when the law of the host State provides for less than the minimum international standard. The principle of non-discrimination, in the context of environmental pollution, may be compared with the principle of equal treatment in the law of State responsibility. The principle of non-discrimination, although it deals with the substantive rights of the claimants, does not affect the substance of the claim directly. The OECD secretariat, however, suggests that there may be channels available, because of equal right of access, to the claimants to petition the Government and administrative authorities of the States where the harm has originated to change their substantive law, as well as to encourage their Governments to negotiate with the Government of the State of the polluter.

124. The potential problem with the application of the principle of non-discrimination in the area of the environment lies in the fact that there are sometimes drastic differences between the substantive remedies provided in various States. Again, because this principle was intended to be applied between neighbouring States, it was assumed that there would be some affinity between even the substantive law of the various States concerned or at least an attempt on their part to harmonize their domestic laws as regards the protection of the environment. A broad application of this principle in respect of long-distance pollution problems as well as between neighbouring States with very diverse environmental policies and laws would create considerable problems.

125. Mention may be made, in this context, of the differences between the environmental laws of the United States of America and Mexico or between some Western European States and their Eastern European neighbours. Even between the European States, the application of the principle has required some changes in domestic laws. OECD undertook a comparative study on the implementation of the principle of equal right of access in 17 OECD member countries, and concluded that difficulties in some countries may be encountered in the implementation of this principle. The first difficulty is related to a long-standing tradition in some countries, whereby administrative courts have no jurisdiction to hear cases concerning the extraterritorial effects of administrative

decisions. A second difficulty, in a few countries, arises from conferring sole jurisdiction on the courts of the place where the damage occurred. OECD, while acknowledging the difficulties, nonetheless supported and endorsed the application of the principle of equal right of access within its membership.

126. In North America, Canada and the United States have tried to harmonize their laws to provide for the implementation of the principle of equal right of access. A framework law in Canada and the United States on the uniformization of transboundary measures and reciprocal treatment provides a model for appropriate legislation. The Transboundary Pollution Reciprocal Access Act has been adopted by a few State legislatures in the United States, including New Jersey, Colorado and Wisconsin. At the international level, there are few examples. They include the Convention on the Protection of the Environment and the Agreement on Third Party Liability in the Field of Nuclear Energy between Switzerland and the Federal Republic of Germany. There is at least one bilateral agreement—the U.S.-Canadian Boundary Waters Treaty, signed on 11 January 1909 by the United Kingdom of Great Britain and Ireland and the United States of America, which provides for equal right of access, but it is not limited to environmental pollution only.

127. Equal right of access is not without problems. Some authors have mentioned that equal access favours litigation against defendants in the State where the activity causing the transboundary harm was undertaken. These authors argue that the courts of the State of the defendants may be more sympathetic to the defendants and less informed about the scope of the transfrontier harm. They suggest that these considerations were behind the jurisdiction regime established under the 1969 Civil Liability Convention whereby the plaintiffs could choose to sue in their own courts. Other problems are linked to restrictions on service of process on foreign defendants, the possibility that sovereign immunity may be invoked if a State-owned enterprise is the defendant, the double actionability rule, the reluctance of courts to grant injunctive relief relating to activities in other States and the difficulty of securing enforcement or recognition of judgements. These matters may have to be resolved within a particular draft convention, as they are, for example, in the 1969 Civil Liability Convention.

128. It has been suggested that the plaintiff has a choice of venue between its own courts or the courts of the State where the activity leading to transboundary harm has occurred. Generally, the civil liability conventions do not provide this choice for the plaintiff. Only the Convention on the Liability of Operators of Nuclear Ships¹²⁴ and the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Sea-

¹²⁴ For a commentary on the Convention, see P. C. Szasz, "The Convention on the liability of operators of nuclear ships", *Journal of Maritime Law and Commerce* (Silver Springs, Md.), vol. 2, No. 3, April 1971, pp. 541–570; and S. Cigoj, "International regulation of civil liability for nuclear risk", *International and Comparative Law Quarterly* (London), vol. 14, part 3, July 1965, pp. 809–844.

bed Mineral Resources provide for a choice of venue. In general, these conventions on nuclear liability confer jurisdiction only on the State where the nuclear incident causing the damage occurred. This normally means the State where the nuclear installation is located except in the case of nuclear material in transit.¹²⁵

129. As regards practice at the international level, the Stockholm Declaration⁷⁸ or the Rio Declaration⁷⁹ did not recognize the principle of the right of equal access. The United Nations Convention on the Law of the Sea appears to uphold the requirement of equal access in its article 235, paragraph 2 of which reads:

States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

(b) *Civil liability*

130. Civil liability regimes have been considered as one other method to implement the polluter-pays principle. These regimes have been used in relation to nuclear and oil pollution. It has been argued that the civil liability conventions do not necessarily implement the polluter-pays principle, since States and voluntary contributions from other sources pay for the polluter.

B. Operator liability

131. In some of the domestic laws which have adopted the concept of strict liability, the operator of the activity is liable for damage caused. The definition of operator changes depending upon the nature of the activity. For example, in the United States of America, under OPA,¹²⁶ the following individuals may be held liable: (a) responsible parties such as the owner or operator of a vessel, onshore and offshore facility, deep-water port and pipeline; (b) the "guarantor", the "person other than the responsible party, who provides evidence of financial responsibility for a responsible party"; and (c) third parties (individuals other than the those mentioned in the first two categories, their agents or employees or their independent contractors, whose conduct is the sole cause of injury).

132. Also in the United States, CERCLA imposes liability on owners and operators of vessels and facilities.¹²⁷ The terms "owner" and "operator" are defined as:

(i) In the case of a vessel, any person owning, operating, or chartering by demise, such vessel;

(ii) In the case of an onshore facility or an offshore facility, any person owning or operating a facility.¹²⁸

¹²⁵ See, for example, article 13 of the Convention on Third Party Liability in the Field of Nuclear Energy, and article XI of the Vienna Convention on Civil Liability for Nuclear Damage.

¹²⁶ See footnote 60 above.

¹²⁷ Art. 9607 (A) (see footnote 57 above).

¹²⁸ Art. 9601 (20 A) (*ibid.*).

133. Both CERCLA and OPA authorize direct action against the financial guarantor of the responsible person.

134. Under section 1 of the 1990 German Environmental Liability Act, the "owner" of the "facilities" which have caused damage is strictly liable.¹²⁹

135. In international law, with a very few exceptions, operators are held liable for the damage their activities cause. This is particularly evident in treaty practice.

1. TREATY PRACTICE

136. The operator of activities causing extraterritorial damage or the insurer of the operator may be liable for damage. This is standard practice in conventions primarily concerned with commercial activities, such as the 1966 Additional Convention to the International Convention concerning the Carriage of Passengers and Luggage by Rail (CIV) of 25 February 1961 relating to the Liability of the Railway for Death of and Personal Injury to Passengers. Article 2 of the Additional Convention reads:

1. The railway shall be liable for damage resulting from the death of, or personal injury or any other bodily or mental harm to, a passenger, caused by an accident arising out of the operation of the railway and happening while the passenger is in, entering or alighting from a train.

....

6. For the purposes of this Convention, the "responsible railway" is that which, according to the list of lines provided for in article 59 of CIV, operates the line on which the accident occurs. If, in accordance with the aforementioned list, there is joint operation of the line by two railways, each of them shall be liable.

137. The operators of railways may be private entities or government agencies. The Additional Convention makes no distinction between them as far as liability and compensation are concerned.

138. Similarly, the Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface provides for the liability of the operator of an aircraft causing injury to a person on the surface.¹³⁰

¹²⁹ Hoffman, *loc. cit.* (footnote 71 above), p. 32.

¹³⁰ The relevant articles of the Convention read:

"PRINCIPLES OF LIABILITY

"Article 1

"1. Any person who suffers damage on the surface shall, upon proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom, be entitled to compensation as provided by this Convention. ...

"Article 2

...

"2. (a) For the purpose of this Convention the term 'operator' shall mean the person who was making use of the aircraft at the time the damage was caused, provided that if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, that person shall be considered the operator.

139. The operators of aircraft may also be private or Government entities. Under article 11 of this Convention, the operators enjoy limitation on liability. However, the operators do not enjoy limitation on liability if the injury was due to their negligence.¹³¹ In some circumstances, liability can be imputed to the insurer of the aircraft.¹³²

140. The 1969 International Convention on Civil Liability for Oil Pollution Damage provides for a regime of strict liability of the shipowner. Paragraph 1 of article III provides:

1. Except as provided in paragraphs 2 and 3 of this article, the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence,

“(b) A person shall be considered to be making use of an aircraft when he is using it personally or when his servants or agents are using the aircraft in the course of their employment, whether or not within the scope of their authority.

“3. The registered owner of the aircraft shall be presumed to be the operator and shall be liable as such unless, in the proceedings for the determination of his liability, he proves that some other person was the operator and, in so far as legal procedures permit, takes appropriate measures to make that other person a party in the proceedings.

“Article 3

“If the person who was the operator at the time the damage was caused had not the exclusive right to use the aircraft for a period of more than fourteen days, dating from the moment when the right to use commenced, the person from whom such right was derived shall be liable jointly and severally with the operator, each of them being bound under the provisions and within the limits of liability of this Convention.

“Article 4

“If a person makes use of an aircraft without the consent of the person entitled to its navigational control, the latter, unless he proves that he has exercised due care to prevent such use, shall be jointly and severally liable with the unlawful user for damage giving a right to compensation under article 1, each of them being bound under the provisions and within the limits of liability of this Convention.”

¹³¹ Article 12 reads:

“1. If the person who suffers damage proves that it was caused by a deliberate act or omission of the operator, his servants or agents, done with intent to cause damage, the liability of the operator shall be unlimited; provided that in the case of such act or omission of such servant or agent, it is also proved that he was acting in the course of his employment and within the scope of his authority.

“2. If a person wrongfully takes and makes use of an aircraft without the consent of the person entitled to use it, his liability shall be unlimited.”

¹³² The relevant paragraphs of article 16 read:

“5. Without prejudice to any right of direct action which he may have under the law governing the contract of insurance or guarantee, the person suffering damage may bring a direct action against the insurer or guarantor only in the following cases:

“(a) Where the security is continued in force under the provisions of paragraph 1 (a) and (b) of this article;

“(b) The bankruptcy of the operator.

“6. Excepting the defence specified in paragraph 1 of this article, the insurer or other person providing security may not, with respect to direct actions brought by the person suffering damage based upon application of this Convention, avail himself of any grounds of nullity or any right of retroactive cancellation.

“7. The provisions of this article shall not prejudice the question whether the insurer or guarantor has a right of recourse against any other person.”

shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident.

141. However, in accordance with article V, paragraph 2, if the incident occurred as a result of “the actual fault or privity of the owner, he shall not be entitled to avail himself of the limitation” of liability.

142. Concerns were voiced in 1969 regarding whether the shipowner or the cargo owner or both should bear the costs of strict liability.¹³³ The final agreement, holding the shipowner strictly liable, was secured by agreeing to adopt another convention (a) to ensure adequate compensation for the victim and (b) distribute the burden of liability by indemnifying the shipowners against part of the liability. This arrangement led to the adoption of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. The preamble to the Convention sets out the two principal goals mentioned above:

Considering however that this regime does not afford full compensation for victims of oil pollution damage in all cases while it imposes an additional financial burden on shipowners,

Considering further that the economic consequences of oil pollution damage resulting from the escape or discharge of oil carried in bulk at sea by ships should not exclusively be borne by the shipping industry but should in part be borne by the oil cargo interests,

Convinced of the need to elaborate a compensation and indemnification system supplementary to the International Convention on Civil Liability for Oil Pollution Damage with a view to ensuring that full compensation will be available to victims of oil pollution incidents and that the shipowners are at the same time given relief in respect of the additional financial burdens imposed on them by the said Convention.

143. The Convention established the International Oil Pollution Compensation Fund. The adoption of the 1984 Protocol amending the 1969 Civil Liability Convention permitted the setting-up of an international oil pollution compensation fund to compensate victims. The 1984 Protocol is not concerned with distribution of liability and relief for shipowners because of the substantial rise in the limits: it deletes all references to shipowners’ indemnification.

144. Article 2, paragraph 4, of the 1984 Protocol amending the 1969 Civil Liability Convention expands the scope of “incident” as defined in article 1, paragraph 8, of the Convention to include the situation in which there is a threat to pollution. The new definition reads:

“Incident” means any occurrence, or series of occurrences having the same origin, which causes pollution damage or creates a grave and imminent threat of causing such damage.

145. The very first civil liability convention on nuclear material is the Convention on Third Party Liability in the Field of Nuclear Energy (hereinafter called the “Paris Convention”) of 29 July 1960. This Convention was drafted by OECD to be applicable within Western European States. The preamble of the Convention states, as its

¹³³ Abecassis and Jarashow, op. cit. (footnote 80 above), p. 253, note 1, citing LEG/CONF/C.2/SR.2-13.

purposes, providing adequate compensation for the victims of nuclear damage and unifying the laws related to nuclear damage in the States parties.

146. The Convention provides for the absolute but limited liability of the operator of a nuclear installation. It is considered one of the more successful conventions in the nuclear area because of the high number of ratifications by the European nuclear States. It was amended in 1964, by its Additional Protocol, to increase the amount of the limitation of liability which had proved inadequate.

147. A comparable regime was provided at the global level in the Vienna Convention on Civil Liability for Nuclear Damage (hereinafter called the "Vienna Convention"). While the Paris Convention does not directly refer to the concept of absolute liability, the Vienna Convention makes an explicit reference to that concept in article IV, paragraph 1, where it states that "the liability of the operator for nuclear damage under this Convention shall be absolute". The Vienna Convention also provides for limitation of liability.

148. The Convention on the Liability of Operators of Nuclear Ships also provides for absolute liability of the operator of nuclear ships.¹³⁴ The Convention also set a civil liability regime in respect of nuclear ships.¹²⁴

149. The Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material was adopted in 1971 to provide for civil liability of the operator of a nuclear installation for damage caused by a nuclear incident occurring in the course of the maritime carriage of nuclear material.

150. In addition to providing for equitable compensation for the victims of nuclear damage, the above four treaties in the field of nuclear damage harmonize important aspects of liability in that area in national laws. They provide for: (a) absolute liability of the operator of the nuclear installation, meaning that the proof of causation suffices for attribution of liability; (b) limitation of liability of the operator; and (c) guaranteed payment of compensation by compulsory insurance. The Convention Supplementary to the Paris Convention also provides for additional public funds to guarantee compensation.¹³⁵ Other conventions do not contain such a requirement.

151. Under the nuclear civil liability conventions, States are given considerable discretion to adopt in their domestic law different ceilings on the amount of liability, insurance arrangements, definitions for nuclear damage or to continue to hold operators liable in cases of grave

natural disasters.¹³⁶ Germany and Austria have reserved the right to exclude article 9 of the Paris Convention on defence against liability, thus making liability absolute.¹³⁷

152. Currently, the IAEA Standing Committee on Liability for Nuclear Damage is attempting to draft a new convention on transboundary nuclear damage. Issues such as supplementary funds for such damage are under consideration.

153. Under articles 6 and 7 of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, the operator is strictly liable. It is indicated in the preamble that the Convention is based on the polluter-pays principle. If there is more than one operator, they shall be jointly and severally liable in accordance with article 6.¹³⁸ The Convention defines operator in article 2, paragraph 5, as "any person who exercises the control of a dangerous activity". And person is defined in paragraph 6 of the same article as "any individual or partnership or any body governed by public or private law, whether corporate or not, including a State or any of its constituent subdivisions".

154. Under article 8 of the Convention on the Regulation of Antarctic Mineral Resource Activities, the primary liability lies with the operator. The sponsoring State remains liable if: (a) it has failed to comply with its obligations under the Convention; and (b) if full compensation cannot be provided through liable operator or otherwise.

155. Under CRTD the carrier is liable. The element of "control" appears in the definition of "carrier". Paragraph 8 of article 1 defines "carrier" with respect to road transport and inland navigation vessel as "the person who at the time of the incident controls the use of the vehicle on board which the dangerous goods are carried". Under this paragraph, "the person in whose name the vehicle is registered in a public register or, in the absence of such

¹³⁶ See article IV, paragraph 3 (b), of the Vienna Convention and article 9 of the Paris Convention.

¹³⁷ See Birnie and Boyle, *op. cit.* (footnote 82 above), p. 373, note 187.

¹³⁸ The relevant paragraphs of article 6 of the Convention read as follows:

"2. If an incident consists of a continuous occurrence, all operators successively exercising the control of the dangerous activity during that occurrence shall be jointly and severally liable. However, the operator who proves that the occurrence during the period when he was exercising the control of the dangerous activity caused only a part of the damage shall be liable for that part of the damage only.

"3. If an incident consists of a series of occurrences having the same origin, the operators at the time of any such occurrence shall be jointly and severally liable. However, the operator who proves that the occurrence at the time when he was exercising the control of the dangerous activity caused only a part of the damage shall be liable for that part of the damage only.

"4. If the damage resulting from a dangerous activity becomes known after all such dangerous activity in the installation or on the site has ceased, the last operator of this activity shall be liable for that damage unless he or the person who suffered damage proves that all or part of the damage resulted from an incident which occurred at a time before he became the operator. If it is so proved, the provisions of paragraphs 1 to 3 shall apply."

¹³⁴ Article II of the Convention reads:

"1. The operator of a nuclear ship shall be absolutely liable for any nuclear damage upon proof that such damage has been caused by a nuclear incident involving the nuclear fuel of, or radioactive products or waste produced in, such ship.

"2. Except as otherwise provided in this Convention no person other than the operator shall be liable for such nuclear damage."

¹³⁵ See paragraph (b) (ii) and (iii) of article 3 of the Supplementary Convention and also the Additional Protocols to the Paris Convention.

registration, the owner of the vehicle shall be presumed to control the use” of the vehicle unless he proves that “another person controls the use of the vehicle” and he discloses the identity of such a person. With respect to carriage by rail, “the person or persons operating the railway line” is considered the “carrier”. The 1995 draft convention on liability and compensation in connection with the carriage of noxious and hazardous substances by sea, prepared by IMO, has adopted a combination of this definition and that of “owner” provided in the 1969 Civil Liability Convention.

156. The IMO draft convention provides in article 4 for the liability of the owner of the ship carrying hazardous substances.¹³⁹

157. Article 4 of the draft protocol to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal provides various alternatives regarding the liable party.¹⁴⁰ While the first two alternatives enumerate individuals such as the generator, the exporter, the disposer or the broker, the third alternative holds liable any person who had operational control of the waste at the time of the incident.

2. JUDICIAL DECISIONS AND STATE PRACTICE OUTSIDE TREATIES

158. No clear picture of the liability of the operator can be derived from judicial decisions or official correspondence. These sources indicate no instances where the operator has been held to be solely liable for payment of compensation for injuries resulting from his activities. In the case of some incidents, private operators have voluntarily paid compensation and taken unilateral action to minimize or prevent injuries, but without admitting liability. It is obviously difficult to determine the real reason for the unilateral and voluntary action. But it cannot be entirely assumed that this action was taken solely on “moral” grounds. The factors of pressure from the home Government, public opinion, or the necessity of a relaxed atmosphere for doing business, should not be underestimated. All these pressures may lead to the creation of an expectation which is stronger than a mere moral obligation.

159. In 1972, the *World Bond*, a tanker registered in Liberia, leaked 45,000 litres of crude oil into the sea while unloading at the refinery of the Atlantic Richfield Corporation, at Cherry Point, in the State of Washington. The oil spread to Canadian waters and fouled 5 miles of beaches in British Columbia. The spill was relatively small, but it had major political repercussions. Prompt action was taken both by the refinery and by the authorities on either side of the frontier to contain and limit the damage, so that the injury to Canadian waters and shorelines could be minimized. The cost of the clean-up opera-

tions was borne by the private operator, the Atlantic Petroleum Corporation.¹⁴¹

160. In the case of the transfrontier pollution caused by the activities of the Peyton Packing Company and the Casuco Company, action was taken unilaterally by those two United States companies to remedy the injury. Similarly, in the *Trail Smelter* case, the Canadian operator, the Consolidated Mining and Smelting Company, acted unilaterally to repair the damage caused by the plant’s activities in the State of Washington. On the other hand, in the case of an oil prospecting project contemplated by a private Canadian corporation in the Beaufort Sea, near the Alaskan border, the Canadian Government undertook to ensure compensation for any damage that might be caused in the United States of America in the event that the guarantees furnished by the corporation proved insufficient.

C. State liability

161. Past trends demonstrate that States have been held liable for injuries caused to other States and their nationals as a result of activities occurring within their territorial jurisdiction or under their control. Even treaties imposing liability on the operators of activities have not in all cases exempted States from liability. This type of State accountability is a hybrid between State responsibility and liability (see para. 81 above).

1. TREATY PRACTICE

162. In some multilateral treaties, States have agreed to be held liable for injuries caused by activities occurring within their territorial jurisdiction or under their control. Some conventions regulating activities undertaken mostly by private operators impose certain obligations upon the State to ensure that its operators abide by those regulations. If the State fails to do so, it is held liable for the injuries the operator causes. For example, under paragraph 2 of article III of the Convention on the Liability of Operators of Nuclear Ships, “the operator is required to maintain insurance or other financial security covering his liability for nuclear damage” in such forms as the licensing State specifies. Furthermore, “the licensing State has to ensure the payment of claims for compensation for nuclear damage established against the operator by providing the necessary funds up to the limit laid down in paragraph 1 [of article III], to the extent that the yield of the insurance of the financial security is inadequate” to satisfy such claims. Hence the licensing State is obliged to ensure that the insurance of the operator or the owner of the nuclear ship satisfies the requirements of the Convention. Otherwise the State itself is liable and has to pay compensation. In addition, under article XV, the State is required to take all necessary measures to prevent a nuclear ship flying its flag from operating without a licence. If a State fails to do so, and

¹³⁹ See footnote 88 above.

¹⁴⁰ See paragraph 83 above.

¹⁴¹ See *The Canadian Yearbook of International Law* 1973 (Vancouver), vol. XI, pp. 333–334.

a nuclear ship flying its flag causes injury to others, the flag State is considered to be the licensing State, and it will be held liable for compensation to victims in accordance with the obligations laid down in article III.¹⁴²

163. Under paragraph 2 of article 8 of the Convention on the Regulation of Antarctic Mineral Resource Activities,

An operator is strictly liable for:

(a) Damage to the Antarctic environment or dependent or associated ecosystems ...;

(b) Loss of or impairment to an established use ...;

(c) Loss or damage to property of a third party or loss of life or personal injury of a third party arising directly out of damage described in subparagraph (a) above; and

(d) Reimbursement of reasonable costs by whomsoever incurred relating to necessary response action ...

164. Paragraph 3 of article 8 provides that damage of the kind referred to in paragraph 2 which would not have occurred or continued if the sponsoring State had carried out its obligations under this Convention with respect to its operator shall, in accordance with international law, entail liability which will be limited to that portion of liability not satisfied by the operator or otherwise.

165. Article 9 of the draft protocol to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal provides for State liability for the payment of compensation to the extent that compensation for damage under the civil liability regime and/or the fund regime is inadequate or not available.

166. For activities involving primarily States, the States themselves have accepted liability. Such is the case under the Convention on International Liability for Damage Caused by Space Objects. Article II of the Convention provides for the absolute liability of the launching State for damage caused by its space object:

¹⁴² Article XV of the Convention reads:

“1. Each Contracting State undertakes to take all measures necessary to prevent a nuclear ship flying its flag from being operated without a licence or authority granted by it.

“2. In the event of nuclear damage involving the nuclear fuel of, or radioactive products or waste produced in, a nuclear ship flying the flag of a Contracting State, the operation of which was not at the time of the nuclear incident licensed or authorized by such Contracting State, the owner of the nuclear ship at the time of the nuclear incident shall be deemed to be the operator of the nuclear ship for all the purposes of this Convention, except that his liability shall not be limited in amount.

“3. In such an event, the Contracting State whose flag the nuclear ship flies shall be deemed to be the licensing State for all the purposes of this Convention and shall, in particular, be liable for compensation for victims in accordance with the obligations imposed on a licensing State by article III and up to the limit laid down therein.

“4. Each Contracting State undertakes not to grant a licence or other authority to operate a nuclear ship flying the flag of another State. However, nothing in this paragraph shall prevent a Contracting State from implementing the requirements of its national law concerning the operation of a nuclear ship within its internal waters and territorial sea.”

A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight.

167. In the event of an accident involving two space objects and causing injury to a third State or its nationals, both launching States are liable to the third State, as provided in article IV.¹⁴³

168. Furthermore, article V provides that, when two or more States jointly launch a space object, they are both jointly and severally liable for any damage the space object may cause.¹⁴⁴

169. Paragraphs 1 and 2 of article XXII provide that, if the launching entity is an international intergovernmental organization, it has the same liability as a launching State.

170. The same article further provides, in paragraphs 3 and 4, that, independently of the launching international intergovernmental organization, those of its members that are parties to the Convention are also jointly and severally liable.¹⁴⁵

¹⁴³ Article IV reads:

“1. In the event of damage being caused elsewhere than on the surface of the earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, and of damage thereby being caused to a third State or to its natural or juridical persons, the first two States shall be jointly and severally liable to the third State, to the extent indicated by the following:

“(a) If the damage has been caused to the third State on the surface of the earth or to aircraft in flight, their liability to the third State shall be absolute;

“(b) If the damage has been caused to a space object of the third State or to persons or property on board, that space object elsewhere than on the surface of the earth, their liability to the third State shall be based on the fault of either of the first two States or on the fault of persons for whom either is responsible.

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

¹⁴⁴ Article V reads:

“1. Whenever two or more States jointly launch a space object, they shall be jointly and severally liable for any damage caused.

“2. A launching State which has paid compensation for damage shall have the right to present a claim for indemnification to other participants in the joint launching. The participants in a joint launching may conclude agreement regarding the apportioning among themselves of the financial obligation in respect of which they are jointly and severally liable. Such agreements shall be without prejudice to the right of a State sustaining damage to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.

“3. A State from whose territory or facility a space object is launched shall be regarded as a participant in a joint launching.”

¹⁴⁵ Paragraphs 3 and 4 of article XXII read:

“3. If an international intergovernmental organization is liable for damage by virtue of the provisions of this Convention, that or-

171. Finally, the United Nations Convention on the Law of the Sea provides in article 139 that States parties to the Convention shall ensure that activities in the “Area” (meaning, underwater areas and seabeds beyond national jurisdictions), whether carried out by the State or its nationals, are in conformity with the Convention. When a State party fails to carry out its obligation, it will be liable for damage. The same liability is imposed upon an international organization for activities in the “Area”. In this case, States members of international organizations acting together bear joint and several liability. States members of international organizations involved in activities in the “Area” must ensure the implementation of the requirements of the Convention with respect to those international organizations.¹⁴⁶

172. Similarly, article 263 of the Convention provides that States and international organizations shall be liable for damage caused by pollution of the marine environment arising out of marine scientific research undertaken by them or on their behalf.

2. JUDICIAL DECISIONS AND STATE PRACTICE OUTSIDE TREATIES

173. Judicial decisions, official correspondence and inter-State relations show that, in certain circumstances, States are held accountable for the private activities con-

duction and those of its members which are States Parties to this Convention shall be jointly and severally liable; provided, however, that:

“(a) any claim for compensation in respect of such damage shall be first presented to the organization;

“(b) only where the organization has not paid, within a period of six months, any sum agreed or determined to be due as compensation for such damage, may the claimant State invoke the liability of the members which are States Parties to this Convention for the payment of that sum.

“4. Any claim, pursuant to the provision of this Convention, for compensation in respect of damage caused to an organization which has made a declaration in accordance with paragraph 1 of this article shall be presented by a State member of the organization which is a State Party to this Convention.”

¹⁴⁶ Article 139 of the Convention (Responsibility to ensure compliance and liability for damage) reads:

“1. States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.

“2. Without prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability. A State Party shall not however be liable for damage caused by any failure to comply with this part by a person whom it has sponsored under article 153, paragraph 2 (b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and annex III, article 4, paragraph 4.

“3. States Parties that are members of international organizations shall take appropriate measures to ensure the implementation of this article with respect to such organizations.”

ducted within their territorial jurisdiction and for the activities they themselves conduct within or beyond the limits of their territorial border. Even when States have refused to accept liability as a legal principle, they have nevertheless acted as though they accepted such liability, whatever the terms used to describe their position. Most of the cases and incidents examined in this section relate to activities conducted by States.

174. In its judgment of 9 April 1949 in the *Corfu Channel* case (merits), ICJ imposed liability upon Albania for failure to notify British shipping of a dangerous situation in its territorial waters, whether or not that situation had been caused by the Government of Albania. ICJ found that it was the obligation of Albania to notify, for the benefit of shipping in general, the existence of mines in its territorial waters, not only by virtue of the Hague Convention No. VIII of 1907, but also of “certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war, ... and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”.¹⁴⁷ The Court found that no attempt had been made by Albania to prevent the disaster and it therefore held Albania “responsible under international law for the explosions ... and for the damage and loss of human life”.¹⁴⁸

175. In its claim against the USSR in 1979 following the accidental crash on Canadian territory of the nuclear-powered Soviet satellite, *Cosmos-954*, Canada sought to impose “absolute liability” on the Soviet Union by reason of the damage caused by the accident. In arguing the liability of the Soviet Union, Canada invoked not only “relevant international agreements”, including the Convention on International Liability for Damage Caused by Space Objects, but also “general principles of international law”.¹⁴⁹

176. In connection with the construction of a highway in Mexico, in proximity to the border with the United States of America, the United States Government, considering that, notwithstanding the technical changes that had been made in the project at its request, the highway did not offer sufficient guarantees for the security of property situated in United States territory, reserved its rights in the event of damage resulting from the construction of the highway. In a note addressed on 29 July 1959 to the Minister of Foreign Relations of Mexico, the United States Ambassador to Mexico concluded:

In view of the foregoing, I am instructed to reserve all the rights that the United States may have under international law in the event that damage in the United States results from the construction of the highway.¹⁵⁰

¹⁴⁷ *I.C.J. Reports 1949*, p. 22.

¹⁴⁸ *Ibid.*, p. 36. For diverse views as regards whether this judgment establishes strict liability for States, see paras. 96 and 97 above.

¹⁴⁹ See footnote 96 above.

¹⁵⁰ See *Digest of International Law* (Washington, D.C.), Marjorie M. Whiteman, ed., vol. 6, 1968, p. 262.

177. In the case of the Rose Street Canal, both the United States and Mexico reserved the right to invoke the accountability of the State whose construction activities might cause damage in the territory of the other State.¹⁵¹

178. In the correspondence between Canada and the United States regarding the United States Cannikin underground nuclear tests on Amchitka, Canada reserved its rights to compensation in the event of damage.¹⁵²

179. The series of United States nuclear tests on Eniwetok Atoll on 1 March 1954 caused injuries extending far beyond the danger area: they injured Japanese fishermen on the high seas and contaminated a great part of the atmosphere and a considerable quantity of fish, thus seriously disrupting the Japanese fish market. Japan demanded compensation. In a note dated 4 January 1955, the United States Government, completely avoiding any reference to legal liability, agreed to pay compensation for injury caused by the tests:

... The Government of the United States of America has made clear that it is prepared to make monetary compensation as an additional expression of its concern and regret over the injuries sustained.

... The United States of America hereby tenders, *ex gratia*, to the Government of Japan, without reference to the question of legal liability, the sum of two million dollars for purposes of compensation for the injuries or damages sustained as a result of nuclear tests in the Marshall Islands in 1954.

...

It is the understanding of the Government of the United States of America that the Government of Japan, in accepting the tendered sum of two million dollars, does so in full settlement of any and all claims against the United States of America or its agents, nationals or juridical entities for any and all injuries, losses or damages arising out of the said nuclear tests.¹⁵³

180. In the case of the injuries sustained in 1954 by the inhabitants of the Marshall Islands, then a Trust Territory administered by the United States of America, the latter agreed to pay compensation. A report of the Committee on Interior and Insular Affairs of the United States Senate stated that, owing to an unexpected wind shift immediately following the nuclear explosion, the 82 inhabitants of the Rongelap Atoll had been exposed to heavy radioactive fallout. After describing the injuries to persons and property suffered by the inhabitants and the immediate and extensive medical assistance provided by the United States, the report concluded: "It cannot be said, however, that the compensatory measures heretofore taken are fully adequate ..." The report disclosed that in February 1960 a complaint against the United States had been lodged with the high court of the Trust Territory with a view to obtaining US\$ 8,500,000 as compensation for property damage, radiation sickness, burns, physical and mental agony, loss of consortium and medical expenses. The suit had been dismissed for lack of jurisdiction. The report indicated, however, that bill

No. 1988 (on payment of compensation) presented in the House of Representatives was "needed to permit the United States to do justice to these people". On 22 August 1964, President Johnson signed into law an act under which the United States assumed "compassionate responsibility" to compensate inhabitants of the Rongelap Atoll, in the Trust Territory of the Pacific Islands, for radiation exposures sustained by them as a result of a thermonuclear detonation at Bikini Atoll in the Marshall Islands on 1 March 1954 and authorized US\$ 950,000 to be paid in equal amounts to the affected inhabitants of Rongelap.¹⁵⁴ According to another report, in June 1982 the Reagan Administration was prepared to pay US\$ 100 million to the Government of the Marshall Islands in settlement of all claims against the United States by islanders whose health and property had been affected by United States nuclear weapons tests in the Pacific between 1946 and 1963.¹⁵⁵

181. The arbitral award rendered on 27 September 1968 in the Gut Dam case also bears on State liability. In 1874, a Canadian engineer had proposed to his Government the construction of a dam between Adam Island, in Canadian territory, and Les Galops Island, in the United States, in order to improve navigation on the St. Lawrence River. Following investigations and the exchange of many reports, as well as the adoption of legislation by the United States Congress approving the project, the Canadian Government undertook the construction of the dam in 1903. However, it soon became clear that the dam was too low to serve the desired purposes and, with United States permission, Canada increased its height. Between 1904 and 1951, several man-made changes affected the flow of water in the Great Lakes-St. Lawrence River Basin. While the dam itself was not altered in any way, the level of the waters in the river and in nearby Lake Ontario increased. In 1951-1952, the waters reached unprecedented levels which, in combination with storms and other natural phenomena, resulted in extensive flooding and erosion, causing injuries on both the north and south shores of the lakes. In 1953, Canada removed the dam as part of the construction of the St. Lawrence Seaway, but the United States claims for damages allegedly resulting from the presence of the Gut Dam continued to fester for some years.¹⁵⁶

182. The Lake Ontario Claims Tribunal, established in 1965 to resolve the matter, recognized the liability of Canada, without finding any fault or negligence on the part of Canada. The Tribunal, of course, relied a great deal on the terms of the second condition stipulated in the instrument signed on 18 August 1903 and 10 October 1904, whereby the United States Secretary of War had approved construction of the dam, as well as on Canada's unilateral acceptance of liability. Furthermore, the Tribunal found Canada liable not only towards the inhabitants of Les

¹⁵¹ *Ibid.*, pp. 263 *et seq.*

¹⁵² See *International Canada* (Toronto), vol. 2, 1971, p. 97.

¹⁵³ *Department of State Bulletin* (Washington, D.C.), vol. 32, No. 812, 17 January 1955, pp. 90-91.

¹⁵⁴ See *Digest of International Law* (footnote 150 above), vol. 4, 1965, p. 567.

¹⁵⁵ See *International Herald Tribune*, 15 June 1982, p. 5, col. 2.

¹⁵⁶ See the report of the United States agent before the Lake Ontario Claims Tribunals, "Canada-United States Settlement of Gut Dam Claims (September 27, 1968)", ILM, vol. 8, 1969, pp. 128-138.

Galops in connection with the injuries caused by the dam, but also towards all United States citizens. Such responsibility was, moreover, found not to be limited in time to some initial testing period. The Tribunal concluded that the only questions remaining to be settled were whether the Gut Dam had caused the damage for which claims had been filed and the amount of compensation.

183. Other transboundary incidents have occurred owing to activities carried out by Governments within their territories, with effects on a neighbouring State, but they have not given rise to official demands for compensation. These incidents have of course been minor and of an accidental nature.

184. In 1949, Austria made a formal protest to the Hungarian Government for installing mines in its territory close to the Austrian border, and demanded their removal, but it did not claim compensation for injuries caused by the explosion of some of the mines on its territory. Hungary had apparently laid the mines to prevent illegal passage across the border. Austria was concerned that during a flood the mines might be washed into Austrian territory and endanger the lives of its nationals resident near the border. These protests, however, did not prevent Hungary from maintaining its minefields. In 1966, a Hungarian mine exploded in Austrian territory, causing extensive damage. The Austrian Ambassador lodged a strong protest with the Hungarian Foreign Ministry, accusing Hungary of violating the uncontested international legal principle according to which measures taken in the territory of one State must not endanger the lives, health and property of citizens of another State. Following a second accident, occurring shortly after, Austria again protested to Hungary, stating that the absence of a public commitment by Hungary to take all measures to prevent such accidents in the future was totally inconsistent with the principle of "good neighbourliness". Hungary subsequently removed or relocated all minefields away from the Austrian border.¹⁵⁷

185. In October 1968, during a shooting exercise, a Swiss artillery unit erroneously fired four shells into the territory of Liechtenstein. The facts concerning this incident are difficult to ascertain. However, the Swiss Government, in a note to the Government of Liechtenstein, expressed regret for the involuntary violation of the frontier. The Swiss Government stated that it was prepared to compensate all damage caused and that it would take all necessary measures to prevent a recurrence of such incidents.¹⁵⁸

186. Judicial decisions and official correspondence demonstrate that States have agreed to assume liability for the injurious impact of activities by private entities operating within their territory. The legal basis for such State liability appears to derive from the principle of territorial sovereignty, a concept investing States with

exclusive rights within certain portions of the globe. This concept of the function of territorial sovereignty was emphasized in the *Island of Palmas* case (4 April 1958).¹⁵⁹ The arbitrator in that case stated that territorial sovereignty:

... cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.¹⁶⁰

187. This concept was later formulated in a more realistic way, namely, that actual physical control is the sound basis for State liability and responsibility. ICJ, in its advisory opinion of 21 June 1971 concerning Namibia, stated:

... Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.¹⁶¹

188. From this perspective, the liability of States for extraterritorial damage caused by private persons under their control is an important issue to be examined in the context of this study. The following are examples of State practice touching upon this source of State liability.

189. In 1948, a munitions factory in Arcisate, in Italy, near the Swiss frontier, exploded and caused varying degrees of damage in several Swiss communes. The Swiss Government demanded reparation from the Italian Government for the damage sustained; it invoked the principle of good neighbourliness and argued that Italy was liable since it tolerated the existence of an explosives factory, with all its attendant hazards, in the immediate vicinity of an international border.¹⁶²

190. In 1956, the River Mura, forming the international boundary between the former Yugoslavia and Austria, was extensively polluted by the sediments and mud which several Austrian hydroelectric facilities had released by partially draining their reservoirs in order to forestall major flooding. Yugoslavia claimed compensation for the economic loss incurred by two paper mills and for damage to fisheries. In 1959, the two States agreed on a settlement, pursuant to which Austria paid monetary compensation and delivered a certain quantity of paper to Yugoslavia.¹⁶³ Although the settlement was reached in the framework of the Permanent Austro-Yugoslavian Commission for the River Mura, this is a case in which the injured State invoked the direct liability of the controlling State and the controlling State accepted the claim to pay compensation.

¹⁵⁹ *Netherlands v. United States of America*, UNRIIAA, vol. II, p. 829.

¹⁶⁰ *Ibid.*, p. 839.

¹⁶¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 54, para. 118.

¹⁶² P. Guggenheim, "La pratique suisse (1956)", *Annuaire suisse de droit international*, 1957 (Zurich), vol. 14, p. 169.

¹⁵⁷ G. Handl, "Conduct of abnormally dangerous activities in frontier areas: the case of nuclear power plant siting", *Ecology Law Quarterly* (Berkeley, Calif.), vol. 7, 1978, pp. 23–24.

¹⁵⁸ *Annuaire suisse de droit international*, 1969–1970 (Zurich), vol. 26, p. 158.

191. In 1971, the Liberian tanker *Juliana* ran aground and split apart off Niigata, on the west coast of the Japanese island of Honshu. The oil of the tanker washed ashore and extensively damaged local fisheries. The Liberian Government (the flag State) offered 200 million yen to the fishermen for damage, which they accepted.¹⁶⁴ In this affair, the Liberian Government accepted the claims for damage caused by the act of a private person. It seems that no allegations of wrongdoing on the part of Liberia were made at an official diplomatic level.

192. Following the accidental spill of 45,000 litres of crude oil into the sea at Cherry Point, in the State of Washington, and the resultant pollution of Canadian beaches (see para. 159 above), the Canadian Government addressed a note to the United States Department of State in which it expressed its grave concern about this “ominous incident” and noted that “the Government wishe[d] to obtain firm assurances that full compensation for all damages, as well as the cost of clean-up operations, w[ould] be paid by those legally responsible”.¹⁴¹ Reviewing the legal implications of the incident before the Canadian Parliament, the Canadian Secretary of State for External Affairs stated:

We are especially concerned to ensure observance of the principle established in the 1938 *Trail Smelter* arbitration between Canada and the United States. This has established that one country may not permit the use of its territory in such a manner as to cause injury to the territory of another and shall be responsible to pay compensation for any injury so suffered. Canada accepted this responsibility in the *Trail Smelter* case and we would expect that the same principle would be implemented in the present situation. Indeed, this principle has already received acceptance by a considerable number of States and hopefully it will be adopted at the Stockholm Conference as a fundamental rule of international environmental law.¹⁶⁵

¹⁶⁵ *Canadian Yearbook ...* (footnote 141 above), p. 334.

¹⁶³ See G. Handl, “State liability for accidental transnational environmental damage by private persons”, *AJIL*, vol. 74, 1980, pp. 545–546; *The Times*, London, 2 December 1971, p. 8, col. 1.

¹⁶⁴ *The Times*, London, 1 October 1974; *Revue générale de droit international public* (Paris), vol. 80, 1975, p. 842.

193. Canada, referring to the precedent of the *Trail Smelter* case, claimed that the United States was responsible for the extraterritorial damage caused by acts occurring under its territorial control, regardless of whether the United States was at fault. The final resolution of the dispute did not involve the legal principle invoked by Canada; the private company responsible for the pollution offered to pay the costs of the clean-up operations; the official United States response to the Canadian claim remains unclear.

194. In 1973, a major contamination occurred in the Swiss canton of Bâle-Ville owing to the production of insecticides by a French chemical factory across the border. The contamination caused damage to the agriculture and environment of that canton and destroyed some 10,000 litres of milk production per month.¹⁶⁶ The facts about the case and the diplomatic negotiations that followed are difficult to ascertain. The Swiss Government apparently intervened and negotiated with the French authorities in order to halt the pollution and obtain compensation for the damage. The reaction of the French authorities is unclear; it appears, however, that persons injured brought charges in French courts.

195. During negotiations between the United States and Canada regarding a plan for oil prospection in the Beaufort Sea, near the Alaskan border, the Canadian Government undertook to guarantee payment of any damage that might be caused in the United States by the activities of the private corporation that was to undertake the prospection. It should be noted that, although the private corporation was to furnish a bond covering compensation for potential victims in the United States, the Canadian Government accepted liability on a subsidiary basis for payment of the cost of transfrontier damage should the bonding arrangement prove to be inadequate.

¹⁶⁶ L. Cafilisch, “La pratique suisse en matière de droit international public, 1973”, *Annuaire suisse de droit international*, 1974 (Zurich), vol. XXX, p. 147.

CHAPTER III

Exoneration from liability

196. In domestic laws, some grounds for exoneration from liability have been anticipated. For example, in the United States of America, section 2703 (a) of OPA provides for “complete defence”, meaning that a responsible party is not liable if it shows by a preponderance of evidence that:

The discharge and resulting damage or removal costs were caused solely by:

1. An act of God;
2. An act of war;

3. An act or omission of a third party: other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party ... But a “third party” defense is available only if the responsible party establishes by a preponderance of the evidence that it:

A. Exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances; and

B. Took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions.

4. Any combination of the above.¹⁶⁷

197. In addition, section 2702 (d) (1) (A), on the liability of third parties provides, that in any case in which a responsible party establishes that a discharge and the resulting removal costs and damages were caused solely by an act or omission of one or more third parties described in section 2703 (a) (3), the third party shall be treated as the responsible party for the purposes of determining liability. The third party defence of this provision seems illusory. Under section 2702 (d) (1) (B) (i) and (ii), the responsible party shall pay damages to the claimant and shall be entitled by subrogation to all rights of the United States Government and the claimant to recover removal costs and damages from the third party.

198. These defences are not available, if, under section 2703 (c), the responsible party fails or refuses:

1. To report the incident as required by law if the responsible party knows or has reasons to know of the incident;
2. To provide all reasonable cooperation and assistance requested by a responsible official in connection with the removal activities; or
3. Without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 1321 ... or the Intervention on the High Seas Act.¹⁶⁸

199. Also under section 2703 (b) of OPA, a responsible party is not liable to a claimant to the extent that the incident is caused by the gross negligence or wilful misconduct of the claimant. Under sections 2709 and 2710, where a responsible party does not have a complete defence, it may proceed against a third party for contribution in case the discharge was caused, at least in part, by the third party or for indemnity.

200. Similar defences are available under the Federal Water Pollution Control Act (hereinafter called FWPCA), section 1321 (f). They include: (a) an act of God; (b) an act of war; (c) negligence on the part of the United States Government; or (d) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses.

201. The same defences are provided under CERCLA, section 9607 (b). They are as follows:

1. An act of God;
2. An act of war;
3. An act or omission of a third party other than an employee or agent of the defendant or other than one whose act or omission occurs in connection with a contractual relationship existing directly or indirectly with the defendant, if a defendant establishes that:

A. He exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances; and

B. He took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

4. Any combination of the above.¹⁶⁹

202. Article 4 of the Environmental Liability Act of Germany provides for the following grounds for exoneration from liability: (a) damage caused by force majeure (*höhere Gewalt*); and (b) if the damage is “only insubstantial” or “reasonable according to the local conditions”.¹⁷⁰ This exclusion, by virtue of article 5 of the Act, applies only if the facility is “operated properly”, meaning that it has complied with all the required safety regulations.¹⁷¹

203. In inter-State relations as under domestic law, there are certain circumstances in which liability may be ruled out. The principles governing exoneration from liability in inter-State relations are similar to those applying in domestic law, such as contributory negligence, war, civil insurrection and natural disasters of an exceptional character.

A. Treaty practice

204. *Contributory negligence by the injured party* is held in some multilateral conventions to extinguish the total or partial liability of the operator or the acting State. Under article IV, paragraph 2, of the Vienna Convention: “If the injury is caused as a result of the gross negligence of the claimant or an act or omission of such person with intent to cause damage, the competent court may, if its domestic law so provides, relieve the operator wholly or partly from his obligation to pay damage to such person.”

205. Article IV, paragraph 3, of the same convention also provides for exoneration from liability “if the injury is caused by a nuclear incident directly* due to an act of *armed conflict, hostilities, civil war or insurrection**”. Thus, unless “the domestic law of the installation State provides to the contrary, the operator is not liable for nuclear damage caused by a nuclear incident directly due to *a grave natural disaster of an exceptional character**”.

206. Under paragraphs 2 and 3 of article 1 of the 1969 Civil Liability Convention, war, hostilities, civil war, insurrection or natural phenomena of an exceptional, inevitable and irresistible character are elements providing exoneration from liability, independently of negligence on the part of the claimant. Thus, when the damage is wholly caused by the negligence or other wrongful act of any Government or authorities responsible for the

¹⁶⁹ *Ibid.*, p. 37. Where an owner or operator has actual knowledge of a release of a hazardous material at the facility and subsequently transfers the property to another person without disclosing that information, the former owner or operator remains liable and cannot invoke the defence under section 9607 (b) (3).

¹⁷⁰ Hoffman, *loc. cit.* (footnote 71 above), p. 32 and footnote 29.

¹⁷¹ This exclusion applies only if the facility is “operated properly” meaning that it has complied with all the regulatory instructions and that there has been no interruption of the operation. See Hoffman, *loc. cit.* (*ibid.*).

¹⁶⁷ Force, *loc. cit.* (footnote 63 above), p. 35.

¹⁶⁸ *Ibid.*, p. 36.

maintenance of lights or other navigational aids, the owner is exonerated from liability. Again the burden of proof is on the shipowner.¹⁷²

207. Under the Convention on International Liability for Damage Caused by Space Objects, if the launching State proves that the damage caused to the claimant State has been wholly or partly the result of *gross negligence* or of an act or omission of the claimant or its nationals with intent to cause damage, it will be exonerated from liability.¹⁷³

208. Under the Additional Convention to CIV, if a passenger suffers injuries due to his own wrongful act or neglect or his behaviour not in conformity with the normal conduct of a passenger, he will have no right of action against the railway. The railway in such cases will be relieved wholly or partially from liability. The Additional Convention, in its article 2, paragraphs 3 and 4, provides:

3. The railway shall be relieved wholly or partly of liability to the extent that the accident is due to the passenger's wrongful act or neglect or to behaviour on his part not in conformity with the normal conduct of passengers.

4. The railway shall be relieved of liability if the accident is due to a third party's behaviour which the railway, in spite of taking the care required in the particular circumstances of the case, could not avoid and the consequences of which it was unable to prevent.

209. Under the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, if injury is caused solely through the negligence or other wrongful act or omission of the injured person or his servants or agents, the compensation shall be reduced to the extent to which the negligence or other wrongful act contributed to the damage.¹⁷⁴

¹⁷² Paragraphs 2 and 3 of article III of the Convention read:

"2. No liability for pollution damage shall attach to the owner if he proves that the damage:

"(a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or

"(b) was wholly caused by an act or omission done with the intent to cause damage by a third party, or

"(c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

"3. If the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person."

¹⁷³ Paragraph 1 of article VI of the Convention reads:

"1. Subject to the provisions of paragraph 2 of this article, exoneration from absolute liability shall be granted to the extent that a launching State establishes that the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant State or of natural or juridical persons it represents."

¹⁷⁴ Article 6 of the Convention reads:

"1. Any person who would otherwise be liable under the provisions of this Convention shall not be liable for damage if he proves that the damage was caused solely through the negligence or other

210. Under article 3, paragraph 3, and article 7, paragraph 5, of the draft convention on liability and compensation in connection with the carriage of noxious and hazardous substances by sea,¹⁷⁵ if the owner of the ship or the shipper of noxious substances proves that the damage resulted wholly or partially either from an act of omission done with the intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner or the shipper may be exonerated wholly or partially from his liability to such person.

211. Article 3, paragraph 2, of the draft convention provides that no liability shall attach to the owner of the ship or the shipper if he proves that the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional and irresistible character, or was wholly caused by an act or omission done with the intent to cause damage by a third party. It was proposed that another subparagraph should be included in the article in which exoneration from liability of the owner or the shipper would be provided for if the damage was wholly caused by negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids. There is, however, no indication in the draft convention whether or not the negligent State is liable for damage. Article 3 does not appear to provide for exoneration from liability for damage caused by natural disaster.

212. Article 3 of the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources provides that the operator of an installation shall be exonerated from liability "if he proves that the damage resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character"; or "if the operator proves that the damage resulted wholly or partly either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, he may be exonerated wholly or partly from his liability to such person." Furthermore, "the operator of an abandoned well is not liable for pollution damage if he proves that the incident which caused the damage occurred more than five years after the date on which the well was abandoned under the authority and in accordance with the requirements of the controlling State. If the

wrongful act of omission of the person who suffers the damage or of the latter's servants or agents. If the person liable proves that the damage was contributed to by the negligence or other wrongful act or omission of the person who suffers the damage, or of his servants or agents, the compensation shall be reduced to the extent to which such negligence or wrongful act or omission contributed to the damage. Nevertheless there shall be no such exoneration or reduction if, in the case of the negligence or other wrongful act or omission of a servant or agent, the person who suffers the damage proves that his servant or agent was acting outside the scope of his authority.

"2. When an action is brought by one person to recover damages arising from the death or injury of another person, the negligence or other wrongful act or omission of such other person, or of his servants or agents, shall also have the effect provided in the preceding paragraph."

¹⁷⁵ See footnote 88 above.

well has been abandoned in other circumstances, the liability of the operator is governed by the applicable national law”.

213. Under article 5, paragraph 4, of CRTD, the carrier shall not be liable if the carrier can prove that “(a) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or (b) the damage was wholly caused by an act or omission with the intent to cause damage by a third party; or (c) the consignor or any other person failed to meet his obligation to inform him of the dangerous nature of the goods, and that neither he nor his servants or agents knew or ought to have known of their nature”.

214. Article 139 of the United Nations Convention on the Law of the Sea also provides for exoneration from liability of the State for damage caused by any failure of a person whom the State has sponsored to comply with regulations on seabed mining, if the State party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and annex III, article 4, paragraph 4, of the Convention. Article 153, paragraph 2 (b), deals with joint activities undertaken by the International Seabed Authority, or by natural or juridical persons, or by States parties to exploit seabed resources. Article 153, paragraph 4, provides for control by the Authority over activities undertaken by States parties, their enterprises or nationals.

215. Article 8 of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment provides the grounds for exoneration from liability of the operator. They include act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; acts by a third party which are considered to be outside the control of the operator, and compliance with compulsory measures.¹⁷⁶ According to the explanatory report on the Convention, adopted by the Council of Europe, administrative authorization to conduct the activity or compliance with the requirements of such authorization is not in itself a ground for exoneration from liability. The Con-

vention also provides that pollution at a tolerable level should be a ground for exemption. The level of pollution which is considered tolerable shall be determined in the light of local conditions and circumstances: the aim of this provision is to avoid extending the regime of strict liability to “acceptable inconveniences”. It is for the competent court to decide which inconveniences are acceptable having regard to local circumstances. The Convention also permits for exemption from liability when a dangerous activity is carried out in the interests of the person suffering damage. This situation covers in particular activities undertaken in emergency cases, and those carried out with the consent of the person who has suffered damage. Under article 9 of the Convention, the court may reduce or disallow compensation to an injured person, “if the injury was caused by the fault of the injured person, or by the fault of a person for whom he is responsible”.

216. Exoneration from liability is stipulated in a few bilateral agreements. It is provided for only in the case of injuries resulting from operations of assistance to the other party, or in such circumstances as war or major calamities. Under the Convention on mutual assistance between French and Spanish fire and emergency services,¹⁷⁷ the party called upon to provide assistance is exonerated from liability for any damage that may be caused to third parties. Again, the Treaty relating to the cooperative development of the water resources in the Columbia River Basin provides, in article XVIII, that neither of the contracting parties shall be liable for injuries resulting from an act, an omission or a delay resulting from war, strikes, major calamity, act of God, uncontrollable force or maintenance curtailment.¹⁷⁸

B. Judicial decisions and State practice outside treaties

217. The few judicial decisions and sparse official correspondence relevant to liability reveal no incident in which a claim for exoneration from liability has been invoked. In the few cases where the acting State has not paid compensation for injuries caused, the injured State does not appear to have agreed with such conduct or recognized it to be within the right of the acting State. Even after the injuries caused by the nuclear tests which,

¹⁷⁶ Article 8 of the Convention reads:

“Article 8. Exemptions

“The operator shall not be liable under this Convention for damages which he proves:

“(a) was caused by an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional inevitable and irresistible character;

“(b) was caused by an act done with the intent to cause damage by a third party, despite safety measures appropriate to the type of dangerous activity in question;

“(c) resulted necessarily from compliance with a specific order or compulsory measure of a public authority;

“(d) was caused by pollution at tolerable levels under local relevant circumstances; or

“(e) was caused by a dangerous activity taken lawfully in the interests of the person who suffered the damage, whereby it was reasonable towards this person to expose him to the risks of the dangerous activity.”

¹⁷⁷ Madrid, 14 July 1959 and 8 February 1973 (United Nations, *Treaty Series*, vol. 951, p. 135).

¹⁷⁸ Washington, 17 January 1961 (United Nations, *Treaty Series*, vol. 542, p. 245). Article XVIII, paragraphs 1 and 2, reads:

“1. Canada and the United States of America shall be liable to the other and shall make appropriate compensation to the other in respect of any act, failure to act, omission or delay amounting to a breach of the Treaty or of any of its provisions other than an act, failure to act, omission or delay occurring by reason of war, strike, major calamity, act of God, uncontrollable force or maintenance curtailment.

“2. Except as provided in paragraph 1, neither Canada nor the United States of America shall be liable to the other or to any person in respect of any injury, damage or loss occurring in the territory of the other caused by any act, failure to act, omission or delay under the Treaty whether the injury, damage or loss results from negligence or otherwise.”

according to the United States Government, had been necessary for reasons of security, that Government paid

compensation for one reason or another without seeking to evade liability.

CHAPTER IV

Compensation

218. State practice relates to both the content and the procedure of compensation. Some treaties provide for a limitation of compensation (limited liability) in case of injuries. These treaties relate principally to activities generally considered essential to present-day civilization, such as the transport of goods and transport services by air, land and sea. The signatories to such treaties have agreed to tolerate such activities, with the potential risks they entail, provided the damage they may cause is compensated. However, the amount of the compensation to be paid for injuries caused is generally set at a level which, from an economic point of view, does not paralyse the pursuit of these activities or obstruct their development. Clearly, this is a deliberate policy decision on the part of the signatories to treaties regulating such activities and, in the absence of such treaties, judicial decisions do not appear to have set limits on the amount of compensation. The study of judicial decisions and official correspondence has not revealed any substantial limitation on the amount of compensation, although some sources indicate that it must be "reasonable" and that the parties have a duty to "mitigate damages".

A. Content

1. COMPENSABLE INJURIES

219. In a number of domestic laws, compensable injuries include at least death, personal injuries and property damage for torts incurring strict liability. For example, the 1990 German Environmental Liability Act provides in its section 1 that if anyone suffers death, personal injury, or property damage due to an environmental impact emitted from one of the facilities named, then the owner of the facility shall be liable to the injured person for the damages caused thereby.⁷³

220. In the United States of America, some federal legislation goes even further and includes cost of clean-up and damage to the environment as well. Section 2707 (a) of OPA makes a responsible party liable for removal costs. "Removal costs" are defined as "the costs of removal that are incurred after a discharge of oil ... the costs to prevent, minimize, or mitigate oil pollution from such incident".¹⁷⁹ A responsible party may recover removal costs incurred by it from the Oil Spill Liability Trust Fund where it is entitled to a complete defence. Also section 9607 (a) of CERCLA states that the owner and operator of a vessel or facility from which there is a release or a threatened release of a hazardous substance

which causes the incurrence of response costs shall be liable for:

A. All costs of removal or remedial action incurred by the United States Government or a state or an Indian tribe not inconsistent with the national contingency plan;

B. Any necessary costs of response incurred by any other person consistent with the national contingency plan;

...

D. The costs of any health assessment or health defects study carried out under section 9604 (i) of the Act.¹⁸⁰

221. Some domestic judicial decisions have dealt with the question of how to evaluate costs of clean-up and restoration. This issue was discussed as early as 1908 in an English court in the case of *Lodge Holes Colliery Co. v. Mayor of Wednesbury*,¹⁸¹ where the defendants' mining operations caused a public road to collapse. The local authorities restored the road to its former level, but at great cost. The House of Lords held that the principle of *restitutio in integrum* did not entitle the plaintiffs to the cost of precise restoration, regardless of the cost. The plaintiffs were entitled to recover from the defendants only the cost of construction of an equally suitable road. This policy was applied in 1980 in the case of *Dodd Properties (Kent) v. Canterbury City Council*.¹⁸² In assessing the damages to the building of the plaintiffs caused by pile-driving operations of the defendants, the court said:

The plaintiffs are ... not bound to accept a shoddy job or put up with an inferior building for the sake of saving expense to the defendants. But I [the judge] do not consider that they are entitled to insist on complete and meticulous restoration when a reasonable building owner would be content with less extensive work which produces a result which does not diminish to any, or any significant, extent the appearance, life or utility of the building, and when there is also a vast difference in the cost of such work and the cost of meticulous restoration.¹⁸³

222. A similar question arose in the United States First Circuit Court of Appeals in 1980 in the case of *Commonwealth of Puerto Rico v. The S.S. Zoe Colocotroni*.¹⁸⁴ The case concerned an oil tanker which ran aground because of its unseaworthy condition, causing pollution

¹⁸⁰ *Ibid.*, p. 31.

¹⁸¹ Cited by Colin de la Rue, in "Environmental damage assessment", *Transnational Environmental Liability and Insurance*, (footnote 63 above), pp. 70-71, and footnote 1.

¹⁸² *Ibid.*, p. 71 and footnote 2.

¹⁸³ *Ibid.*

¹⁸⁴ U.S. Court of Appeals, 628 F. 2 d, p. 652 (1st Cir., 1980). Cited by de la Rue (footnote 181 above), p. 71 and footnote 3.

¹⁷⁹ Force, loc. cit. (footnote 63 above), p. 30, footnote 31.

damage to the coast of Puerto Rico. First, the Puerto Rico authorities were awarded US\$ 6 million, of which only US\$ 78,000 was needed for cleaning up. The remainder was the cost of replanting mangroves and replacing marine organisms killed by the spill. The Court of Appeals did not endorse this approach. Emphasizing the need for a sense of proportion in assessing such costs, the Court observed:

[Recoverable costs are costs] reasonably to be incurred ... to restore or rehabilitate the environment in the affected area to its pre-existing condition, or as close thereto as is possible without grossly disproportionate expenditures. The focus in determining such a remedy should be the steps a reasonable and prudent sovereign or agency would take to mitigate the harm done by the pollution, with attention to such factors as technical feasibility, harmful side effects, compatibility with or duplication of such regeneration as is naturally to be expected, and the extent to which efforts beyond a certain point would become either redundant or disproportionately expensive.¹⁸⁵

223. Section 311 (f) of FWPCA also provides for recovery of the expenses of replacing and restoring *natural resources* that had been damaged or destroyed.

224. Section 2706 of OPA states that a governmental entity may recover “damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage”.¹⁸⁶ Section 2701 of the Act defines “natural resources” as including “land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any state or local government or Indian tribe, or any foreign government”.¹⁸⁷ As regards measure of damages, subsection 2706 (d) of the Act states the following:

A. The cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources;

B. The diminution of those natural resources pending restoration; plus

C. The reasonable cost of assessing those damages.¹⁸⁵

225. Section 2702 (b) (2) of OPA authorizes the United States Government, as well as a state and a political subdivision to recover “damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources ...” and “damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil”.¹⁸⁸

226. CERCLA also provides in section 9607 (a) for damages for injury to natural resources: “Damages for injuries to, destruction of, or loss of natural resources, including the reasonable cost of assessing such injury,

destruction, or loss resulting from such a release.” Damages recovered may only be used to restore, replace or acquire the equivalent of the damage to natural resources.¹⁸⁹

227. In the case of the *Exxon Valdez* oil tanker, which ran aground on 24 March 1989 in Alaska’s Prince William Sound, and resulted in the largest oil spill in United States history, the United States Government, while taking steps in the cleaning up operation, conducted a study on measuring damages to the environment.¹⁹⁰ That study was never released, because the case was settled out of court. The settlement called Exxon to pay US\$ 25 million in criminal penalties and US\$ 100 million in restitution to federal and state agencies for *repairs to the damaged environment of Prince William Sound*. In consideration of the US\$ 2.5 billion spent by Exxon by the time of settlement for cleaning up the spill, another US\$ 125 million in criminal fines was forgiven. This settlement was only with federal and state authorities and did not include private claims.

228. Damage to private individuals either in the form of personal injuries or loss of property has also been considered recoverable under domestic law. For example, under section 2702 (b) of OPA, any person may recover “damages for injury to, or economic losses resulting from the destruction of real [immovables] or personal [movables] property which shall be recoverable by a claimant who owns or leases that property”.¹⁹¹ It also allows any person who uses natural resources which have been injured, destroyed or lost to recover damages for loss of subsistence use of natural resources, without regard to the ownership or management of the resources. The subsection also provides that any person may recover damages equal to *the loss of profits or impairment of earning capacity* due to the injury, destruction, or loss of real property, personal property, or natural resources.

229. CERCLA did not expressly create the right of action for damages for private persons except, under certain circumstances, for removal costs. However, section 9607 (h) of the Act was amended to remedy this problem. It now provides that the owner or operator of a vessel shall be liable under maritime tort law and as provided under section 9614 of the Act, notwithstanding any provision on limitation of liability or the absence of any physical damage to the proprietary interest of the claimant.¹⁹²

230. As regards the determination of whether there has been lost profit, in the United Kingdom of Great Britain and Northern Ireland the rule of “remoteness” has tended to exclude claims for “pure economic loss”.¹⁹³ This is illustrated in the case of *Weller and Co v. Foot and*

¹⁸⁵ Ibid.

¹⁸⁶ Cited by Force (footnote 63 above), p. 32 and footnote 37.

¹⁸⁷ Ibid. and footnote 39.

¹⁸⁸ Ibid., p. 33, and footnotes 42–43.

¹⁸⁹ Ibid., p. 32.

¹⁹⁰ See footnote 70 above. For a study of potential damage to the environment, see Frank B. Cross, “Natural resources damage valuation”, *Vanderbilt Law Review*, vol. 42, No. 2, March 1989, pp. 270 *et seq.*

¹⁹¹ Cited by Force (footnote 63 above), p. 33 and footnote 44.

¹⁹² Ibid., p. 34.

¹⁹³ De la Rue, *loc. cit.* (footnote 181 above), p. 73.

Mouth Disease Research Institute, where cattle had been infected with foot and mouth disease by a virus that escaped from the defendant's premises. The Government of the United Kingdom made an order closing two markets in the area, causing a loss of profits to the plaintiff auctioneers. The court held that the defendant owed a duty of care to the cattle owners, but not to the auctioneers who did not have any proprietary interest which could have been damaged by the escape of the virus. It has been observed that this rule of "remoteness" is normally applied with considerable flexibility, taking into account policy considerations.¹⁹¹

(a) *Treaty practice*

231. Under a number of conventions, material injuries such as loss of life, loss of or damage to property are compensable injuries. Article I of the Vienna Convention defines nuclear damage as follows:

1. For the purposes of this Convention,

...

(k) "Nuclear damage" means

(i) Loss of life, any personal injury or any loss of, or damage to, property which arises out of or results from the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or radioactive products or waste in, or of nuclear material coming from, originating in, or sent to, a nuclear installation;

...

(iii) If the law of the Installation States so provides, loss of life, any personal injury or any loss of, or damage to, property which arises out of or results from other ionizing radiation emitted by any other source of radiation inside a nuclear installation.

232. The Additional Convention to CIV provides for the payment of necessary expenses such as the cost of medical treatment and transport, and compensation for loss due to partial or total incapacity to work and increased expenditure on the injured person's personal requirements necessitated by the injury. In the event of the death of the passenger, the compensation must cover the cost of transport of the body, burial or cremation. If the deceased passenger had a legally enforceable duty to support other persons who are now deprived of such support, such persons are entitled to compensation for their loss. National law governs the right to compensation for those to whom the deceased was providing support on a voluntary basis.¹⁹⁴

¹⁹⁴ Articles 3 and 4 of the Additional Convention read:

"Article 3. Damages in case of death of the passenger"

"1. In the case of the death of the passenger the damages shall include:

"(a) any necessary expenses following on the death, in particular the cost of transport of the body, burial and cremation;

"(b) if death does not occur at once, the damages defined in article 4.

"2. If, through the death of the passenger, persons towards whom he had, or would have had in the future, a legally enforceable duty to maintain are deprived of their support, such persons shall

233. Under the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources, not only pollution damage but also preventive measures are compensable (art. 1, para. 6). Preventive measures are defined as "any reasonable measures taken by any person in relation to a particular incident to prevent or minimize pollution damage with the exception of well-control measures and measures taken to protect, repair or replace an installation" (art. 1, para. 7).

234. The Protocol of 1984 amending the 1969 Civil Liability Convention was intended to increase the maximum amount of compensation under the 1969 Convention. The Protocol also expanded the concept of "pollution damage" as defined in the 1969 Convention.¹⁹⁵ Under article 2, paragraph 3, of the 1984 Protocol, "pollution damage" means:

(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;

(b) the costs of preventive measures and further loss or damage caused by preventive measures.

235. The Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment defined damages in article 2, paragraph 7, as:

(a) Loss of life or personal injury;

(b) Loss or damage to property other than to the installation itself or property held under the control of the operator, at the site of the dangerous activity;

(c) Loss or damage by impairment of the environment insofar as this is not considered to be damage within the meaning of sub-paragraphs (a) or (b), provided that compensation for impairment of the environment, other than for loss of profit from such impairment, shall be limited to the costs of measures of reinstatement actually undertaken;

(d) The costs of preventive measures and further loss or damage caused by preventive measures,

to the extent that the loss or damage referred to in subparagraphs (a) to (c) of this paragraph arises out of or results from the hazardous properties of the dangerous substances, genetically modified organisms or micro-organisms or arises or results from waste.

also be indemnified for their loss. Rights of action for damages by persons whom the passenger was maintaining without being legally bound to do so shall be governed by national law.

"Article 4. Damages in case of personal injury to the passenger"

"In the case of personal injury or any other bodily or mental harm to the passenger the damages shall include:

"(a) any necessary expenses, in particular the cost of medical treatment and transport;

"(b) compensation for loss due to total or partial incapacity to work, or to increased expenditure on his personal requirements necessitated by the injury."

¹⁹⁵ Article 1, paragraph 6, of the Convention defines "pollution damage" as "loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures ..."

236. Article 2, paragraph 8, defines “measures of reinstatement” as “any reasonable measures aiming to reinstate or restore damaged or destroyed components of the environment or to introduce, where reasonable, the equivalent of these components into the environment”. Paragraph 9 defines “preventive measures” as “any reasonable measures taken by any person after an incident has occurred to prevent or minimise loss or damage ...”.

237. The Convention does not address the question of threshold of impairment to the environment in article 2. It attempts to deal with the issue in article 8 on exemptions where paragraph (d) of that article exonerates the operator from liability if the operator can prove that damage “was caused by pollution at tolerable levels under local relevant circumstances”.

238. Article 9 of the Convention specifies that, if the person who suffered damage was responsible for such damage or contributed to such damage, “the compensation may be reduced or disallowed having regard to all the circumstances”.

239. Paragraph 2 of principle 9 (Liability and compensation) of the Principles Relevant to the Use of Nuclear Power Sources in Outer Space, adopted on 14 December 1992 by the General Assembly in its resolution 47/68, provides for *restitutio in integrum*. The relevant part of the paragraph reads: “[The liable State shall] provide such reparation in respect of the damage as will restore the [injured party] ... to the condition which would have existed if the damage had not occurred.”

240. Under the terms of article 8 of the Convention on the Regulation of Antarctic Mineral Resource Activities, the operator is liable for “loss of or damage to property of a third party or loss of life or personal injury” (para. 2 (c)). As such, the operator is also liable for “damage to the Antarctic environment or dependent or associated ecosystems ... in the event that there has been no restoration to the status quo ante” (para. 2 (a)).

241. The same article, furthermore, provides that the liable operator shall provide for “reimbursement of reasonable costs by whomsoever incurred relating to necessary response action, including prevention, containment, clean up and removal measures, and action taken to restore* the status quo ante where Antarctic mineral resource activities undertaken by that Operator result in or threaten to result in damage to the Antarctic environment or dependent or associated ecosystems” (para. 2 (d)).

242. The concept of “damage” has also been defined in article 1, paragraph 10, of CRTD as “(a) loss of life or personal injury ...; (b) loss of or damage to property ...; (c) loss or damage by contamination to the environment caused by the dangerous goods, provided that compensation for impairment of the environment other than for loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; (d) the costs of preventive measures”... Under the last clause of the article, “[w]here it is not reasonably possible to separate damage caused by the dangerous goods from that caused by other

factors, all such damage shall be deemed to be caused by the dangerous goods”. The same definition has been adopted for “damage” in article 1, paragraph 6, of the draft convention on liability and compensation in connection with the carriage of noxious and hazardous substances by sea.¹⁹⁶

243. The draft protocol to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal¹⁹⁷ defines “damage” in article 2 as (a) loss of life or personal injury; (b) loss or damage in accordance with the protocol; (c) loss of profit from impairment of the environment; (d) impairment of the environment, insofar as this is not considered to be within the meaning of the previous subparagraphs; (e) the costs of preventive measures; (f) any loss or damage caused by preventive measures.

244. Article 4 of the draft protocol allows a claimant to invoke the forms or modalities of compensation in respect of damage defined in article 2. With respect to damage to the environment, article 4 ter provides as follows. If the environment can be reinstated, compensation shall be limited to the costs of measures of reinstatement actually undertaken or to be undertaken, or the costs of returning the environment to a comparable state, where reasonable. If the environment cannot be reinstated, either compensation shall be limited to an amount calculated as if the environment could be reinstated, or it shall be calculated only taking into account the intrinsic value of the ecological systems involved (including their aesthetic and cultural values) and in particular the potential loss of value entailed in the destruction of a species or flora or fauna (punitive damages shall not form part of the calculation here). Where compensation is received for damage to the environment that cannot be reinstated, it shall be used for purpose of environmental reinstatement which may include the creation of a comparable environment in another area. Finally, national law shall determine who is entitled to take measures of reinstatement and receive the compensation outlined above.

245. A few conventions dealing with nuclear materials include express provisions concerning damage other than nuclear damage caused by a nuclear incident or jointly by a nuclear incident and other occurrences. To the extent that those injuries are not reasonably separate from nuclear damage, they are considered nuclear damage and consequently compensable under the conventions.¹⁹⁸

¹⁹⁶ See footnote 88 above.

¹⁹⁷ See footnote 83 above.

¹⁹⁸ For example, article IV, paragraph 4, of the Vienna Convention provides:

“4. Whenever both nuclear damage and damage other than nuclear damage have been caused by a nuclear incident or jointly by a nuclear incident and one or more other occurrences, such other damage shall, to the extent that it is not reasonably separable from the nuclear damage, be deemed, for the purposes of this Convention, to be nuclear damage caused by that nuclear incident. Where, however, damage is caused jointly by a nuclear incident covered by this Convention and by an emission of ionizing radiation not

(Continued on next page.)

246. Non-material injuries may also be compensable. Thus it is clearly stated in article 5 of the Additional Convention to CIV that under national law compensation may be required for mental, physical pain and suffering and for disfigurement.¹⁹⁹

247. Under article I of the Vienna Convention, loss or damage are compensable under the law of the competent court. Hence, if the law of the competent court provides for compensability of *non-material injury*, such injury is compensable under the Convention. Article I, paragraph 1 (k) (ii), reads that “nuclear damage” “means any other loss or damage so arising or resulting if and to the extent that the law of the competent court so provides”.

248. Paragraph 3 of principle 9 of the Principles Relevant to the Use of Nuclear Power Sources in Outer Space also provides that “compensation shall include reimbursement of the duly substantiated expenses for search, recovery and clean-up operations, including expenses for assistance received from third parties”.

(b) *Judicial decisions and State practice outside treaties*

249. The few existing judicial decisions and State practice reveal that only material injuries are compensable. Material injuries here refer to physical, tangible or quantitative injuries, as opposed to intangible harm to the dignity of the State. Material injuries which have been compensated in the past include loss of life, personal

injury and loss of or damage to property. This has not, however, prevented States from claiming compensation for non-material injuries.

250. State practice shows that in some cases involving potential or actual nuclear contamination or other damage caused by nuclear accidents, which have given rise to great anxiety, reparation has neither been made nor claimed for non-material injury. The outstanding examples are the Palomares incident (1966) and the Marshall Islands case. The Palomares incident involved the collision between a United States B-52G nuclear bomber and a KC-135 supply plane during a refuelling operation off the coast of Spain, resulting in the dropping of four plutonium-uranium 235 hydrogen bombs, with a destructive power of 1.5 megatons (75 times the power of the Hiroshima bomb).²⁰⁰ This incident created not only substantial material damage, but also gave rise to fears and anxiety throughout the western Mediterranean basin for two months, until the causes of potential damage had been neutralized. Two of the bombs that fell on land ruptured and discharged their TNT, scattering uranium and plutonium particles near the Spanish coastal village of Palomares, thereby causing imminent danger to the health of the inhabitants and the ecology of the area. Immediate remedial action was taken by the United States of America and Spain, and it is reported that the United States removed 1,750 tons of mildly radioactive Spanish soil and buried them in the United States.²⁰¹ The third bomb hit the ground intact, but the fourth bomb was lost somewhere in the Mediterranean. After a two-month search by submarines and growing apprehension among the nations of the Mediterranean area, the bomb was located, but was lost during the operation for nine more days. Finally, after 80 days of the threat of detonation of the bomb, the device was retrieved.

251. Apparently, the United States *did not pay* any compensation for the apprehension caused by the incident, and there was no formal “open discussion” between Spain and the United States about the legal liability. The accident, however, is unique; if the bomb had not been retrieved, the extent of its damage could not have been measured in monetary terms. The United States could not have left the dangerous “instrument” of its activity in or near Spain and discharged its responsibility by paying compensation.

252. Following the nuclear tests in the atmosphere undertaken by the United States in Eniwetok Atoll, in the Marshall Islands (see para. 179 above), the Japanese Government did not demand compensation for non-material injuries. In a note by the United States Government concerning the payment of damages through a global settlement, the United States Government referred to the final

(Footnote 198 continued.)

covered by it, nothing in this Convention shall limit or otherwise affect the liability, either as regards any person suffering nuclear damage or by way of recourse or contribution, of any person who may be held liable in connection with that emission of ionizing radiation.”

Similarly, article IV of the Convention on the Liability of Operators of Nuclear Ships provides:

“Whenever both nuclear damage and damage other than nuclear damage have been caused by a nuclear incident or jointly by a nuclear incident and one or more other occurrences and the nuclear damage and such other damage are not reasonably separable, the entire damage shall, for the purposes of this Convention, be deemed to be nuclear damage exclusively caused by the nuclear incident. However, where damage is caused jointly by a nuclear incident covered by this Convention and by an emission of ionizing radiation or by an emission of ionizing radiation in combination with the toxic, explosive or other hazardous properties of the source of radiation not covered by it, nothing in this Convention shall limit or otherwise affect the liability, either as regards the victims or by way of recourse or contribution, of any person who may be held liable in connection with the emission of ionizing radiation or by the toxic, explosive or other hazardous properties of the source of radiation not covered by this Convention.”

¹⁹⁹ Article 5 of the Additional Convention stipulates:

“National law shall determine whether and to what extent the railway shall be bound to pay damages for injuries other than those for which there is provision in articles 3 and 4, in particular for mental or physical pain and suffering (*pretium doloris*) and for disfigurement.”

²⁰⁰ For further details on this accident, see T. Szuld, *The Bombs of Palomares* (New York, Viking Press, 1967), and F. Lewis, *One of Our H-bombs Is Missing* (New York, McGraw Hill, 1967).

²⁰¹ “Radioactive Spanish earth is buried 10 feet deep in South Carolina”, *The New York Times*, 12 April 1966, p. 28, col. 3.

settlement with the Japanese Government for “any and all injuries, losses, or damages arising out of the said nuclear tests”. It was left to the Japanese Government to determine which individual injuries deserved compensation:

Following nuclear testing on 1 March 1954, at the Eniwetok testing grounds, the Government of Japan announced that injuries from radioactive fallout had been sustained on that date by members of the crew of a Japanese fishing vessel, the *Diago Fukuryu Maru*, which at the time of the test was outside the danger zone previously defined by the United States. On 23 September 1954, the chief radio operator, Aikichi Kuboyama, of the fishing vessel died. By an Agreement effected by exchange of notes on 4 January 1955, which entered into force the same day, the United States tendered, *ex gratia*, “as an additional expression of its concern and regret over the injuries sustained” by Japanese fishermen as a result of the nuclear tests in 1954 in the Marshall Islands, the sum of \$2 million for purposes of compensation for the injuries or damages sustained, and in full settlement of any and all claims on the part of Japan for any and all injuries, losses, or damages arising out of the said nuclear tests. The sum paid was, under the Agreement, to be distributed in such an equitable manner as might be determined by the Government of Japan and included provision for a solatium on behalf of each of the Japanese fishermen involved and for the claims advanced by the Government of Japan for their medical and hospitalization expenses.²⁰²

253. In the *Trail Smelter* case, the tribunal *rejected* the United States proposal that *liquidated* damages be imposed on the operator of the smelter whenever emissions exceeded the predefined limits, regardless of any injuries it might cause. The tribunal, taking the view that only actual *injuries incurred* deserved compensation, stated:

The Tribunal has carefully considered the suggestions made by the United States for a regime by which a prefixed sum would be due whenever the concentrations recorded would exceed a certain intensity for a certain period of time or a certain greater intensity for any twenty minute period.

It has been unable to adopt this suggestion. In its opinion, and in that of its scientific advisers, such a regime would unduly and unnecessarily hamper the operations of the *Trail Smelter* and would not constitute a “solution fair to all parties concerned”.²⁰³

254. It may therefore be assumed that the concept of non-material injury is not accepted in State practice in connection with activities causing extraterritorial injuries. States have not made monetary or other reparation for non-material damage.

255. However, States have sometimes demanded reparation for such damage. In at least one case, a State has demanded compensation for violation of its territorial sovereignty. When the *Cosmos-954* crashed on Canadian territory, Canada demanded compensation for the injuries it had sustained by reason of the crash, including violation by the satellite of its territorial sovereignty. Basing its claim on “international precedents”, Canada stated:

The intrusion of the *Cosmos-954* satellite into Canada’s air space and the deposit on Canadian territory of hazardous radioactive debris from the satellite constitutes a violation of Canada’s sovereignty. This violation is established by the mere fact of the trespass of the satellite, the harmful consequences of this intrusion being the damage caused to Canada by the presence of hazardous radioactive debris and the interference with the *sovereign right of Canada** to determine the acts that

will be performed on its territory. *International precedents recognize that a violation of sovereignty gives rise to an obligation to pay compensation.*²⁰⁴

256. In the *Trail Smelter* case, in reply to the United States claim for damages for wrong done in violation of its sovereignty, the tribunal held that it *lacked jurisdiction*. The tribunal found it unnecessary to decide whether the facts proven did or did not constitute an infringement or violation of sovereignty of the United States under international law independently of the Arbitration Convention.²⁰⁵

257. State practice reveals instances of *potential material damage*. This category of practice is parallel to the role of *injunctio* in judicial decisions, as in the *Nuclear Tests* case. There can certainly be no material injury prior to the operation of a particular injurious activity. Nevertheless, in a few instances, negotiations have taken place to secure the adoption of protective measures, and even to demand the halting of the proposed activity. Such demands have been based on the gravity of the potential damage entailed. The general feeling seems to be that States must take reasonable protective measures to ensure, outside the limits of their territorial sovereignty, the safety and harmlessness of their lawful activities. Of course, the potential harm must be incidental and unintentional; nonetheless, the potentially injured States have the right to demand that protective measures be taken.

258. State practice regarding liability for reparation of actual damage is more settled. There is clearer acceptance of the explicit or implicit liability of States for their behaviour. In connection with a few incidents, States have also accepted responsibility for reparation of *actual damage* caused by the activities of private persons in their territorial jurisdiction or under their control. In the *River Mura* incident (see para. 190 above), the former Yugoslavia claimed damages from Austria for the *economic loss* incurred by two paper mills and by the fisheries, as a result of the extensive pollution caused by the Austrian hydroelectric facilities. In the *Juliana* tanker incident, the flag State, Liberia, offered 200 million yen to the Japanese fishermen in compensation for the damage which they had suffered as a result of the *Juliana* running aground and washing its oil onto the coast of Japan.

259. Compensation has been made where an activity occurring in the shared domain has required the *relocation of people*. In connection with the United States nuclear tests in the Eniwetok Atoll, the compensation entailed payment for temporary usage of land and for *relocation costs*.

260. In the *Trail Smelter* case, the tribunal awarded the United States damages in respect of physical damage to cleared land and uncleared land and buildings by reason of the reduction in crop yield and in the rental value of

²⁰² See *Digest of International Law* (footnote 154 above), p. 565.

²⁰³ UNRIAA (footnote 97 above), p. 1974.

²⁰⁴ See ILM (footnote 96 above), para. 21.

²⁰⁵ UNRIAA (footnote 97 above), p. 1932.

the land and buildings and, in one instance, of *soil impairment*. The denial of damages for other injuries, it appears, resulted mainly from *failure of proof*. With respect to damage to cleared land used for crops, the tribunal found that damage through reduction in crop yield due to fumigation had occurred in varying degrees during each of the years 1932 to 1936, but found no proof of damage in the year 1937. The properties owned by individual farmers which allegedly had suffered damage had been divided by the United States into three classes: (a) properties of "farmers residing on their farms"; (b) properties of "farmers who do not reside on their farms"; (a, b) properties of "farmers who were driven from their farms"; and (c) properties of large landowners. The tribunal did not adopt that division, and adopted as the measure of indemnity to be applied on account of damage in respect of cleared land used for crops the measures of damage which the United States courts applied in cases of nuisance or trespass of the type involved in the case, namely, the amount of reduction in the value of use or rental value of the land caused by fumigations.²⁰⁶

261. The tribunal found that, in the case of farm land, reduction in the value of the use was in general the amount of the reduction of the crop yield arising from injury to crops, less cost of marketing the same.²⁰⁷ In the opinion of the tribunal, the *failure* of farmers to increase their seeded land in proportion to such increase in other localities might also be taken into consideration. This is an example of the *duty to mitigate the injury*.

262. With regard to the problem of abandonment of properties by their owners, the tribunal noted that practically all such properties listed appeared to have been abandoned prior to the year 1932. In order to deal with that problem as well as with that of farmers who had been unable to increase their seeded land, the tribunal decided to estimate the damage on the basis of the *statistical data* available concerning the *average acreage* on which it was reasonable to believe that crops would have been seeded and harvested during the period under consideration but for the fumigations.²⁰⁶

263. With regard to claims for *impairment of the soil content* through increased acidity produced by the sulphur dioxide contained in the waters, the tribunal considered that the evidence put forward in support of that contention was not conclusive, except for one small area in respect of which an indemnity was awarded.²⁰⁶ The tribunal also awarded an indemnity for *reduction in the value* of farms in proximity to the frontier line by reason of their exposure to the fumigations.²⁰⁸

264. With regard to the claim that the fumes had inhibited the growth and reproduction of timber, the tribunal adopted the measure of damages applied in United States

courts, namely, reduction in value of the land itself due to such destruction and impairment:

With regard to damage due to destruction and impairment of growing timber (not of merchantable size), the Tribunal has adopted the measure of damages applied by American courts, viz., the reduction in value of the land itself due to such destruction and impairment. Growing timberland has a value for firewood, fences, etc. as well as a value as a source of future merchantable timber. No evidence has been presented by the United States as to the locations or as to the total amounts of such growing timber existing on 1 January 1932, or as to its distribution into types of conifers—yellow pine, Douglas fir, larch or other trees. While some destruction or impairment, deterioration, and retardation of such growing timber has undoubtedly occurred since such date, it is impossible to estimate with any degree of accuracy the amount of damage. The Tribunal has, however, taken such damage into consideration in awarding indemnity for damage to land containing growing timber.²⁰⁹

265. The United States had *failed to prove* damage in respect of livestock.²¹⁰ Again, proof of damage to property in the town of Northport was also insufficient.²¹¹

266. With regard to damages in respect of business enterprises, the United States had claimed that the businessman had suffered loss of business and impairment of the value of goodwill because of the reduced economic status of the residents of the damaged area. The tribunal found that such damage was too indirect, remote and uncertain to be appraised and not such for which an indemnity could be awarded. In the opinion of the tribunal, the argument that indemnity should be obtained for an injury to or reduction in a man's business due to the inability of his customers or clients to buy—which inability or impoverishment had been caused by a nuisance, even if proved—was too indirect and remote to become the basis, in law, for an award of indemnity.²¹²

267. The United States contention of *pollution of waterways had not been proved* and since the tribunal considered itself bound by the terms of the Arbitration Convention, it did not consider the United States request for indemnity for *money expended in the investigation* undertaken concerning the problems created by the smelter. The United States had made this claim in con-

²⁰⁹ Ibid., p. 1929.

²¹⁰ "With regard to 'damages in respect of livestock', claimed by the United States, the Tribunal is of the opinion that the United States has failed to prove that the presence of fumes from the Trail Smelter has injured either the livestock or the milk or wool productivity of livestock since 1 January 1932, through impaired quality of crop or grazing. So far as the injury to livestock is due to reduced yield of crop or grazing, the injury is compensated for in the indemnity which is awarded herein for such reduction of yield." (UNRIAA (footnote 97 above), p. 1931.)

²¹¹ "With regard to 'damages in respect of property in the town of Northport', the same principles of law apply to assessment of indemnity to owners of urban land as apply to owners of farm and other cleared land, namely, that the measure of damage is the reduction in the value of the use or rental value of the property, due to fumigations. The Tribunal is of the opinion that there is no proof of damage to such urban property; that even if there were such damage, there is no proof of facts sufficient to enable the Tribunal to estimate the reduction in the value of the use or rental value of such property; and that it cannot adopt the method contended for by the United States of calculating damages to urban property." (Ibid.)

²¹² Ibid.

²⁰⁶ Ibid., pp. 1924–1925.

²⁰⁷ Ibid., p. 1925.

²⁰⁸ Ibid., p. 1926.

nection with its *action for violation of sovereignty*. The tribunal, however, appeared to recognize the possibility of *granting indemnity for the expenses of processing claims*. It agreed that in some cases of international arbitration, damages had been awarded for expenses, not as compensation for violation of territorial sovereignty, but as compensation for expenses incurred by individual claimants in prosecuting their claims for wrongful acts by the offending Governments. For the tribunal, the difficulty lay not so much in the content of the claim as in its characterization as damages for violation of territorial sovereignty. It therefore decided that “neither as a separable item of damage nor as an incident to other damage should any award be made for that which the United States terms ‘violation of sovereignty’”.²¹³

268. In the *Alabama* case, the tribunal awarded damages in respect of net freights lost and other undefined damage resulting from the United Kingdom of Great Britain and Ireland’s failure to exercise “due diligence”. However, damages in respect of the costs of pursuit of the confederate cruisers outfitted in British ports were denied because such costs could not be distinguished from the ordinary expenses of the war, as were damages in respect of prospective earnings since they depended on future and uncertain contingencies.²¹⁴

269. In its claim against the Soviet Union for injuries resulting from the crash of the Soviet nuclear-powered satellite, *Cosmos-954*, on Canadian territory, Canada stressed the duty to *mitigate damages*:

Under general principles of international law, Canada had a duty to take the necessary measures to prevent and reduce the harmful consequences of the damage and thereby to mitigate damages. Thus, with respect to the debris, it was necessary for Canada to undertake without delay operations of search, recovery, removal, testing and clean-up. These operations were also carried out in order to comply with the requirements of the domestic law of Canada. Moreover, article VI of the Convention [on International Liability for Damage Caused by Space Objects] imposes on the claimant State a duty to observe reasonable standards of care with respect to damage caused by a space object.²¹⁵

270. The Canadian claim also indicated that the compensation sought was reasonable, proximately caused by the accident and capable of being calculated with a reasonable degree of certainty:

In calculating the compensation claimed, Canada has applied the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty.²¹⁶

271. The Atlantic Richfield Corporation (ARCO), which operated the refinery at Cherry Point, in the State of Washington, where some 45,000 litres of crude oil had spilled into the sea in 1972 (see para. 159 above), paid an

initial *clean-up bill* of US\$ 19,000 submitted by the municipality of Surrey to cover its operations. ARCO later agreed to pay another US\$ 11,606.50, to be transmitted by the United States to the Canadian Government, for its *costs incurred in connection with the clean-up operation*, but refused to reimburse an additional item of US\$ 60 designated “bird loss (30 birds at \$2 a bird)”. The payment was made “without admitting any liability in the matter and without prejudice to its rights and legal position”.²¹⁷

2. FORMS OF COMPENSATION

272. In State practice, compensation for extraterritorial damage caused by activities conducted within the territorial jurisdiction or under the control of States has been paid either in the form of a lump sum to the injured State, so that it may settle individual claims, or directly to the individual claimants. The forms of compensation prevailing in relations between States are similar to those existing in domestic law. Indeed, some conventions provide that national legislation is to govern the question of compensation. When damages are monetary, States have generally sought to select readily convertible currencies.

(a) *Treaty practice*

273. While references to the forms of compensation are made in multilateral conventions, they are not sufficiently detailed. Attempts have been made in the conventions to make the compensation provisions useful to the injured party in terms of currency and of its transferability from one State to another. Under the Paris Convention, for example, the nature, form and extent of the compensation as well as its *equitable distribution* has to be governed by *national law*. Furthermore, the compensation must be freely *transferable* between the contracting parties.²¹⁸

274. The Additional Convention to CIV also provides that, for certain injuries, compensation may be awarded in the form of a lump sum. However, if *national law*

²¹⁷ See footnote 141 above, and *Montreal Star*, 9 June 1972.

²¹⁸ The relevant provisions of the Convention are:

“Article 7

“... ”

“(g) Any interest and costs awarded by a court in actions for compensation under this Convention shall not be considered to be compensation for the purposes of this Convention and shall be payable by the operator in addition to any sum for which he is liable in accordance with this article.

“... ”

“Article 11

“The nature, form and extent of the compensation, within the limits of this Convention, as well as the equitable distribution thereof, shall be governed by national law.

“Article 12

“Compensation payable under this Convention, insurance and reinsurance premiums, sums provided as insurance, reinsurance, or other financial security required pursuant to article 10, and interest and costs referred to in article 7 (g), shall be freely transferable between the monetary areas of the Contracting Parties.”

²¹³ *Ibid.*, pp. 1932–1933.

²¹⁴ Moore, *op. cit.* (footnote 93 above), p. 658.

²¹⁵ See ILM (footnote 96 above), pp. 905–906, para. 17.

²¹⁶ *Ibid.*, p. 907, para. 23.

permits, payment of an *annuity* or, if the injured passenger so requests, compensation, shall be awarded as an annuity. Such forms of damages are also provided for injuries suffered by persons for whose support the deceased passenger was legally responsible, as well as for medical treatment and transport of an injured passenger and for loss due to his total or partial incapacity to work.²¹⁹

275. The Convention on the Liability of Operators of Nuclear Ships states the value in gold of the franc, the currency in which compensation must be paid. It also provides that the awards may be converted into each national currency in round figures and that conversion into national currencies other than gold shall be effected on the basis of their gold value.²²⁰

276. If agreed between the parties concerned, compensation under the Convention on International Liability for Damage Caused by Space Objects may be paid in any currency; otherwise, it is to be paid in the currency of the *claimant State*. If the claimant State agrees, the compensation may be paid in the *currency of the State from which compensation is due*.²²¹

(b) *Judicial decisions and State practice outside treaties*

277. Forms of compensation are referred to in judicial decisions and official correspondence in only a few cases, such as the compensation afforded Japan by the United

²¹⁹ The relevant provisions of the Convention read:

“Article 6. *Form and limit of damages in case of death of or personal injury to the passenger*

“1. The damages under article 3, paragraph 2, and article 4 (b) shall be awarded in the form of a lump sum; however, if national law permits payment of an annuity, damages shall be awarded in this form if so requested by the injured passenger or the claimants designated in article 3, paragraph 2.

“... ”

“Article 9. *Interest and refund of compensation*

“1. The claimant shall be entitled to claim interest on compensation which shall be calculated at the rate of 5 per cent per annum. Such interest shall accrue from the date of the claim, or, if a claim has not been made, from the date on which legal proceedings are instituted, save that for compensation due under articles 3 and 4, interest shall accrue only from the day on which the events relevant to its assessment occurred, if that day is later than the date of the claim or the date on which legal proceedings were instituted.

“2. Any compensation improperly obtained shall be refunded.”

²²⁰ Paragraph 4 of article III of the Convention reads:

“4. The franc mentioned in paragraph 1 of this article is a unit of account constituted by sixty-five and one half milligrams of gold of millesimal finess nine hundred. The amount awarded may be converted into each national currency in round figures. Conversion into national currencies other than gold shall be effected on the basis of their gold value at the date of payment.”

²²¹ Article XIII of the Convention reads:

“Unless the claimant State and the State from which compensation is due under this Convention agree on another form of compensation, the compensation shall be paid in the currency of the claimant State or, if that State so requests, in the currency of the State from which compensation is due.”

States of America for injuries arising out of the Pacific nuclear tests and the compensation required of the United Kingdom of Great Britain and Ireland in the *Alabama* case (see para. 87 above). In each case, a lump-sum payment was made to the State which could then pay equitable compensation to the injured individuals.

278. In addition to monetary compensation, compensation has occasionally taken the form of removing the danger or effecting *restitutio in integrum*. That was the case, for example, in the Palomares incident, in 1966, when nuclear bombs dropped on Spanish territory and near the coasts of Spain following a collision between a United States nuclear bomber and a supply plane. In a situation where the damage or danger of damage is so grave, the primary compensation is restitution, that is, removing the cause of the damage and restoring the area to its condition prior to the incident. The United States removed the causes of danger from Spain by retrieving the bombs and by removing the contaminated Spanish soil and burying it in its own territory (see para. 250 above).

279. Following the nuclear tests conducted in the Marshall Islands, the United States reportedly spent nearly US\$ 110 million to clean up several of the islands of the Eniwetok Atoll so that they could again become habitable. However, one of the islands of the Runit Atoll, which had been used to bury nuclear debris, was declared off-limits for 20,000 years.¹⁵⁵ A clean-up operation is not restitution, but the intention and the policy behind it are similar. Following the accidental pollution of the Mura River, Austria, in addition to paying monetary compensation for the damage caused to the Yugoslav fisheries and paper mills, delivered a certain quantity of paper to the former Yugoslavia.

280. In 1981, Canada agreed to a lump-sum payment of Can\$ 3 million from the Soviet Union in full and final settlement of all matters connected with the disintegration of the Soviet satellite Cosmos-954 in Canada.²²²

3. LIMITATION ON COMPENSATION

281. As in domestic law, State practice has provided for limitations on compensation, particularly in connection with activities which, although important to present-day civilization, can be very injurious, as well as with activities capable of causing accidental but devastating injuries, such as those involving the use of nuclear materials. The provisions on limitation of compensation have been carefully designed to fulfil two objectives: (a) to protect industries from an unlimited liability that would paralyse them financially and discourage their future development; (b) to ensure reasonable and fair compensation for those who suffer injuries as a result of these potentially dangerous activities.

²²² See “Canada-Union of Soviet Socialist Republics: Protocol on settlement of Canada’s claim for damages caused by ‘Cosmos 954’” in ILM, vol. XX, No. 3, May 1981, p. 689.

282. The United States OPA provides for limitation of liability. However, limitation cannot be invoked if, under section 2704 (c) (1), the incident was proximately caused by:

- A. The gross negligence or wilful misconduct of, or
- B. The violation of an applicable Federal safety, construction or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party ...²²³

283. Under section 2704 (c) (2) of the same law, the responsible party is not entitled to limit its liability if it fails or refuses:

- A. To report the incident as required by law and the responsible party knows or has reason to know of the incident;
- B. To provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or
- C. Without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 1321 of this title or the Intervention on the High Seas Act.²²²

284. The limitation of liability provided under section 2714 (c) of the law may also be lost in accordance with paragraph (a) of the same section by the wilful misconduct or violation of a safety regulation by an employee of the responsible party or by an independent contractor performing services for the responsible party.

285. In the United States as well, CERCLA contains, in section 9607 (c) (1), provisions on limitation of liability. This subsection also authorizes the imposition of *punitive damages*, if a liable person fails without sufficient cause properly to provide removal or remedial action upon order of the President in an amount at least equal to and not more than three times the amount of costs incurred as a result of the failure to take proper action. Like OPA, the right to limit liability is lost if the defendant fails to cooperate or provide assistance to public officials.

286. Section 15 of the 1990 German Environmental Liability Act also provides for limitations of liability.⁷¹

(a) *Treaty practice*

287. The Paris Convention is drafted to deal systematically and uniformly only with the question of liability and compensation in the field of nuclear energy. Article 7 of the Convention limits the liability of the operator. It also provides that the aggregate of compensation required to be paid in respect of damage caused by a nuclear incident shall not exceed the maximum liability established in accordance with the article.²²⁴

²²³ Cited by Force (footnote 63 above), p. 40.

²²⁴ Article 7 (a) of the Convention defines the minimum and maximum amounts of compensation:

“The aggregate of compensation required to be paid in respect of damage caused by a nuclear incident shall not exceed the maximum liability established in accordance with this article.”

288. Under the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, if the total amount of claims established exceeds the limit of liability, they shall be reduced in proportion to their respective amounts in respect of claims exclusively for loss of life or personal injury or exclusively for damage to property. But if the claims concern both loss of life or personal injury and damage to property, one half of the total sum shall be allocated preferentially for loss of life or personal injury. The remainder shall be distributed proportionately among the claims in respect of damage to property and the portion not already covered of the claims in respect of loss of life and personal injury.²²⁵

289. The Additional Convention to CIV provides for limitation of liability. However, if the damage is caused by the wilful misconduct or gross negligence of the railway, the limitation of liability is removed.²²⁶

290. Article 10 of the Additional Convention nullifies any agreement between passengers and the railway in which the liability of the railway is precluded or has been limited to a lower amount than that provided for in the Convention.²²⁷

²²⁵ Article 14 of the Convention reads:

“If the total amount of the claims established exceeds the limit of liability applicable under the provisions of this Convention, the following rules shall apply, taking into account the provisions of paragraph 2 of article 11:

“(a) If the claims are exclusively in respect of loss of life or personal injury or exclusively in respect of damage to property, such claims shall be reduced in proportion to their respective amounts.

“(b) If the claims are both in respect of loss of life or personal injury and in respect of damage to property, one half of the total sum distributable shall be appropriated preferentially to meet claims in respect of loss of life and personal injury and, if insufficient, shall be distributed proportionately between the claims concerned. The remainder of the total sum distributable shall be distributed proportionately among the claims in respect of damage to property and the portion not already covered of the claims in respect of loss of life and personal injury.”

²²⁶ Articles 7 and 8 of the Additional Convention read:

“Article 7. *Limit of damages in case of damage to or loss of articles*

“When, under the provisions of this Convention, the railway is liable to pay damages for damage to, or for total or partial loss of any articles which the passenger who has sustained an accident had either on him or with him as hand luggage, including any animals which he had with him, compensation for the damage may be claimed up to the sum of 2,000 francs per passenger.”

“Article 8. *Amount of damages in case of wilful misconduct or gross negligence*

“The provisions of articles 6 and 7 of this Convention or those of the national law which limit compensation to a fixed amount shall not apply if the damage results from wilful misconduct or gross negligence of the railway.”

²²⁷ Articles 10 and 12 of the Additional Convention read:

“Article 10. *Prohibition of limitation of liability*

“Any terms or conditions of carriage or special agreements concluded between the railway and the passenger which purport to exempt the railway in advance, either totally or partially, from liability under this Convention, or which have the effect of reversing the burden of proof resting on the railway, or which provide for

(Continued on next page.)

291. The preamble to the International Convention relating to the Limitation of the Liability of Owners of Seagoing Ships clearly indicates the objectives of the contracting parties as “determining by agreement certain uniform rules relating to the limitation of liability of owners of seagoing ships”.

292. Article 1 of the Convention only reiterates the preamble. Under article 1, paragraph 3, the limitation of liability of the seagoing ship will cease if it is proved that the injury was caused by the negligence of the shipowner or of persons for whose conduct he is responsible. The question upon whom lies the burden of proving whether there has been a fault is to be determined by the law of the forum.

293. The 1969 Civil Liability Convention also provides for limitation of liability. In accordance with article V, paragraph 1, of the Convention, “the shipowner is entitled to limit his liability in respect of any one incident to an aggregate amount of 2,000 francs for each ton of the ship’s tonnage”. The amount of limitation of liability was viewed as too low. The Convention was therefore amended by the 1984 Protocol to increase the maximum amount of compensation available in case of oil pollution and was intended to attract some States in particular the United States of America to join the Protocol. The Protocol is not concerned with distribution of liability and relief for shipowners because of the substantial rise in the limits. The Protocol deletes all references to shipowners’ indemnification. Article 6 of the Protocol amended of article V, paragraph 2, of the Convention by providing that: “The owner shall not be entitled to limit his liability under this Convention if it is proved that the pollution damage resulted from *his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result**.”

294. However, in March 1989 when the *Exxon Valdez* ran aground in Prince William Sound, Alaska, it unleashed strong public reaction. This led to a decision by the United States Congress to reject the Protocol and to enact the OPA of 1990 which introduces limits on liability substantially higher than the 1984 Protocol amending the 1969 Civil Liability Convention and also provides unlimited liability in more circumstances than the Protocol, such as in situations of gross negligence,

wilful misconduct and violations of applicable federal regulations.²²⁸

295. The liability of the operator is also limited under article 6 of the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources. Under paragraph 4 of the same article, the operator will not be entitled to limit his liability if it is proved that the pollution damage occurred as a result of an act or omission of the operator himself, done deliberately with actual knowledge that pollution damage will result. Two elements are thus required to remove the limitation on liability: one is an act or omission of the operator, and the second is actual knowledge that pollution damage will result. Hence the negligence of the operator does not, under this Convention, remove the limitation on liability.

296. CRTD limits the liability of the carrier (art. 9). This limitation of liability is not applicable if, under article 10, paragraph 1, of the Convention, “it is proved that the damage resulted from his personal act or omission or an act or omission of his servants or agents, committed with the intent to cause such damage or recklessly and with knowledge that such damage would probably result, provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment”. Article 13 of the Convention requires compulsory insurance from the carrier which should be equivalent to the maximum amount of liability.²²⁹ Article 14 provides that “every State Party shall designate one or several competent authorities to issue or approve certificates attesting that the carrier has valid insurance”.

297. The draft convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea²³⁰ also provides, in article 6, for limitation of liability along the lines of article V of the 1969 Civil Liability Convention. Article 10 of the draft convention follows article VII of the 1969 Civil Liability Convention requiring compulsory insurance of the owner. The draft convention also anticipates a financial scheme to guarantee the payment of full compensation. The fund scheme is similar to the scheme established by the draft

²²⁸ See Birnie and Boyle, *op. cit.* (footnote 82 above), p. 296.

²²⁹ Article 13 of the Convention reads:

“1. The carrier’s liability shall be covered by insurance or other financial security, such as a bank guarantee, if the dangerous goods are carried in the territory of a State Party.

“2. The insurance or other financial security shall cover the entire period of the carrier’s liability under this Convention in the sums fixed by applying the limits of liability prescribed in article 9 and shall cover the liability of the person named in the certificate as carrier or, if that person is not the carrier as defined in article 1, paragraph 8, of such person as does incur liability under this Convention.

“3. Any sums provided by insurance or by other financial security maintained in accordance with paragraph 1 of this article shall be available only for the satisfaction of claims under this Convention.”

²³⁰ See footnote 88 above.

(Footnote 227 continued.)

limits lower than those laid down in article 6 (2) and article 7, shall be null and void. Such nullity shall not, however, avoid the contract of carriage which shall remain subject to the provisions of CIV and this Convention.

“Article 12. *Bringing of actions not within the provisions of this Convention*

“No action of any kind shall be brought against a railway in respect of its liability under article 2 (1) of this Convention, except subject to the conditions and limitations laid down in this Convention.

“The same shall apply to any action brought against persons for whom the railway is liable under article 11.”

protocol to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, which does not provide any limitation to liability. Article 5 of the draft protocol provides that there shall be no fixed financial limit to liability.

298. The original draft of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment contained a provision on limitation of liability. This provision was deleted in the final draft.

(b) *Judicial decisions and State practice outside treaties*

299. Judicial decisions and official correspondence reveal no limitation on compensation other than that agreed upon in treaties. Some references have been made to equitable, fair and adequate compensation. By a broad interpretation, limitation on compensation may sometimes be compatible with equitable and fair compensation.

B. Authorities competent to award compensation

300. Article 33, paragraph 1, of the Charter of the United Nations provides a wide choice of peaceful modes of dispute settlement from the most informal to the most formal:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

301. State practice reveals that these modes of settlement of disputes have been utilized to resolve questions of liability and compensation relating to acts with extra-territorial injurious consequences. International courts, arbitral tribunals, joint commissions as well as domestic courts have decided on those questions. Generally, on the basis of prior agreements among States, PCIJ, ICJ and arbitral tribunals have dealt with disputes relating to the utilization of and activities on the continental shelf, in the territorial sea, etc. When there have been ongoing activities, usually among neighbouring States, such as the use of shared waters, for which there are established institutions constituted by States, claims arising from these activities have normally been referred to the joint institution or commission concerned. Domestic courts have been used on issues involving civil liability and in particular the liability of the operator.

1. LOCAL COURTS AND AUTHORITIES

(a) *Treaty practice*

302. A number of multilateral agreements designate local courts and authorities as competent to decide on questions of liability and compensation. With regard to activities, primarily of a commercial nature, in which the actors are private entities and the primary liability is that of the op-

erator, local courts have been recognized as appropriate decision makers. This is typical of the civil liability conventions. For example, the Paris Convention confers jurisdiction *only* on the courts of the contracting State in whose territory the nuclear installation of the operator liable is located. When the nuclear incident occurs during transportation, jurisdiction lies, unless otherwise provided, with the courts of the contracting State in whose territory the nuclear substances involved were at the time of the incident. Article 13 of the Convention indicates in detail how jurisdiction is divided among the *domestic* courts of the contracting parties, according to the place of occurrence of the nuclear incident.

303. Under article VIII of the Vienna Convention, and subject to the provisions of this Convention, "the nature, form and extent of compensation, as well as its equitable distribution, are governed by the competent courts".

304. The Convention further provides, in article XI, that jurisdiction lies with the domestic courts of the contracting party in whose territory the nuclear incident occurs and that, if the incident occurs outside the territory of any contracting party, or if the place of the incident cannot be determined, the courts of the installation State of the operator liable have jurisdiction.

305. Article X of the Convention on the Liability of Operators of Nuclear Ships provides that action for compensation shall be brought either before the courts of the licensing State or before the courts of the contracting State or States in whose territory nuclear damage has been sustained.

306. Under the 1969 Civil Liability Convention, only the courts of the contracting State or States in whose territory, including the territorial sea, the pollution damage has occurred, or preventive measures have been taken to prevent or minimize damage, are to entertain claims for compensation. Thus each contracting State has to ensure that its courts possess the necessary jurisdiction. Once a fund has been established in accordance with the requirements of article V of the Convention, the courts of the State where the fund is established have *exclusive* jurisdiction to decide on all matters relating to its apportionment and distribution.

307. Under article XI of the Convention, the domestic courts also have jurisdiction in respect of ships owned by a contracting State and used for commercial purposes.

308. Similarly, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage provides that the domestic courts of the contracting parties are competent to decide on actions against the Fund, and that the contracting States must endow their courts with the necessary jurisdiction to entertain such actions.

309. The Additional Convention to CIV provides that, unless otherwise agreed upon by States, or stipulated in

the licence of the railway, the domestic courts of the State in whose territory the accident to the passenger occurs are competent to entertain actions for compensation.²³¹

310. Under the Convention on the Protection of the Environment, the nuisance which an activity entails or may entail in the territory of another contracting State is equated with a nuisance in the State where the activity is carried out. Thus any person who is or may be affected by such a nuisance may bring a claim before the court or administrative authority of that State for compensation. The rules on compensation must not be less favourable to the injured party than those in the State where the activity is carried out. Indeed, the Convention provides for *equal access* to the competent authorities and for *equal treatment* of the injured parties, whether local or foreign.²³²

311. Under article 11 of the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources, the authorities competent to decide on questions of liability and compensation are the national courts of either the controlling State or the State in whose territory the damage has occurred. Each contracting party is required to ensure that its courts possess the necessary jurisdiction to entertain actions for compensation. It appears, under the

²³¹ Article 15 of the Additional Convention reads as follows:

“Article 15. Jurisdiction

“Actions brought under this Convention may only be instituted in the competent court of the State on whose territory the accident to the passenger occurred, unless otherwise provided in agreements between States, or in any licence or other document authorizing the operation of the railway concerned.”

²³² The relevant articles of the Convention read:

“Article 2

“In considering the permissibility of environmentally harmful activities, the nuisance which such activities entail or may entail in another Contracting State shall be equated with a nuisance in the State where the activities are carried out.

“Article 3

“Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate court or administrative authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the court or the administrative authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out.

“The provisions of the first paragraph of this article shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities. The question of compensation shall not be judged by rules which are less favourable to the injured party than the rules of compensation of the State in which the activities are being carried out.

“... ”

“Protocol

“... ”

“The right established in article 3 for anyone who suffers injury as a result of environmentally harmful activities in a neighbouring State to institute proceedings for compensation before a court or administrative authority of that State shall, in principle, be regarded as including the right to demand the purchase of his real property.”

Convention, that the national courts are to apply both the Convention and their domestic law, the former for questions of liability and compensation and the latter for evidentiary and procedural matters. However, only the courts of a State party in which a fund has been constituted are competent to determine all matters relating to the apportionment and distribution of that fund. Furthermore, if a well has been abandoned in circumstances other than those provided in the Convention, the liability of the operator, in accordance with article 3, paragraph 4, of the Convention, is governed by the applicable domestic law.

312. In accordance with article 232 of the United Nations Convention on the Law of the Sea, “States shall be liable for damage or loss attributable to them arising from measures taken pursuant to section 6 [of part XII, relating to the protection and preservation of the marine environment], when such measures are unlawful or exceed those reasonably required”. Accordingly, States are required to endow their courts with appropriate jurisdiction to deal with actions brought in respect of such loss or damage.

313. The Convention on the Regulation of Antarctic Mineral Resource Activities provides in article 8, paragraph 7 (a), that “rules and procedures in respect of the provisions on liability set out in this Article shall be elaborated through a separate protocol which shall be adopted”. Each State party to the Convention, is required, under article 8, paragraph 10, pending the adoption of the protocol, to ensure that “recourse is available in its national courts for adjudicating liability claims pursuant to paragraphs 2, 4 and 6 [of article 8] against operators which are engaged in prospecting. Such recourse shall include the adjudication of claims against any operator it has sponsored”.

314. Article 8, paragraph 11, of this Convention provides that nothing in that article shall be construed so as to preclude the application of existing or future international rules on liability of either the State or the operator.

315. Under article 19, paragraph 1, of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment:

1. Actions for compensation may be brought only within a State Party at the court of the place:

- (a) where the damage was suffered;
- (b) where the dangerous activity was conducted; or
- (c) where the defendant has his habitual residence.

In accordance with article 21 of the same Convention:

1. When proceedings involving the same course of action and between the same parties are brought in the courts of different States parties, any court other than the court first seized shall, of its own motion, stay its proceedings until the jurisdiction of the court first seized is established;

2. When such jurisdiction is established, other courts shall decline jurisdiction.

316. Under article 19, paragraph 1, of CRTD, actions for compensation may only be brought in the courts of any State party:

- (a) where the damage was sustained as a result of the incident;
- (b) where the incident occurred;
- (c) where preventive measures were taken to prevent or minimize damage; or
- (d) where the carrier has his habitual residence.

The article also requires, in paragraph 3, that each contracting State shall ensure that its courts possess the necessary jurisdiction to entertain such actions for compensation.

317. Under article 10 of the draft protocol to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,²³³ claims for compensation may only be brought in the courts of a Contracting Party where either the damage was sustained, or the damage has its origin, or the person alleged to be liable resides, is domiciled or has his principal place of business.

(b) *Judicial decisions and State practice outside treaties*

318. The existing judicial decisions and official correspondence contain no indication concerning the competence of local courts and authorities to rule on questions of liability and compensation, except possibly on the distribution of lump-sum payments.

2. INTERNATIONAL COURTS, ARBITRAL TRIBUNALS AND JOINT COMMISSIONS

(a) *Treaty practice*

319. In the case of activities not exclusively of a commercial nature, in which the acting entities are primarily States, the competent organs for deciding on questions of liability and compensation are generally arbitral tribunals. The Convention on International Liability for Damage Caused by Space Objects provides that, if the parties fail to reach agreement through diplomatic negotiations, the question of compensation shall be submitted to arbitration. Accordingly, a claims commission composed of three members, one appointed by the claimant State, one appointed by the launching State and a chairman, is to be established upon the request of either party.²³⁴

²³³ See footnote 83 above.

²³⁴ The relevant articles of the Convention read:

Article VIII

“1. A State which suffers damage, or whose natural or juridical persons suffer damage, may present to a launching State a claim for compensation for such damage.

“2. If the State of nationality has not presented a claim, another State may, in respect of damage sustained in its territory by any natural or juridical person, present a claim to a launching State.

“3. If neither the State of nationality nor the State in whose territory the damage was sustained has presented a claim or notified

320. In part XV of the United Nations Convention on the Law of the Sea, the parties are encouraged and requested to settle their disputes by peaceful means. The Convention provides for a wide range of possible modes

its intention of presenting a claim, another State may, in respect of damage sustained by its permanent residents, present a claim to a launching State.

Article IX

“A claim for compensation for damage shall be presented to a launching State through diplomatic channels. If a State does not maintain diplomatic relations with the launching State concerned, it may request another State to present its claim to that launching State or otherwise represent its interests under this Convention. It may also present its claim through the Secretary-General of the United Nations, provided the claimant State and the launching State are both Members of the United Nations.

“... ”

Article XI

“1. Presentation of a claim to a launching State for compensation for damage under this Convention shall not require the prior exhaustion of any local remedies which may be available to a claimant State or to natural or juridical persons it represents.

“2. Nothing in this Convention shall prevent a State, or natural or juridical persons it might represent, from pursuing a claim in the courts or administrative tribunals or agencies of a launching State. A State shall not, however, be entitled to present a claim under this Convention in respect of the same damage for which a claim is being pursued in the courts or administrative tribunals or agencies of a launching State or under another international agreement which is binding on the States concerned.

“... ”

Article XIV

“If no settlement of a claim is arrived at through diplomatic negotiations as provided for in article IX, within one year from the date on which the claimant State notifies the launching State that it has submitted the documentation of its claim, the parties concerned shall establish a Claims Commission at the request of either party.

Article XV

“1. The Claims Commission shall be composed of three members: one appointed by the claimant State, one appointed by the launching State and the third member, the chairman, to be chosen by both parties jointly. Each party shall make its appointment within two months of the request for the establishment of the Claims Commission.

“2. If no agreement is reached on the choice of the chairman within four months of the request for the establishment of the Commission, either party may request the Secretary-General of the United Nations to appoint the chairman within a further period of two months.

Article XVI

“1. If one of the parties does not make its appointment within the stipulated period, the chairman shall, at the request of the other party, constitute a single member Claims Commission.

“2. Any vacancy which may arise in the Commission for whatever reason shall be filled by the same procedure adopted for the original appointment.

“3. The Commission shall determine its own procedure.

“4. The Commission shall determine the place or places where it shall sit and all other administrative matters.

“5. Except in the case of decisions and awards by a single member Commission, all decisions and awards of the Commission shall be by majority vote.

“... ”

Article XVIII

“The Claims Commission shall decide the merits of the claim for compensation and determine the amount of compensation payable, if any.”

of settlement of disputes, as well as for an elaborate system according to which the competent organs for deciding a dispute, depending upon the nature of the dispute, are the International Tribunal for the Law of the Sea, or ICJ, or an arbitral tribunal. Articles 278 to 285 set out the modes of settlement compatible with Article 33 of the Charter of the United Nations.

(b) *Judicial decisions and State practice outside treaties*

321. Most judicial decisions in this matter have been rendered by PCIJ, ICJ or by arbitral tribunals on the basis of an agreement between the parties or of a prior treaty obligation. At least one arbitral tribunal, that was called upon to adjudicate in the Trail Smelter case, provided in its award for an arbitration mechanism in the event that the States parties might be unable to agree on the modification or amendment of the regime proposed by one side.

3. APPLICABLE LAW

(a) *Treaty practice*

322. The Convention on International Liability for Damage Caused by Space Objects regulates space activities at present controlled by States. It provides that “in accordance with international law and the principles of justice and equity, in order to provide such reparation in respect of the damage as will restore the person, natural or juridical, State or international organization on whose behalf the claim is presented to the condition which would have existed if the damage had not occurred” (art. XII).

323. Similarly, article 293 of the United Nations Convention on the Law of the Sea provides that, a court (that is, ICJ or the International Tribunal for the Law of the Sea) or a tribunal having jurisdiction, in accordance with section 2 of part XV of the Convention, to rule in a dispute concerning the application or interpretation of the Convention, shall apply the provisions of the Convention and other rules of international law not incompatible with the Convention. However, if the parties to a dispute agree, the court or tribunal can adjudicate *ex aequo et bono*.

324. On the other hand, the Additional Convention to CIV, which regulates an essentially commercial activity, provides in article 6, paragraph 2, for the application of *national law*.²³⁵

325. Similarly, the Convention on the Liability of Operators of Nuclear Ships provides in article VI for the application of *national laws*.²³⁶

326. Under article 5, paragraph 5, of the International Convention relating to the Limitation of the Liability of Owners of Seagoing Ships, claims for liability and compensation are to be brought before the appropriate national courts of the contracting parties. In addition, the time limit within which such claims may be brought or prosecuted shall be decided in accordance with the national law of the contracting State in which the claim is brought.

327. The Convention further provides, in article I, paragraph 6, that the *national law* shall determine the question upon whom lies the burden of proving whether or not the accident causing the injury resulted from a fault.

328. The Convention on the Law Applicable to Products Liability which is intended to resolve the issue of jurisdiction and applicable law regarding litigations on product liability, provides in article 4 for:

The application of the internal law of the State of the place of injury, if that State is also:

(a) The place of the habitual residence of the person directly suffering damage; or

(b) The principal place of business of the person claimed to be liable; or

(c) The place where the product was acquired by the person directly suffering damage.

329. Article 5 of the Convention provides that:

Notwithstanding the provisions of Article 4, the applicable law shall be the internal law of the State of the habitual residence of the person directly suffering damage, if that State is also:

(a) The principal place of business of the person claimed to be liable; or

(b) The place where the product was acquired by the person directly suffering damage.

330. Under article 6 of the Convention:

Where neither of the laws designated in articles 4 and 5 applies, the applicable law shall be the internal law of the State of the principal place of business of the person claimed to be liable, unless the claim-

²³⁵ Article 6 (Form and limit of damages in case of death of or injury to the passenger), paragraph 2, reads:

“The amount of damages to be awarded under paragraph 1 shall be determined in accordance with national law. However, in the event of the national law providing for a maximum limit of less than 200,000 francs, the limit per passenger shall, for the purposes of this Convention, be fixed at 200,000 francs in the form of a lump sum or of an annuity corresponding to that amount.”

²³⁶ Article VI of the Convention reads:

“Where provisions of national health insurance, social insurance, social security, workmen’s compensation or occupational disease compensation systems include compensation for nuclear damage, rights of beneficiaries under such systems and rights of subrogation or of recourse against the operator, by virtue of such systems, shall be determined by the law of the Contracting State having established such systems. However, if the law of such contracting State allows claims of beneficiaries of such systems and such rights of subrogation and recourse to be brought against the operator in conformity with the terms of this Convention, this shall not result in the liability of the operator exceeding the amount specified in paragraph 1 of article III.”

ant bases his claim upon the internal law of the State of the place of injury.

331. Article 11 of the draft Protocol to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal²³⁷ provides that all matters of substance or procedure regarding claims brought in a competent court which are not specifically regulated in the Protocol shall be governed by the law of that court, including any rules of such law regarding conflict of jurisdiction.

(b) *Judicial decisions and State practice outside treaties*

332. Under Article 38 of the Statute of ICJ as well as of PCIJ, the function of the Court is to decide such disputes as are submitted to it in accordance with international law, the sources of which are:

(a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(b) International custom, as evidence of a general practice accepted as law;

(c) The general principles of law recognized by civilized nations;

(d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

333. Under the same article, if the parties agree, the Court has the competence to decide their case *ex aequo et bono*. It is within this legal framework that international courts have adjudicated on issues of extraterritorial injuries and liability.

334. The decisions of arbitral tribunals have also been based on the treaty obligations of the contracting parties, on international law, and occasionally on the domestic law of States. In the *Trail Smelter* case, the tribunal examined the decisions of the United States Supreme Court as well as other sources of law and reached the conclusion that “under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another ...”²³⁸

335. In their official correspondence, States have invoked international law and the general principles of law,

²³⁷ See para. 83 above.

as well as treaty obligations. Canada’s claim for damages for the crash of the former Soviet satellite Cosmos-954 was based on treaty obligations as well as the “general principles of law recognized by civilized nations”.⁹⁶ Regional principles or standards of behaviour have also been considered relevant in relations between States. The principles accepted in Europe concerning the obligation of States whose activities may be injurious to their neighbours to negotiate with them were invoked by the Netherlands Government in 1973 when the Belgian Government announced its intention to build a refinery near its frontier with the Netherlands. Similarly, in an official letter to Mexico concerning the protective measures taken by that country to prevent flooding, the United States Government referred to the “principle of international law which obligates every State to respect the full sovereignty of other States”.²³⁹

336. In their decisions, domestic courts, in addition to citing domestic law, have referred to the applicability of international law, the principles of international comity, etc. For example, the German Constitutional Court, in rendering a provisional decision concerning the flow of the waters of the Danube in the *Donauversinkung* case (1927), raised the question of accountability, under international law, of acts of interference with the flow of the waters. It stated that “only considerable interference with the natural flow of international rivers can form the basis for claims under international law”.²⁴⁰ Again, in the *Roya* case (1939), the Italian Court of Cassation referred to international obligations. It stated that a State “cannot disregard the international duty ... not to impede or to destroy ... the opportunity of the other States to avail themselves of the flow of water for their own national needs”.²⁴¹ Finally, in its judgement in the *United States v. Arjona* case (1887), the United States Supreme Court invoked the *law of nations* which “requires every national Government to use ‘due diligence’ to prevent a wrong being done within its own dominion to another nation”.²⁴²

²³⁸ UNRIAA (footnote 97 above), p. 1965.

²³⁹ See *Digest of International Law* (footnote 150 above), p. 265.

²⁴⁰ *Württemberg and Prussia v. Baden* (1927), *Entscheidungen des Reichsgerichts in Zivilsachen* (Berlin, 1927), vol. 116, appendix 2, p.18; *Annual Digest of Public International Law Cases, 1927–1928* (London), vol. 4, 1931, p. 128, case No. 86.

²⁴¹ *Société énergie électrique du littoral méditerranéen v. Compagnia imprese elettriche liguri* case in *Il Foro Italiano* (Rome), vol. 64, 1939, part 1, col. 1036.

²⁴² *United States Reports*, vol. 120, p. 484.

CHAPTER V

Statute of limitations

337. Under article 18 of CRTD, the claimant must bring a claim against the carrier or its guarantor “within three years from the date at which the person suffering the damage knew or ought reasonably to have known of the damage and of the identity of the carrier. This period may be extended, if the parties so agree after the incident”. However, “in no case shall an action be brought

after ten years from the date of the incident which caused the damage”.

338. Article 17 of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment provides “a limitation of three years from the date on which the claimant knew or ought reasonably to

have known of the damage and of the identity of the operator". However, "in no case shall actions be brought after thirty years from the date of the incident which caused the damage. ... Where the incident consists of a series of occurrences having the same origin, the thirty years shall run from the date of the last of such occurrences. In respect of a site for the permanent deposit of waste, the thirty years shall, at the latest, run from the date on which the site was closed in accordance with the internal law".

339. Under article 10 of the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for Exploitation of Seabed Mineral Resources, rights of compensation shall be extinguished within 12 months of the date on which the injured party knew or should reasonably have known of the damage:

Rights of compensation under this Convention shall be extinguished unless, within 12 months of the date on which the person suffering the damage knew or ought reasonably to have known of the damage, the claimant has in writing notified the operator of his claim or has brought an action in respect of it. However in no case shall an action be brought after four years from the date of the incident which caused the damage. Where the incident consists of a series of occurrences, the four years' period shall run from the date of the last occurrence.

340. In certain circumstances, the liability of the operator or of the State may be precluded. Some multilateral conventions provide for exoneration. The typical exoneration is that which results from prescription. Article 21 of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface provides that actions under the Convention are limited to two years from the date of the incident. Any suspension or interruption of these two years is determined by the law of the court where the action is brought. Nevertheless, the maximum time for bringing an action may not extend beyond three years from the date of the accident.²⁴³

341. Articles 16 and 17 of the Additional Convention to CIV, provide for a period of time after which a right of action will be extinguished.²⁴⁴

²⁴³ Article 21 reads:

"1. Actions under this Convention shall be subject to a period of limitation of two years from the date of the incident which caused the damage.

"2. The grounds for suspension or interruption of the period referred to in paragraph 1 of this article shall be determined by the law of the court trying the action; but in any case the right to institute an action shall be extinguished on the expiration of three years from the date of the incident which caused the damage."

²⁴⁴ These articles read:

"Article 16. Extinction of rights of action

"1. A claimant shall lose right of action if he does not give notice of the accident to a passenger to one of the railways to which a claim may be presented in accordance with article 13 within three months of his becoming aware of the damage.

"When notice of the accident is given orally by the claimant, confirmation of this oral notice must be delivered to the claimant by the railway to which the accident has been notified.

"2. Nevertheless the right of action shall not be extinguished:

342. The Convention on the Liability of Operators of Nuclear Ships provides for a 10-year period of prescription from the date of the nuclear incident. The domestic law of the licensing State may provide for a longer period.²⁴⁵

"(a) if, within the period of time provided for in paragraph 1, the claimant has made a claim to one of the railways designated in article 13 (1);

"(b) if the claimant proves that the accident was caused by the wrongful act or neglect of the railway;

"(c) if notice of the accident has not been given, or has been given late, as a result of circumstances for which the claimant is not responsible;

"(d) if during the period of time specified in paragraph (1), the railway responsible—or one of the two railways if in accordance with article 2 (6) two railways are responsible—knows of the accident to the passenger through other means.

"Article 17. Limitation of actions

"1. The periods of limitation for actions for damages brought under this Convention shall be:

"(a) in the case of the passenger who has sustained an accident, three years from the day after the accident;

"(b) in the case of other claimants, three years from the day after the death of the passenger, or five years from the day after the accident, whichever is the earlier.

"2. When a claim is made to the railway in accordance with article 13, the three periods of limitation provided for in paragraph 1 shall be suspended until such date as the railway rejects the claim by notification in writing, and returns the document attached thereto. If part of the claim is admitted, the period of limitation shall start to run again only in respect of that part of the claim still in dispute. The burden of proof of the receipt of the claim or of the reply and of the return of the documents, shall rest with the party relying upon these facts.

"The running of the period of limitation shall not be suspended by further claims having the same object.

"3. A right of action which has become barred by lapse of time may not be exercised even by way of counterclaim or set-off.

"4. Subject to the foregoing provisions, the limitation of actions shall be governed by national law."

²⁴⁵ Article V of the Convention reads:

"1. Rights of compensation under this Convention shall be extinguished if an action is not brought within ten years from the date of the nuclear incident. If, however, under the law of the licensing State the liability of the operator is covered by insurance or other financial security or State indemnification for a period longer than ten years, the applicable national law may provide that rights of compensation against the operator shall only be extinguished after a period which may be longer than ten years but shall not be longer than the period for which his liability is so covered under the law of the licensing State. However, such extension of the extinction period shall in no case affect the right of compensation under this Convention of any person who has brought an action for loss of life or personal injury against the operator before the expiry of the aforesaid period of ten years.

"2. Where nuclear damage is caused by nuclear fuel, radioactive products or waste which were stolen, lost, jettisoned, or abandoned, the period established under paragraph 1 of this article shall be computed from the date of the nuclear incident causing the nuclear damage, but the period shall in no case exceed a period of twenty years from the date of the theft, loss, jettison or abandonment.

"3. The applicable national law may establish a period of extinction or prescription of not less than three years from the date on which the person who claims to have suffered nuclear damage had knowledge or ought reasonably to have had knowledge of the damage and of the person responsible for the damage, provided that the

343. A 10-year period of prescription is also provided for in the Vienna Convention.²⁴⁶

344. The same period of prescription is provided for in the Paris Convention.²⁴⁷

period established under paragraphs 1 and 2 of this article shall not be exceeded.

“4. Any person who claims to have suffered nuclear damage and who has brought an action for compensation within the period applicable under this article may amend his claim to take into account any aggravation of the damage, even after the expiry of that period, provided that final judgment has not been entered.”

²⁴⁶ Article VI of the Convention reads:

“1. Rights of compensation under this Convention shall be extinguished if an action is not brought within ten years from the date of the nuclear incident. If, however, under the law of the Installation State, the liability of the operator is covered by insurance or other financial security or by State funds for a period longer than ten years, the law of the competent court may provide that rights of compensation against the operator shall only be extinguished after a period which may be longer than ten years, but shall not be longer than the period for which his liability is so covered under the law of the Installation State. Such extension of the extinction period shall in no case affect rights of compensation under this Convention of any person who has brought an action for loss of life or personal injury against the operator before the expiry of the aforesaid period of ten years.

“2. Where nuclear damage is caused by a nuclear incident involving nuclear material which at the time of the nuclear incident was stolen, lost, jettisoned or abandoned, the period established pursuant to paragraph 1 of this article shall be computed from the date of that nuclear incident, but the period shall in no case exceed a period of twenty years from the date of the theft, loss, jettison or abandonment.

“3. The law of the competent court may establish a period of extinction or prescription of not less than three years from the date on which the person suffering nuclear damage had knowledge or should have had knowledge of the damage and of the operator liable for the damage, provided that the period established pursuant to paragraphs 1 and 2 of this article shall not be exceeded.

“...”

²⁴⁷ Articles 8 and 9 of the 1964 Additional Protocol to the Convention read:

“Article 8

(a) The right of compensation under this Convention shall be extinguished if an action is not brought within ten years from the date of the nuclear incident. National legislation may, however, establish a period longer than ten years if measures have been taken by the Contracting Party in whose territory the nuclear installation of the operator liable is situated to cover the liability of that operator in respect of any actions for compensation begun after the expiry of the period of ten years and during such longer period: provided that such extension of the extinction period shall in no case affect the right of compensation under this Convention of any person who has brought an action in respect of loss of life or personal injury against the operator after the expiry of the period of ten years.

“(b) In the case of damage caused by a nuclear incident involving nuclear fuel or radioactive products or waste which, at the time of the incident have been stolen, lost, jettisoned or abandoned and have not yet been recovered, the period established pursuant to paragraph (a) of this article shall be computed from the date of that nuclear incident, but the period shall in no case exceed twenty years from the date of the theft, loss, jettison or abandonment.

“(c) National legislation may establish a period of not less than two years from the extinction of the right or as a period of limitation either from the date at which the person suffering damage has knowledge or from the date at which he ought reasonably to have known of both the damage and the operator liable: provided that the period established pursuant to paragraphs (a) and (b) of this article shall not be exceeded.

345. The Convention on International Liability for Damage Caused by Space Objects provides for a one-year limit for bringing actions for damages. The one year runs from the occurrence of the damage or from the identification of the launching State which is liable. This latter period, however, shall not exceed one year following the date by which the State could reasonably be expected to have learned of the facts.²⁴⁸

346. An action for damages may be brought within three years from the date of the occurrence of the damage under the 1969 Civil Liability Convention. No action may be brought after six years from the date of the incident which caused the damage.²⁴⁹

“(d) Where the provisions of article 13 (c) (ii) are applicable, the right of compensation shall not, however, be extinguished if, within the time provided for in paragraph (a) of this article:

“(i) prior to the determination by the Tribunal referred to in article 17, an action has been brought before any of the courts from which the Tribunal can choose; if the Tribunal determines that the competent court is a court other than that before which such action has already been brought, it may fix a date by which such action has to be brought before the competent court so determined; or

“(ii) a request has been made to a Contracting Party concerned to initiate a determination by the Tribunal of the competent court pursuant to article 13 (c) (ii) and an action is brought subsequent to such determination within such time as may be fixed by the Tribunal.”

“(e) Unless national law provides to the contrary, any person suffering damage caused by a nuclear incident who has brought an action for compensation within the period provided for in this article may amend his claim in respect of any aggravation of the damage after the expiry of such period provided that final judgement has not been entered by the competent court.”

“Article 9

“The operator shall not be liable for damage caused by a nuclear incident directly due to an act of armed conflict, hostilities, civil war, insurrection or, except in so far as the legislation of the Contracting Party in whose territory his nuclear installation is situated may provide to the contrary, a grave natural disaster of an exceptional character.”

²⁴⁸ Article X of the Convention reads:

“1. A claim for compensation for damage may be presented to a launching State not later than one year following the date of the occurrence of the damage or the identification of the launching State which is liable.

“2. If, however, a State does not know of the occurrence of the damage or has not been able to identify the launching State which is liable, it may present a claim within one year following the date on which it learned of the aforementioned facts; however, this period shall in no event exceed one year following the date on which the State could reasonably be expected to have learned of the facts through the exercise of due diligence.

“3. The time-limits specified in paragraphs 1 and 2 of this article shall apply even if the full extent of the damage may not be known. In this event, however, the claimant State shall be entitled to revise the claim and submit additional documentation after the expiration of such time-limits until one year after the full extent of the damage is known.”

²⁴⁹ Article VIII of the Convention reads:

“Rights of compensation under this Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage. Where this incident consists of a series of occurrences, the six years’ period shall run from the date of the first such occurrence.”

347. The provisions of this Convention do not apply to warships or other ships owned or operated by a State and used only for governmental and non-commercial service.²⁵⁰

348. An identical period of prescription is stipulated in article 6 of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.²⁵¹

²⁵⁰ Article XI, paragraph 1, of the Convention reads:

“The provisions of this Convention shall not apply to warships or other ships owned or operated by a State and used, for the time being, only on government non-commercial service.”

²⁵¹ Article 6 of the Convention reads:

“1. Rights of compensation under article 4 or indemnification under article 5 shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to article 7, paragraph 6, within three years from the date when the damage

349. Article 6 of the draft protocol to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal²⁵² provides that claims for compensation shall be filed within five years from the date at which the claimant knew or should reasonably have known of damage, its sources and the person responsible therefor. In no case shall a claim for compensation be accepted after 30 years from the date of the incident.

occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage.

“2. Notwithstanding paragraph 1, the right of the owner or his guarantor to seek indemnification from the Fund pursuant to article 5, paragraph 1, shall in no case be extinguished before the expiry of a period of six months as from the date on which the owner or his guarantor acquired knowledge of the bringing of an action against him under the Liability Convention.”

²⁵² See paragraph 83 above.

CHAPTER VI

Insurance and other anticipatory financial schemes to guarantee compensation

350. When it is decided to permit the performance of certain activities, in the knowledge that they may cause injuries, it is necessary to provide, in advance, for guarantees of payment of damages. This means that the operator of certain activities must either take out an insurance policy or provide financial security. Such requirements are similar to those stipulated in the domestic laws of many States in connection with the operation of complex industries, as well as with more routine activities such as driving a car.

351. For example, section 2716 (a) of OPA of the United States provides that owners and operators of vessels and oil production facilities must provide evidence of financial responsibility to meet the maximum amount of liability to which the responsible party could be subjected. Under section 2716 (b), if such evidence of financial responsibility is not provided, the vessel's clearance will be revoked, or the vessel will not be given an entry-permit in the United States. Any vessel subject to this requirement which is found in navigable waters without the necessary evidence of financial responsibility for the vessel shall be subject to seizure by and forfeiture to the United States. Under section 2716 (e), the financial responsibility requirement may be satisfied by evidence of insurance, surety bond, guarantee, letter of credit, qualification as a self-insurer or other evidence of financial responsibility. The requirement of section 2716 of OPA applies also in relation to FWPCA.²⁵³

352. Under section 2716 (f) of OPA any claim for removal costs or damages authorized under the Act may be

brought *directly against the guarantor* of the responsible party. The guarantor may assert against the claimant all rights and defences which would be available to a responsible party including the defence that the incident was caused by the wilful misconduct of the responsible party. The guarantor, however, may not defend against the claim that the responsible party has obtained insurance through fraud or misrepresentation.²⁵²

353. Similarly, CERCLA requires, in section 9608, proof of financial responsibility which may be established by insurance, guarantee, surety bond, or qualification as a self-insured. If the owner or the operator fails to provide the required guarantee, the clearance requirement will be withheld or revoked, and entry to any port or place or navigable waters in the United States will be denied or the vessel will be detained.²⁵²

354. Section 9608 (c) of CERCLA authorizes direct action against the guarantor. Like OPA, the guarantor may invoke the defence that the incident was caused by the wilful misconduct of the owner or operator. Under section 9608 (d) of CERCLA, a guarantor's liability is limited to the amount of the insurance policy, etc. However, this statute does not bar additional recovery under any other State or federal statute, contractual, or common law liability of a guarantor, including liability for bad faith in negotiating or failing to negotiate the settlement of a claim.²⁵²

355. The Environmental Liability Act of Germany lists, in its appendix 2, three types of facilities which should provide evidence of financial capacity to provide compensation in case of liability under the Act. The requirements of such evidence of financial capacity will be sat-

²⁵³ Force, loc. cit. (footnote 63 above), pp. 41–43.

isfied under section 19 of the Act by one of following: (a) to purchase insurance; (b) to obtain a hold harmless or indemnity guarantee from the State or the federal government; or (c) to obtain such a guarantee from specific credit institutions.²⁵⁴

A. Treaty practice

356. Some multilateral treaties include provisions to ensure the payment of compensation in case of harm and liability. Most multilateral agreements concerning nuclear activities are in this category. Thus, they require the maintenance of insurance or other financial security for the payment of damages in case of liability. The Convention on the Liability of Operators of Nuclear Ships requires the maintenance of such security. The terms and the amount of the insurance carried by the operator of nuclear ships are determined by the licensing State. Although the licensing State is not required to carry insurance or to provide other financial security, it must “ensure” the payment of claims for compensation for nuclear damage if the operator’s insurance or security proves to be inadequate.²⁵⁵

357. Similar requirements are stipulated in article VII of the Vienna Convention. The operator is required to maintain an insurance or other financial security required by the installation State. While the installation State is not required to carry insurance or to provide other financial security to cover the injuries that may be caused by the operation of the nuclear plant, it must ensure the payment of claims for compensation established against the operator by providing the necessary funds if the insurance is inadequate.²⁵⁶

²⁵⁴ Hoffman, loc. cit. (footnote 71 above), p. 39.

²⁵⁵ The relevant paragraphs of article III of the Convention read:

“1. The liability of the operator as regards one nuclear ship shall be limited to 1,500 million francs in respect of any one nuclear incident, notwithstanding that the nuclear incident may have resulted from any fault or privity of that operator; such limit shall include neither any interest nor costs awarded by a court in actions for compensation under this Convention.

“2. The operator shall be required to maintain insurance, or other financial security covering his liability for nuclear damage, in such amount, of such type and in such terms as the licensing State shall specify. The licensing State shall ensure the payment of claims for compensation for nuclear damage established against the operator by providing the necessary funds up to the limit laid down in paragraph 1 of this article to the extent that the yield of the insurance of the financial security is inadequate to satisfy such claims.

“3. However, nothing in paragraph 2 of this article shall require any Contracting State or any of its constituent subdivisions, such as States, Republics or Cantons, to maintain insurance or other financial security to cover their liability as operators of nuclear ships.”

²⁵⁶ Article VII of the Convention reads:

“1. The operator shall be required to maintain insurance or other financial security covering his liability for nuclear damage in such amount, of such type and in such terms as the Installation State shall specify. The Installation State shall ensure the payment of claims for compensation for nuclear damage which have been established against the operator by providing the necessary funds to the extent that the yield of insurance or other financial security is inadequate to satisfy such claims but not in excess of the limit, if any, established pursuant to article V.

358. Likewise, article 10 of the Paris Convention requires the operator of nuclear plants to maintain insurance or provide other financial security in accordance with the Convention.²⁵⁷

359. In addition to conventions dealing with nuclear materials, conventions regulating other activities with a risk of substantial injury also require guarantees for payment of compensation in case of injury. Under article 15 of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, the operators of aircraft registered in another contracting State are required to maintain insurance or provide other security for possible damage that they may cause on the surface. Paragraph 4 (c) of that article provides that a contracting State may accept, instead of insurance, “a guarantee by the contracting State where the aircraft is registered, if that State undertakes that it will not claim immunity from suit in respect of that guarantee”.

360. The 1969 Civil Liability Convention requires, in its article VII, paragraph 1, that “the owner of a ship registered in a contracting State which carries more than 2,000 tonnes of oil as cargo maintain insurance or other financial security”.

361. Article 235 of the United Nations Convention on the Law of the Sea also provides, in paragraph 3, that States shall cooperate in “the development of procedures for payment of adequate compensation”.

362. Article 12 of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment requires the parties to the Convention, where appropriate, to ensure under internal law that operators have “a financial guarantee up to a certain limit, of such type and terms as specified by internal law, to cover the

“2. Nothing in paragraph 1 of this article shall require a Contracting Party or any of its constituent subdivisions, such as States or Republics, to maintain insurance or other financial security to cover their liability as operators.

“3. The funds provided by insurance, by other financial security or by the Installation State pursuant to paragraph 1 of this article shall be exclusively available for compensation due under this Convention.

“4. No insurer or other financial guarantor shall suspend or cancel the insurance or other financial security provided pursuant to paragraph 1 of this article without giving notice in writing of at least two months to the competent public authority or, in so far as such insurance or other financial security relates to the carriage of nuclear material, during the period of the carriage in question.”

²⁵⁷ Article 10 of the Convention reads:

“(a) To cover the liability under this Convention, the operator shall be required to have and maintain insurance or other financial security of the amount established pursuant to article 7 and of such type and terms as the competent public authority shall specify.

“(b) No insurer or other financial guarantor shall suspend or cancel the insurance or other financial security provided for in paragraph (a) of this article without giving notice in writing of at least two months to the competent public authority or, in so far as such insurance or other financial security relates to the carriage of nuclear substances, during the period of the carriage in question.

“(c) The sums provided as insurance, reinsurance, or other financial security may be drawn upon only for compensation for damage caused by a nuclear incident.”

liability under this Convention". Such financial security may be subject to a certain limit. Under the article, the parties, in determining which activities should be subject to the requirement of financial security, should take account of the risks of the activity.

363. Similarly, article 10 of the 1995 draft convention on liability and compensation in connection with the carriage of noxious and hazardous substances by sea²⁵⁸ provides for compulsory insurance of the shipowner and shipper. Draft article 11 provides for a scheme to provide compensation, to the extent that the protection afforded in earlier articles including article 10 is inadequate or not available.

B. Judicial decisions and State practice outside treaties

364. In a few cases, a State engaged in activities entailing risks of damage to other States has unilaterally guaranteed reparation of possible damage. The United States of America has adopted legislation guaranteeing reparation for damage caused by certain nuclear incidents. On 6 December 1974, by Public Law 93-513, adopted in the form of a joint resolution of Congress, the United States assured compensation for damage that might be caused by nuclear incidents involving the nuclear reactor of a United States warship.²⁵⁹

²⁵⁸ See paragraph 155 above.

²⁵⁹ The relevant paragraphs of this law read:

"Whereas it is vital to the national security to facilitate the ready acceptability of United States nuclear powered warships into friendly foreign ports and harbours; and

"Whereas the advent of nuclear reactors has led to various efforts throughout the world to develop an appropriate legal regime for compensating those who sustain damages in the event there should be an incident involving the operation of nuclear reactors; and

"Whereas the United States has been exercising leadership in developing legislative measures designed to assure prompt and equitable compensation in the event a nuclear incident should arise out of the operation of a nuclear reactor by the United States as is evidenced in particular by section 170 of the Atomic Energy Act of 1954, as amended; and

"Whereas some form of assurance as to the prompt availability of compensation for damage in the unlikely event of a nuclear incident involving the nuclear reactor of a United States warship would, in conjunction with the unparalleled safety record that has been achieved by United States nuclear powered warships in their operation throughout the world, further the effectiveness of such warships: Now, therefore, be it

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the policy of the United States that it will pay claims or judgments for bodily injury, death, or damage to or loss of real or personal property proven to have resulted from a nuclear incident involving the nuclear reactor of a United States warship: *Provided*, that the injury, death, damage, or loss was not caused by the act of an armed force engaged in combat or as a result of civil insurrection. The President may authorize, under such terms and conditions as he may direct, the payment of such claims or judgments from any contingency funds available to the Government or may certify such claims or judgments to the Congress for appropriation of the necessary funds."

(Public Law 93-513, *United States Statutes at Large*, 1974, vol. 88, part 2, pp. 1610-1611.)

365. Public Law 93-513 was subsequently supplemented by Executive Order 11918, of 1 June 1976, which provided for prompt, adequate and effective compensation in the case of certain nuclear incidents.²⁶⁰

366. In an exchange of notes between the United States of America and Spain in connection with the Treaty of friendship and cooperation concluded between them in 1976, the United States gave the assurance that "it will endeavour, should the need arise, to seek legislative authority to settle in a similar manner claims for bodily injury, death or damage to or loss of real or personal property proven to have resulted from a nuclear incident involving any other United States nuclear component giving rise to such claims within Spanish territory".²⁶¹

367. In other words, the United States unilaterally expanded its liability and volunteered, if necessary, to enact legislation expressing such obligation towards Spain.

368. Similarly, a statement made by the United States Department of State in connection with weather modification activities also speaks of advance agreements with potential victims' States. In connection with the 1966 hearings before the United States Senate on pending legislation concerning a programme to increase usable precipitation in the United States, the State Department made the following statement:

²⁶⁰ The Executive Order reads:

"By virtue of the authority vested in me by the joint resolution approved December 6, 1974 (Public Law 93-513, 88 Stat. 1601, 42 U.S.C.2211), and by section 301 of Title 3 of the *United States Code*, and as President of the United States of America, in order that prompt, adequate and effective compensation will be provided in the unlikely event of injury or damage resulting from a nuclear incident involving the nuclear reactor of a United States warship, it is hereby ordered as follows:

"Section 1. (a) With respect to the administrative settlement of claims or judgments for bodily injury, death, or damage to or loss of real or personal property proven to have resulted from a nuclear incident involving the nuclear reactor of a United States warship, the Secretary of Defense is designated and empowered to authorize, in accord with Public Law 93-513, the payment, under such terms and conditions as he may direct, of such claims and judgments from contingency funds available to the Department of Defense. (b) The Secretary of Defense shall, when he considers such action appropriate, certify claims or judgments described in subsection (a) and transmit to the Director of the Office of Management and Budget his recommendation with respect to appropriation by the Congress of such additional sums as may be necessary.

"Sec. 2. The provisions of section 1 shall not be deemed to replace, alter or diminish the statutory and other functions vested in the Attorney General, or the head of any other agency, with respect to litigation against the United States and judgments and compromise settlements arising therefrom.

"Sec. 3. The functions herein delegated shall be exercised in consultation with the Secretary of State in the case of any incident giving rise to a claim of a foreign country or national thereof, and, international negotiations relating to Public Law 93-513 shall be performed by or under the authority of the Secretary of State."

(*Federal Register* (Washington, D.C.), vol. 41, No. 108, 3 June 1976, p. 22329.)

²⁶¹ *Digest of United States Practice in International Law 1976* (Washington, D.C.), p. 441.

The Department of State's only concern would be in case the experimental areas selected would be close to national boundaries which might create problems with the adjoining countries of Canada and Mexico. In the event of such possibilities the Department would like to ensure that provision is made for advance agreements with any affected countries before such experimentation took place.²⁶²

369. In at least one case, a State undertook to guarantee compensation for injuries that might be caused in a neighbouring State by a private company operating in its ter-

²⁶² Letter addressed by the Department of State to Senator Magnuson, Chairman of the Senate Committee on Commerce, "Weather Modification", *Hearings before the Committee on Commerce*, United States Senate, 89th Congress, 2nd session, part 2, 1966, p. 321.

ritory. Thus Canada and the United States conducted negotiations concerning a project for petroleum prospection that a private Canadian company planned to undertake in the Beaufort Sea, off the Mackenzie delta. The project aroused grave concern in the neighbouring territory of Alaska, in particular in respect of the safety measures envisaged and the funds available for compensating potential victims in the United States. As a result of negotiations, the Canadian company was required to constitute a fund that would ensure payment of the required compensation. The Canadian Government, in turn, undertook to guarantee the payment of compensation.²⁶³

²⁶³ *International Canada* (Toronto), vol. 7, No. 3, pp. 84–85.

CHAPTER VII

Enforcement of judgements

370. If the rights of injured parties are to be effectively protected, it is essential that decisions and judgements awarding compensation should be enforceable. State practice has established the principle that States must not impede or claim immunity from judicial procedures dealing with disputes arising from extraterritorial injuries resulting from activities undertaken within their jurisdiction. States have thus agreed to enforce the judgements or awards rendered by the competent organs concerning disputes arising from such injuries.

A. Treaty practice

371. Multilateral agreements generally contain provisions relating to this last step in the protection of the rights of injured parties. They provide that, once a final judgement on compensation has been rendered, it shall be enforced in the territories of the contracting parties and that parties may not invoke jurisdictional immunity. For example, the Paris Convention provides, in article 13 (*d*) and (*e*), that final judgements rendered by a court competent under the Convention are enforceable in the territory of any of the contracting parties, and that, if an action for damages is brought against a contracting party as an operator liable under the Convention, such party may not invoke jurisdictional immunity.²⁶⁴

²⁶⁴ The relevant paragraphs of article 13 read:

"(d) Judgments entered by the competent court under this article after trial, or by default, shall, when they have become enforceable under the law applied by that court, become enforceable in the territory of any of the other Contracting Parties as soon as the formalities required by the Contracting Party concerned have been complied with. The merits of the case shall not be the subject of further proceedings. The foregoing provisions shall not apply to interim judgments.

"(e) If an action is brought against a Contracting Party under this Convention, such Contracting Party may not, except in respect of

372. Similar provisions are contained in the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, which provides that a final judgement pronounced by a competent court shall be enforceable in the territory of any contracting State once the formalities prescribed by the laws of that State have been complied with.²⁶⁵

373. Under the Additional Convention to CIV, the final judgements rendered by competent courts are enforceable in any other contracting State.²⁶⁶

measures of execution, invoke any jurisdictional immunities before the court competent in accordance with this article."

²⁶⁵ The relevant paragraph of article 20 of the Convention reads:

"4. Where any final judgment, including a judgment by default, is pronounced by a court competent in conformity with this Convention, on which execution can be issued according to the procedural law of that court, the judgment shall be enforceable upon compliance with the formalities prescribed by the laws of the Contracting State, or of any territory, State or province thereof, ..."

²⁶⁶ Article 20 of the Convention provides:

"Article 20. Execution of judgments. Security for costs

"1. Judgments entered by the competent court under the provisions of this Convention after trial, or by default, shall, when they have become enforceable under the law applied by that court, become enforceable in any of the other Contracting States as soon as the formalities required in the State concerned have been complied with. The merits of the case shall not be the subject of further proceedings.

"The foregoing provisions shall not apply to interim judgments nor to awards of damages in addition to costs, against a plaintiff who fails in his action.

"Settlements concluded between the parties before the competent court with a view to putting an end to a dispute, and which have been entered on the record of that court, shall have the force of a judgment of that court.

"2. Security for costs shall not be required in proceedings arising out of the provisions of this Convention."

374. Article XII of the Vienna Convention contains similar language.²⁶⁷

375. Under article 12 of the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources, a judgement given by a competent court, which is enforceable in the State of origin where it is not subject to ordinary forms of review, shall be recognized in the territory of any other State party. If, however, the judgement is obtained by fraud, or if the defendant was not given reasonable notice and a fair opportunity to present his case, the judgement is not enforceable. The article provides further that a judgement recognized as valid shall be enforceable in the territory of any State party once the "formalities" required by that State have been complied with, but that those formalities may neither reopen the case nor raise the question of applicable law.²⁶⁸

376. Article 13 of the same Convention provides that, if the operator is a State party, it will still be subject to the national court of the controlling State or the State in whose territory the damage has occurred, and must waive all defences based on its status as a sovereign State.²⁶⁹

377. The 1969 Civil Liability Convention similarly provides that final judgements rendered in a contracting State are enforceable in any other contracting State. The Convention provides further, in paragraph 2 of article XI,

²⁶⁷ Article XII of the Convention reads:

"1. A final judgment entered by a court having jurisdiction under article XI shall be recognized within the territory of any other Contracting Party, except:

"(a) where the judgment was obtained by fraud;

"(b) where the party against whom the judgment was pronounced was not given a fair opportunity to present his case; or

"(c) where the judgment is contrary to the public policy of the Contracting Party within the territory of which recognition is sought, or is not in accord with fundamental standards of justice.

"2. A final judgment which is recognized shall, upon being presented for enforcement in accordance with the formalities required by the law of the Contracting Party where enforcement is sought, be enforceable as if it were a judgment of a court of that Contracting Party.

"3. The merits of a claim on which the judgment has been given shall not be subject of further proceedings."

²⁶⁸ Article 12 of the Convention reads:

"1. Any judgment given by a court with jurisdiction in accordance with article 11, which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any State Party, except:

"(a) where the judgment was obtained by fraud, or

"(b) where the defendant was not given reasonable notice and a fair opportunity to present his case.

"2. A judgment recognized under paragraph 1 of this article shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be reopened, nor a reconsideration of the applicable law."

²⁶⁹ Article 13 reads:

"Where a State Party is the operator, such State shall be subject to suit in the jurisdictions set forth in article 11 and shall waive all defences based on its status as a sovereign State."

that States shall waive all defences based on their status as sovereign States.²⁷⁰

378. In the Convention on International Liability for Damage Caused by Space Objects, the language on enforceability of awards is different. Under article XIX, a decision of the Claims Commission shall be final and binding if the parties have so agreed; otherwise, the Commission shall render a recommendatory award, which the parties shall consider in good faith. The enforceability of awards thus depends entirely upon the agreement of the parties.²⁷¹

379. Under article 23 (Recognition and enforcement) of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment:

1. Any decision given by a court with jurisdiction in accordance with Article 19 above, where it is no longer subject to ordinary forms of review, shall be recognized in any Party, unless:

(a) such recognition is contrary to public policy in the Party in which recognition is sought;

(b) it was given in default of appearance and the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence;

(c) the decision is irreconcilable with a decision given in a dispute between the same parties in the State in which recognition is sought;

(d) the decision is irreconcilable with an earlier decision given in another State involving the same cause of action and between the same parties, provided that this latter decision fulfils the conditions necessary for its recognition in the State addressed.

2. A decision recognized under paragraph 1 above which is enforceable in the Party of origin shall be enforceable in each Party as

²⁷⁰ Articles X and XI of the Convention read:

"Article X"

"1. Any judgment given by a Court with jurisdiction in accordance with article IX which is enforceable in the State of origin where it is no longer subject to ordinary forms of review shall be recognized in any Contracting State, except:

"(a) where the judgment was obtained by fraud; or

"(b) where the defendant was not given reasonable notice and a fair opportunity to present his case.

"2. A judgment recognized under paragraph 1 of this article shall be enforceable in each Contracting State as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be reopened."

"Article XI"

"...

"2. With respect to ships owned by a Contracting State and used for commercial purposes, each State shall be subject to suit in the jurisdictions set forth in article IX and shall waive all defences based on its status as a sovereign State."

²⁷¹ Article XIX of the Convention reads:

"1. The Claims Commission shall act in accordance with the provisions of article XII.

"2. The decision of the Commission shall be final and binding if the parties have so agreed; otherwise the Commission shall render a final and recommendatory award, which the parties shall consider in good faith. The Commission shall state the reasons for its decision or award.

"..."

soon as the formalities required by that Party have been completed. The formalities shall not permit the merits of the case to be reopened.

380. The rules of this article are based on the European Community Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

381. As regards the relationship between the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment and other treaties dealing with the enforcement of judgements, article 24 of this Convention provides that: "Whenever two or more Parties are bound by a treaty establishing rules of jurisdiction or providing for recognition and enforcement in a Party of decisions given in another Party, the provisions of that Treaty replace the corresponding provisions of [the relevant articles]" of this Convention.

382. As far as the relation between this Convention and the domestic law of States parties is concerned, article 25 of the Convention states that the Convention is without prejudice to the domestic laws of States parties or any other agreements which they may have. As regards parties members of the European Economic Community, the Community rules will be the governing rules and the provisions of the Convention apply only to the extent that there is no Community rule governing a particular issue.²⁷²

²⁷² Article 25 of the Convention reads:

"Article 25. Relation between the Convention and other provisions"

"1. Nothing in this Convention shall be construed as limiting or derogating from any of the rights of the persons who have suffered the damage or as limiting the provisions concerning the protection or reinstatement of the environment which may be provided under the laws of any Party or under any other agreement to which it is a Party.

"2. In their mutual relations, Parties which are members of the European Economic Community shall apply Community

383. In accordance with article 20 of CRTD:

1. Any judgement given by a court with jurisdiction in accordance with article 19, which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any State Party, except:

- (a) where the judgment was obtained by fraud; or
- (b) where the defendant was not given reasonable notice and a fair opportunity to present his case; or
- (c) where the judgment is irreconcilable with an earlier judgment given in the State where the recognition is sought, or given in another State Party with jurisdiction in accordance with article 19 and already recognized in the State where the recognition is sought, involving the same cause of action and between the same parties.

2. Any judgement recognized under paragraph 1 ... shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be reopened.

384. Article 12 of the draft protocol to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal²⁷³ provides that any judgement of a competent court shall, if it is enforceable in the State of origin, be recognized in any contracting party and shall be enforceable without review of the merits of the case.

B. Judicial decisions and State practice outside treaties

385. The issue of enforcement of awards and judgements by arbitral tribunals and courts has not been raised in judicial decisions. In their official correspondence, States have usually arrived at compromises and in most cases have complied with the solutions agreed upon. The content of such correspondence has been examined in the preceding chapters.

rules and shall therefore not apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned."

²⁷³ See paragraph 83 above.

THE LAW AND PRACTICE RELATING TO RESERVATIONS TO TREATIES

[Agenda item 6]

DOCUMENT A/CN.4/470*

First report on the law and practice relating to reservations to treaties by Mr. Alain Pellet, Special Rapporteur

[Original: French]
[30 May 1995]

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General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	United Nations, <i>Treaty Series</i> , vol. 55, p. 187.
Convention establishing the Inter-Governmental Maritime Consultative Organization (Geneva, 6 March 1948)	<i>Ibid.</i> , vol. 289, p. 3.
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	<i>Ibid.</i> , vol. 78, p. 277.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, p. 221.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	<i>Ibid.</i> , vol. 189, p. 137.
Protocol relating to the Status of Refugees (New York, 31 January 1967)	<i>Ibid.</i> , vol. 606, p. 267.
Single Convention on Narcotic Drugs (New York, 30 March 1961)	<i>Ibid.</i> , vol. 520, p. 151.
Protocol amending the Single Convention on Narcotic Drugs of 1961 (Geneva, 25 March 1972)	<i>Ibid.</i> , vol. 976, p. 3.
International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vols. 993, p. 3, and 999, p. 171.
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American Convention on Human Rights (San José, Costa Rica, 22 November 1969)	<i>Ibid.</i> , vol. 1144, p. 123.

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Introduction

1. At the forty-fourth session of the Commission, in 1992, the Planning Group of the Enlarged Bureau established a working group to consider a limited number of topics to be recommended to the General Assembly for inclusion in the programme of work of the Commission.¹ These included the law and practice relating to reservations to treaties, which had been suggested as a possible topic by various delegations at the forty-sixth session of the Assembly.²

2. This topic, which had aroused special interest among the members of the Commission,³ formed the subject, in accordance with the procedure fixed by the Commission on the recommendation of the Planning Group,⁴ of an explanatory outline indicating: (a) the major issues raised by the topic; (b) any applicable treaties, general principles and relevant national legislation or judicial decisions; (c) existing doctrine; and (d) the advantages and disadvantages of preparing a report, a study or a draft convention, if the Commission decided to proceed with the topic.⁵

3. After considering the outline, the working group established by the Planning Group recommended the inclusion in the agenda of the Commission of the topic entitled "The law and practice relating to reservations to treaties". For reasons that will be discussed below, the Commission adopted this recommendation at its forty-fifth session and decided that, subject to approval by the General Assembly, the topic would be included in the agenda.⁶

4. In the debate in the Sixth Committee of the General Assembly at its forty-eighth session, the ILC decision to

include the topic in its agenda was generally endorsed. It was pointed out that the topic had the merit of precision, responding to clear, current needs of the international community and offering ILC an opportunity to make a direct contribution, on a realistic timescale, to the formation and development of State practice.⁷

5. Accordingly, in resolution 48/31 of 9 December 1993, the General Assembly endorsed the ILC decision to include in its agenda the topic of "The law and practice relating to reservations to treaties", "on the understanding that the final form to be given to the work on [this topic] shall be decided after a preliminary study is presented to the General Assembly".

6. At its forty-sixth session, the Commission appointed the Special Rapporteur for this topic.⁸

7. The present report has no doctrinal pretensions, in that it endeavours to enumerate the main problems raised by the topic, without in any way prejudging the possible response of the Commission regarding their substance. On the other hand, in keeping with the General Assembly's wish to have a preliminary study to determine "the final form to be given to the work" on this topic, it has been deemed advisable to submit to the Commission comparatively precise proposals in this regard. Furthermore, as the topic has already been taken up on a number of occasions by the Commission in connection with earlier, more general studies, this report tries to give an overview of that work and to suggest solutions that will not jeopardize earlier advances yet will allow for the codification and progressive development of the law on reservations to treaties. To this end, it will consist of three chapters dealing with the previous work of the Commission on reservations (chap. I), the problems left in abeyance (chap. II) and the possible forms of the results of the work of the Commission on the topic (chap. III).

¹ See *Yearbook ... 1992*, vol. II (Part Two), p. 54, para. 368.

² See A/CN.4/L.469, para. 422.

³ See A/CN.4/L.473/Rev.1, para. 23.

⁴ See *Yearbook ... 1992*, vol. II (Part Two), p. 54, para. 369.

⁵ See *Yearbook ... 1993*, vol. II (Part One), pp. 228–237, document A/CN.4/454.

⁶ *Ibid.*, vol. II (Part Two), pp. 96–97, paras. 427–430 and 440.

⁷ See A/CN.4/457, para. 433.

⁸ *Yearbook ... 1994*, vol. II (Part Two), p. 179, para. 381.

CHAPTER I

The previous work of the Commission on reservations and the outcome

8. Three topics considered by the Commission since its inception have caused it to study, from different standpoints, the question of reservations to treaties. It has done so in the context of the codification of:

(a) The law of treaties;

(b) Succession of States in respect of treaties;

(c) The question of treaties concluded between States and international organizations or between two or more international organizations.

9. These three topics led to the adoption by diplomatic conferences of three conventions, the Vienna Convention on the Law of Treaties (hereinafter called the 1969 Vienna Convention), the Vienna Convention on Succession of States in respect of Treaties (hereinafter called the 1978 Vienna Convention) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter called the 1986 Vienna Convention). All three instruments contain provisions on reservations.

A. The law of treaties

10. The Special Rapporteurs of the Commission on the topic of the law of treaties, Mr. James L. Brierly, Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice and Sir Humphrey Waldock, engaged in a study of the question of reservations to treaties. All of them laid special emphasis on the problem of the admissibility of reservations.

11. A turning point came, however, in the position of the Commission on this point in 1962, following the first report by Sir Humphrey Waldock;⁹ from then on, the Commission gave up the rule of unanimity it had advocated thus far and favoured the flexible system adopted by ICJ in its advisory opinion of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.¹⁰

1. THE WORK OF THE COMMISSION FROM 1950 TO 1961

(a) *Consideration of the reports of Mr. James L. Brierly (1950–1951)*

12. In his first report on the law of treaties, submitted to the Commission at its second session, in 1950, the first Special Rapporteur on this topic, Mr. Brierly, briefly took up the question of reservations and was very clearly in favour of the unanimity rule, which was formulated in draft article 10, paragraph 3, proposed to the Commission, in the following terms:

The acceptance of a treaty subject to a reservation is ineffective unless or until every State or international organization whose consent is requisite to the effectiveness of that reservation has consented thereto.¹¹

13. This principle was adopted with virtually no discussion by the Commission, which, in its report to the General Assembly on its second session, said that:

... a reservation requires the consent at least of all parties to become effective. But the application of these principles in detail to the great variety of situations which may arise in the making of multilateral treaties was felt to require further consideration.¹²

14. The problem resurfaced, however, in the same year. Following the debate in the Sixth Committee of the General Assembly on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, on 16 November 1950, the Assembly adopted resolution 478 (V) in which it requested an advisory opinion by ICJ on the matter and it also invited ILC:

(a) In the course of its work on the codification of the law of treaties, to study the question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law; to give priority to this study and to report thereon, especially as regards multilateral conventions of which the Secretary-General is the depositary, this report to be considered by the General Assembly at its sixth session;

(b) In connexion with this study, to take account of all the views expressed during the fifth session of the General Assembly, and particularly in the Sixth Committee.

15. Further to this request, the Commission had before it, at its third session, a report by the Special Rapporteur,¹³ and two memorandums, submitted by Messrs Gilberto Amado and Georges Scelle.¹⁴

16. In his report, the Special Rapporteur argued that:

... In approaching this task it would appear that the Commission has to bear in mind two main principles. First there is the desirability of maintaining the integrity of international multilateral conventions. It is to be preferred that some degree of uniformity in the obligations of all parties to a multilateral instrument should be maintained. One of the ways in which international law is developed is by a consistent rule of general application being laid down in multilateral (or what amounts in practice to the same thing, a succession of closely similar bilateral) conventions. An example of this may be seen in the rule, now fairly generally accepted, and yet of entirely conventional origin, that *consuls de carrière* possess certain personal immunities, though under customary international law they originally possessed none. Frequent or numerous reservations by States to multilateral conventions of international concern hinder the development of international law by preventing the growth of a consistent rule of general application.

... Secondly, and on the other hand, there is the desirability of the widest possible application of multilateral conventions. It may be assumed, from the very fact that they are multilateral, that the subjects with which they deal are of international concern, i.e., matters which are not only susceptible of international regulation but regarding which it is desirable to reform or amend existing law. If they are to be effective, multilateral conventions must be as widely in force or as generally accepted as possible. An example of this may be seen in the Red Cross Convention of 1949 signed by some 60 States. These are Conventions to which it is clearly desirable to have as many ratifications as possible.¹⁵

17. The Special Rapporteur concluded that the best solution would be to include express provisions tailored to the different types of treaty, some examples of which he gave in annex E of his report.¹³ He also thought it necessary to envisage the possibility that States would not follow this recommendation and to give guidance to the depositary if the treaty was silent on that point; however, having noted that the opinions of writers were far from unanimous and the practice far from homogeneous,¹⁶ he thought that the drafting should wait

⁹ See *Yearbook ... 1962*, vol. II, pp. 31–35, 60–68 and 73–80, document A/CN.4/144, arts. 1 (I) and 17–19, and appendix (Historical summary of the question of reservations to multilateral conventions). A fundamental change in the Commission's approach to reservations was noted by Sinclair in *The Vienna Convention on the Law of Treaties*, pp. 58–61.

¹⁰ *I.C.J. Reports 1951*, p. 15.

¹¹ *Yearbook ... 1950*, vol. II, pp. 238–242, document A/CN.4/23, in particular p. 240.

¹² *Ibid.*, p. 381, document A/1316, para. 164.

¹³ *Yearbook ... 1951*, vol. II, p. 1, document A/CN.4/41. The report had five annexes (A. Summary of debates in the Sixth Committee of the General Assembly; B. Opinions of writers; C. Examples of clauses in conventions regarding reservations; D. Practice with regard to reservations; E. Draft articles on reservations).

¹⁴ *Ibid.*, pp. 17 and 23 respectively, documents A/CN.4/L.9 and A/CN.4/L.14.

¹⁵ *Ibid.*, pp. 3–4, document A/CN.4/41, paras. 11–12.

¹⁶ *Ibid.*, pp. 2–4, paras. 8–11.

for the advisory opinion of ICJ requested by the General Assembly.

18. The Court rendered its opinion on 28 May 1951¹⁰ and the discussion in the Commission focused basically on this opinion, which Mr. Scelle had vigorously criticized in his memorandum¹⁴ which found hardly any support among the other members of the Commission during the discussions.

19. In its report on the work of its third session, the Commission noted that:

the criterion of the compatibility of a reservation with the object and purpose of a multilateral convention, applied by the International Court of Justice to the Convention on Genocide, is not suitable for application to multilateral conventions in general. It involves a classification of the provisions of a convention into two categories, those which do and those which do not form part of its object and purpose. It seems reasonable to assume that, ordinarily at least, the parties regard the provisions of a convention as an integral whole, and that a reservation to any of them may be deemed to impair its object and purpose.¹⁷

The Commission declared itself

... impressed with the complexity of the task which he [the Secretary-General] would be required to discharge if reserving States can become parties to multilateral conventions despite the objections of some of the parties to their reservations.¹⁸

20. While noting that “multilateral conventions are so diversified in character and object that, when the negotiating States have omitted to deal in the text of a convention with the admissibility or effect of reservations, no single rule uniformly applied can be wholly satisfactory”,¹⁹ the Commission nevertheless suggested that:

in the absence of contrary provisions in any multilateral convention and of any organizational procedure applicable, the following practice should be adopted with regard to reservations to multilateral conventions, especially those of which the Secretary-General of the United Nations is the depositary:

(1) The depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention.

(2) The depositary of a multilateral convention, in communicating a reservation to a State which is entitled to object, should at the same time request that State to express its attitude towards the reservation within a specified period, and such period may be extended if this is deemed to be necessary. If, within the period so specified or extended, a State fails to make its attitude towards the reservation known to the depositary, or if, without expressing an objection to the reservation, it signs, ratifies, or otherwise accepts the convention within the period, it should be deemed to have consented to the reservation.

(3) The depositary of a multilateral convention should communicate all replies to its communications, in respect of any reservation to the convention, to all States which are or which are entitled to become parties to the convention.

¹⁷ *Yearbook ... 1951*, vol. II (A/1858), p. 128, para. 24. It can be noted that in general terms the majority position in the Commission at that time was broadly the same as the position stated in the joint dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo attached to the ICJ advisory opinion of 28 May 1951 (*I.C.J. Reports 1951*, pp. 31–48).

¹⁸ *Yearbook ... 1951*, vol. II (A/1858), p. 129, para. 25.

¹⁹ *Ibid.*, para. 28.

(4) If a multilateral convention is intended to enter into force as a consequence of signature only, no further action being requisite, a State which offers a reservation at the time of signature may become a party to the convention only in the absence of objection by any State which has previously signed the convention; when the convention is open to signature during a limited fixed period, only in the absence of objection by any State which becomes a signatory during that period.

(5) If ratification or acceptance in some other form, after signature, is requisite to bring a multilateral convention into force,

(a) A reservation made by a State at the time of signature should have no effect unless it is repeated or incorporated by reference in the later ratification or acceptance by that State;

(b) A State which tenders a ratification or acceptance with a reservation may become a party to the convention only in the absence of objection by any other State which, at the time the tender is made, has signed, or ratified or otherwise accepted the convention; when the convention is open to signature during a limited fixed period, also in the absence of objection by any State which signs, ratifies or otherwise accepts the convention after the tender is made but before the expiration of this period; provided, however, that an objection by a State which has merely signed the convention should cease to have the effect of excluding the reserving State from becoming a party, if within a period of twelve months from the time of the making of its objection, the objecting State has not ratified or otherwise accepted the convention.²⁰

21. After lengthy debate, the Sixth Committee of the General Assembly adopted by a narrow majority the text that was to become resolution 598 (VI) of 12 January 1952.²¹ In paragraph 3, the General Assembly:

Requests the Secretary-General:

(a) In relation to reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, to conform his practice to the advisory opinion of the [International] Court [of Justice] of 28 May 1951;

(b) In respect of future conventions concluded under the auspices of the United Nations of which he is the depositary:

(i) To continue to act as depositary in connexion with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and

(ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications.

22. This “non-decision” was poorly received by writers on law,²² but it nevertheless constituted the guidance followed by the Secretary-General in his practice as

²⁰ *Ibid.*, pp. 130–131, para. 34.

²¹ Adopted by 23 votes to 18, with 7 abstentions. For the debate, see *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 264th–278th meetings, and *ibid.*, *Annexes*, agenda item 49, pp. 8–11, document A/2047.

²² See in particular Fenwick, “When is a treaty not a treaty?”, especially p. 296: “The decision of the General Assembly of the United Nations on 12 January in the matter of reservations to multilateral treaties cannot be said to have clarified the situation. Rather it would seem only to have added to the confusion and left us with a rule which is no rule at all.”

depository²³ until 1959, when the problem resurfaced in connection with the declaration made by India on the occasion of the deposit of its instrument of acceptance of the Convention on the Inter-Governmental Maritime Consultative Organization.²⁴ Once again, the debates were inconclusive and their only concrete consequence was the invitation to the Secretary-General, in General Assembly resolution 1452 B (XIV) of 7 December 1959, to apply the above-mentioned paragraph 3 (b) of resolution 598 (VI) to all the agreements of which he was the depository, which did not contain provisions to the contrary, even if they had been concluded before 1952.

(b) *The reports of Sir Hersch Lauterpacht (1953–1954)*

23. The position taken by the Commission in 1951 was to have a powerful influence on its work on reservations to treaties in subsequent years.

24. In his first report on the law of treaties (1953), Sir Hersch Lauterpacht, who had succeeded Mr. Brierly as Special Rapporteur, took up the problem of reservations once again. He proceeded in a rather unusual manner by proposing a draft article *de lege lata*, but matching it with four alternative proposals *de lege ferenda*, which gave the impression that the Special Rapporteur thought that the existing laws were not satisfactory and that he hoped to have them modified by persuading the Commission to engage in the progressive development of international law.²⁵

25. Draft article 9 stated the principle of unanimity very clearly:

A signature, ratification, accession, or any other method of accepting a multilateral treaty is void if accompanied by a reservation or reservations not agreed to by all other parties to the treaty.²⁶

According to the Special Rapporteur,

...

article 9 as here drafted must be regarded as probably still representing the existing law.

...

However, although nothing decisive has occurred to dislodge the principle of unanimous consent as a rule of existing international law,

²³ See “Summary of Practice of the Secretary-General as Depository of Multilateral Treaties” (ST/LEG/7), particularly p. 39, para. 80.

²⁴ On this problem, see, *inter alia*, the report of the Secretary-General to the fourteenth session of the General Assembly (*Official Records of the General Assembly, Fourteenth Session, Annexes*, pp. 2 *et seq.*, document A/4235), the records of the debates of the Sixth Committee at the fourteenth session of the Assembly (*ibid.*, *Fourteenth Session, Sixth Committee*, 614th–629th meetings), and the report of the Secretary-General submitted in accordance with General Assembly resolution 1452 B (XIV) (document A/5687). See also Schachter, “The question of treaty reservations at the 1959 General Assembly”.

²⁵ *Yearbook ... 1953*, vol. II, pp. 91 and 123–136, document A/CN.4/63. It must be pointed out that, since the Commission did not state a view, the report reflects the views of the Special Rapporteur alone.

²⁶ *Ibid.*, p. 91.

the Commission, for reasons stated in the comment which follows, is not now of the view that it constitutes a satisfactory rule and that it can—or ought to—be maintained.²⁷

26. From that time on, the four alternative proposals weakened the rigour of the principle. The “principal considerations underlying the alternative drafts” were presented by the Special Rapporteur in the following way:

A. It is desirable to recognize the right of States to append reservations to a treaty and become at the same time parties to it provided these reservations are not of such a nature to meet with disapproval on the part of a substantial number of the States which finally accept the obligations of the treaty;

B. It is not feasible or consistent with principle to recognize an unlimited right of any State to become a party to a treaty while appending reservations however sweeping, arbitrary, or destructive of the reasonably conceived purpose of the treaty and of the legitimate interests and expectations of the other parties;

C. The requirement of unanimous consent of all parties to the treaty as a condition of participation in the treaty of a State appending reservations is contrary to the necessities and flexibility of international intercourse.²⁸

27. There is no need to go into the details of each of these alternatives—some of which proposed bold solutions.²⁹ As Ruda pointed out, “The main characteristics of these Alternatives is that they were offered as new proposals, as a compromise between the unanimity rule and the principle of a sovereign right to formulate reservations. They had the flexibility of the Pan-American rules, but they provided more guarantees against the abuse on making reservations. ... The impact of the new realities of international life and the Advisory Opinion of the International Court of Justice had begun to shake the basis of a well-established rule of international law”.³⁰

28. Apart from one small change to the draft article *de lege lata*, the Special Rapporteur repeated his 1953 proposals in 1954.³¹ In his second report on the law of treaties, he argued forcefully in favour of a progressive development of the existing rules and commented, not without malice:

It is a matter for reflection that while the International Court of Justice, whose function is to *apply* existing law, in its advisory opinion on the question of Reservations to the Convention on Genocide, devoted itself mainly to the *development* of the law in this sphere by laying down the novel principle of compatibility of reservations with the purpose of the treaty, the International Law Commission whose task is both to codify and develop international law, limited itself substantially to a statement of existing law.³²

²⁷ *Ibid.*, pp. 123–124.

²⁸ *Ibid.*, p. 125.

²⁹ Such as the solution of entrusting the Chamber of Summary Procedure of ICJ with responsibility for ruling on the admissibility of reservations (alternative D) (*ibid.*, p. 134).

³⁰ Ruda, “Reservations to treaties”, p. 158.

³¹ See *Yearbook ... 1954*, vol. II, pp. 131–133, document A/CN.4/87. The Special Rapporteur proposed that the words “Unless otherwise provided by the treaty,” should precede the text of draft article 9 (para. 25 above).

³² *Ibid.*, p. 131, para. 3.

29. Moreover, the Special Rapporteur drew attention to the current discussions about reservations to the future international covenant on human rights and, in particular, to the British proposal which drew extensively on the deliberations of Sir Gerald Fitzmaurice—who would succeed Sir Hersch Lauterpacht the following year following his election to ICJ—in an article published in 1953.³³

(c) *The first report of Sir Gerald Fitzmaurice (1956)*

30. Since, for lack of time, the reports of Sir Hersch Lauterpacht were not discussed by the Commission, the new Special Rapporteur, Sir Gerald Fitzmaurice, in his first report on the law of treaties, drafted in 1956, once again took up the question of reservations, which was the subject of articles 37 to 40 of the code which he proposed should be adopted.³⁴

31. The Special Rapporteur's proposals, which drew extensively on the article cited above (para. 29), to which it referred explicitly, did not depart very far in their general spirit from those of his predecessor. Like him, he started from the principle of unanimity, which he applied strictly to bilateral and "plurilateral" treaties,³⁵ but he too tried to weaken the rigour of the principle by taking a relatively timid line in that respect, for the system which he proposed rested on an entirely consensual basis: in cases where the treaty is silent, a reservation has effect only in the following cases:

(a) If the intention to make it was stated during the negotiation of the treaty without meeting with any objection; or

(b) If the States concerned,³⁶ to which the reservation must be communicated, do not raise any objection.

But if "a reservation meets with objection, ... the reserving State ... cannot become ... a party ... unless the reservation is withdrawn".³⁷

32. The Special Rapporteur also tried to provide a rigorous definition of the notion of reservation:

Only those reservations which involve a derogation of some kind from the substantive provisions of the treaty concerned are properly to be regarded as such, and the term reservation herein is to be understood as limited in that sense.³⁸

33. The provisions concerning reservations proposed in the Special Rapporteur's first report were not considered by the Commission and he did not have an opportunity to return to them subsequently before his election to ICJ in 1961.

2. THE WORK OF THE COMMISSION
FROM 1962 TO 1965

34. The first report of Sir Gerald Fitzmaurice constitutes the swansong of the principle of unanimity, which was abandoned by the Commission following the reports of his successor as Special Rapporteur, Sir Humphrey Waldock.

(a) *Consideration of the first report of Sir Humphrey Waldock (1962)*

35. The first report by Sir Humphrey Waldock deals with the conclusion, entry into force and registration of treaties and includes copious developments with respect to the commentaries to the three draft articles relating to reservations.³⁹ In addition, in draft article 1, paragraph 1, the Special Rapporteur proposed a definition of the word "reservation" which he characterized—in contrast to "[a]n explanatory statement or statement of intention or of understanding"—by the fact that it "will vary the legal effect of the treaty in its application between [the State making the reservation] and the other party or parties to the treaty".

36. Taking up the distinction, already drawn by Sir Gerald Fitzmaurice,⁴⁰ between bilateral and plurilateral treaties⁴¹ on the one hand and multilateral treaties on the other, the Special Rapporteur focuses his attention on reservations to the latter category of instruments and comes out firmly in favour of a "flexible" system, adducing, *inter alia*, the following arguments³⁹:

(a) The proposals formulated by the Commission in 1951, which differed from the opinion of ICJ delivered that same year,¹⁰ did not commend themselves to a majority of States in the General Assembly;

(b) The international community itself has undergone rapid expansion since 1951, so that the very number of potential participants in multilateral treaties now seems to make the unanimity principle less appropriate and less practicable;

³³ Fitzmaurice, "Reservations to multilateral conventions".

³⁴ *Yearbook ... 1956*, vol. II, pp. 115–116 and 126–127, document A/CN.4/101.

³⁵ Article 38, *ibid.*, pp. 115 and 127. The Special Rapporteur defines plurilateral treaties as treaties "made between a limited number of States for purposes specially interesting those States".

³⁶ This notion was subjected to quite complicated tinkering.

³⁷ Article 39, para. 3 (footnote 34 above), pp. 115 and 127.

³⁸ Article 37, para. 1 (*ibid.*, p. 115); see also article 13 (*l*) (*ibid.*, p. 109).

³⁹ See the draft articles and commentaries presented by the Special Rapporteur (*Yearbook ... 1962*, vol. II, pp. 60–68, document A/CN.4/144, articles 17 ("Power to formulate and withdraw reservations"), 18 ("Consent to reservations and its effects") and 19 ("Objection to reservations and its effects"); see also the "Historical summary of the question of reservations to multilateral conventions" (*ibid.*, appendix, pp. 73–80).

⁴⁰ See paragraph 31 and footnote 35 above.

⁴¹ Which, according to the Special Rapporteur, pose no particular problems: reservations to those categories of agreements must, in principle, be accepted by the other party or parties.

(c) Since the adoption of General Assembly resolution 598 (VI) (see para. 21 above), the system which has been in operation de facto for all new multilateral treaties of which the Secretary-General is the depositary has approximated to the “flexible” system advocated by the larger of the two main groups of States in the General Assembly in 1951;

(d) The essential interests of each individual State are safeguarded by a flexible system, as, through an objection to a reservation, the objecting State may prevent the treaty from entering into force between itself and the reserving State and as States which have accepted the reservation are not bound to the reserving State by the provision to which the reservation applies;

(e) Such a system should have no sensible effect on the drafting of multilateral treaties, the text of which would, in any case, require the approval of a two-thirds majority of the negotiating States;

(f) The integrity of the treaty would only be materially affected if a reservation of a somewhat substantial kind were to be formulated by a number of States, if only because of the threat of objections by the other States;

(g) Furthermore, the rule calculated to promote the widest possible acceptance of whatever measure of common agreement can be achieved may be the one most suited to the immediate needs of the international community.

37. Taking those premises as his starting point, the Special Rapporteur proposed a system which differed in many respects from those envisaged by his predecessors.

38. He started from the principle that, unless expressly or implicitly forbidden by the treaty itself, “A State is free, when signing, ratifying, acceding to or accepting a treaty, to formulate⁴² a reservation ...”,⁴³ provided that it “shall have regard to the compatibility of the reservation with the object and purpose of the treaty”.⁴⁴

39. The Special Rapporteur thus referred, for the first time in the Commission, to the criterion adopted by ICJ in 1951 and rejected by the Commission that same year. However, although also of the opinion “that there is value in the Court’s principle as a general concept”, the Special Rapporteur expressed his doubts as to that highly subjective concept and refused to use it “as a *criterion* of a reserving State’s status as a party to a treaty in combination with the objective criterion of the acceptance or

rejection of the reservation by other States”.⁴⁵ Consequently, draft article 18 provided that:

1. A reservation, since it purports to modify the terms of the treaty as adopted, shall only be effective against a State which has given, or is presumed to have given, its consent ...³⁹

In paragraph 3 (b) the same article stated that that presumption could result from the silence of States which are, or are entitled to become, parties to the treaty, for a period of 12 months.

40. The most original feature of Sir Humphrey Waldock’s draft was not, however, that presumption.⁴⁶ Rather, it concerned the effects resulting from the acceptance, express or implied, of a reservation, since, according to draft article 18, paragraph 4 (b) (ii):

The consent, express or implied, of any other State which is a party or a presumptive party to a multilateral treaty shall suffice, as between that State and the reserving State, to establish the admissibility of a reservation not specifically authorized by the treaty, and shall at once constitute the reserving State a party to the treaty with respect to that State.⁴⁷

41. Conversely, if an objection to a reservation causes a bilateral treaty to “fall to the ground” and excludes the participation of the State that has formulated the reservation to a bilateral treaty, according to draft article 19, paragraph 4 (c):³⁹

In the case of a multilateral treaty, the objections shall preclude the entry into force of the treaty as between the objecting and the reserving States, but shall not preclude its entry into force as between the reserving State and any other State which does not object to the reservation.

42. The debate in the Commission revealed profound divisions among its members; nevertheless, a majority concluded that

in the case of general multilateral treaties, the considerations in favour of a flexible system, under which it is for each State individually to decide whether to accept a reservation and to regard the reserving State as a party to the treaty for the purpose of the relations between the two States, outweigh the arguments advanced in favour of retaining a “collegiate” system under which the reserving State would only become a party if the reservation were accepted by a given proportion of the other States concerned.⁴⁸

43. As to the detail, however, the Special Rapporteur’s proposals have been substantially transformed by the Commission:

(a) The distinction between “plurilateral” treaties, multilateral treaties not of a general character and general multilateral treaties has been abandoned. The rules pro-

⁴² The Special Rapporteur rightly points out that “there is an inherent ambiguity in saying ... that a State may ‘make’ a reservation; for the very question at issue is whether a reservation *formulated* by one State can be held to have been effectively ‘made’ unless and until it has been assented to by the other interested States” (draft art. 9 (footnote 39 above), p. 62, Commentary, para. (1)).

⁴³ Draft article 17, para. 1 (a) (footnote 39 above), p. 60.

⁴⁴ *Ibid.*, para. 2 (a), p. 60.

⁴⁵ *Ibid.*, p. 66, Commentary, para. (10).

⁴⁶ The two previous Special Rapporteurs had proposed shorter periods, of three months.

⁴⁷ This rule was to be applicable only in the absence of contrary rules provided in the treaty itself and, for the constituent instruments of international organizations, subject to the consent of the competent organ.

⁴⁸ *Yearbook ... 1962*, vol. II, p. 180, document A/5209, para. 23, Draft articles on the law of treaties, arts. 18–20, Commentary, para. (14).

posed by the Commission therefore cover all multilateral treaties, except those concluded between a small number of States, for which the unanimity rule is retained;⁴⁸

(b) The draft articles adopted by the Commission⁴⁹ no longer cover reservations to a bilateral treaty, which “presents no problem, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty”;⁵⁰

(c) Some minor drafting changes, generally with a view to simplification, were made to the draft articles proposed by the Special Rapporteur;

(d) Instead of three, these draft articles became five, devoted respectively to Formulation of reservations (art. 18), Acceptance of and objection to reservations (art. 19), The effect of reservations (art. 20), The application of reservations (art. 21) and The withdrawal of reservations (art. 22).⁵¹

44. However, the main change introduced by the Commission to the system proposed by the Special Rapporteur is the link established by article 20, paragraph 2 (b), between the principle of compatibility with the object and purpose of the treaty—thereby elevated to the rank of a true “criterion” (see para. 39 above)—and the effect of objections to reservations, since

An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.⁵⁰

45. The purely consensual system adopted by the Special Rapporteur was thus altered by the inclusion of an eminently subjective criterion, without the respective roles of the one and the other being clearly defined and with the Commission itself acknowledging, in its commentary on article 20, that

The criterion of “compatibility with the object and purpose of the treaty” ... is to some extent a matter of subjective appreciation; and

...

This necessarily means that there may be divergent interpretations of the compatibility of a particular reservation with the object and purpose of a given treaty.⁵²

This ambiguity, which has never been completely removed, gave rise to many discussions subsequently and to a number of difficulties, but it no doubt enabled the

⁴⁸ *Yearbook ... 1962*, vol. II, p. 180, document A/5209, para. 23, Draft articles on the law of treaties, arts. 18–20, Commentary, para. (14).

⁴⁹ For the text of the draft articles on the law of treaties, as adopted by the Commission, see *Yearbook ... 1966*, vol. II, pp. 177–188, document A/6309/Rev.1.

⁵⁰ *Yearbook ... 1962*, vol. II, p. 177, document A/5209, para. 23, Draft articles, arts. 18–20, Commentary, para. (1).

⁵¹ For articles 18–20, *ibid.*, pp. 175–176 and for articles 21–22, *ibid.*, p. 181.

⁵² *Ibid.*, p. 181, Commentary to article 20, para. (22).

system to be adopted and is even perhaps the explanation for its relative success.

46. Despite this ambiguity—or perhaps, because of it!—the draft of the Commission was favourably received during the debates in the General Assembly.⁵³ Bolstered by that broad majority support, the “flexible” system had then supplanted the “traditional” system; it would no longer be called into question in the future.

(b) *The adoption of the draft articles on the law of treaties (1965–1966)*

47. In 1965, Sir Humphrey Waldock submitted to the Commission his fourth report on the law of treaties,⁵⁴ in which he proposed a revision of the draft articles to take account of the comments of Governments. In addition to that report, the Commission had before it the following documents: “Resolutions of the General Assembly concerning the law of treaties: note prepared by the Secretariat”⁵⁵ and “Depositary practice in relation to reservations: report of the Secretary-General”.⁵⁶

48. The fourth report of the Special Rapporteur dealt, *inter alia*, with the provisions relating to reservations,⁵⁷ to which it proposed certain amendments, in line with the wishes of some States.

49. The Special Rapporteur was receptive to a criticism by the Danish Government⁵⁸ about the general structure of the draft articles relating to reservations, regarded as unnecessarily complicated and liable to cause confusion, particularly inasmuch as it might give the impression that the procedure for implied acceptance of reservations (see para. 39 above) might be applicable to reservations prohibited by the treaty. Consequently, the title and the contents of the first three articles were changed (see para. 43 above) so as clearly to distinguish cases of “treaties permitting or prohibiting reservations” (art. 18) from those “silent concerning reservations” (art. 19), with article 20 on the “procedure regarding reservations” and the titles of articles 21 (The application of reservations) and 22 (The withdrawal of reservations) remaining unchanged.

⁵³ *Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 736th–744th meetings*, and *ibid.*, *Annexes*, agenda item 76, document A/5287, p. 14, para. 24.

⁵⁴ *Yearbook ... 1965*, vol. II, p. 3, document A/CN.4/177 and Add.1 and 2.

⁵⁵ *Yearbook ... 1963*, vol. II, pp. 18–28, document A/CN.4/154, paras. 106–124.

⁵⁶ *Yearbook ... 1965*, vol. II, pp. 74 *et seq.*, document A/5687. See in particular pp. 103–107, annexes I (Questionnaire annexed to the Secretary-General’s letter of 25 July 1962 with respect to depositary practice in relation to reservations in accordance with General Assembly resolution 1452 B (XIV), II (Examples of reservation clauses appearing in conventions concluded under the auspices of the United Nations) and III (General Assembly resolutions governing the practice of the Secretary-General in respect of reservations).

⁵⁷ *Ibid.*, document A/CN.4/177 and Add.1 and 2, p. 15 (art. 1, para. 1 (f)) and pp. 45–56 (arts. 18–22).

⁵⁸ *Ibid.*, pp. 46 and 50.

50. Albeit with some nuances, it is certain that, on the whole, Governments approved of the “flexible” system adopted by the Commission in 1962 and the Special Rapporteur was certainly justified in considering that:

Although they criticize certain aspects of the Commission’s proposals, the comments of Governments, taken as a whole, appear ... to endorse the Commission’s decision to try to work out a solution of the problem of reservations to multilateral treaties on the basis of the flexible system followed in the existing texts of articles 18-20.⁵⁹

51. It is no less clear that Governments showed themselves perplexed about the exact role of the criterion of compatibility of the reservation with the purpose and object of the treaty in the globally consensual mechanism retained by the Commission (see para. 45 above). Their comments were, however, the result of greatly differing considerations which often led them to opposite conclusions:

(a) In the view of some, this criterion might lead to an abusive restriction of the right to formulate reservations;⁶⁰

(b) Others considered it too vague⁶¹ or unnecessary;⁶²

(c) Others again considered that it should be strengthened and, if possible, “objectivized”.⁶³

52. Faced with these differences of opinion, the Special Rapporteur firmly maintained the principle adopted by the Commission, pointing out, in the first place, that a reservation incompatible with the purpose and object of the treaty would be contrary to the principle of good faith and, in the second place, that it seemed very unlikely that that criterion would exercise a material influence in inhibiting participation in multilateral treaties.⁶⁴ He therefore proposed a new wording for draft article 19, paragraph 1, which merely positively reaffirmed the principle stated in 1962:

Where a treaty is silent on the question of reservations, reservations may be proposed provided that they are compatible with the object and purpose of the treaty ...⁶⁵

However, this express limitation on the right to formulate reservations is not expressly referred to in draft article 19, paragraph 4, which deals with the effect of acceptance or objection and, according to the Special Rapporteur, this means that “incompatible” reservations are

prohibited, whereas “compatible” reservations may be the subject of objections.⁶⁶

53. Paragraph 4 of the new draft article proposed by the Special Rapporteur thus read:

...

(a) acceptance of a reservation by any party constitutes the reserving State a party to the treaty in relation to such party;

(b) objection to a reservation by any party precludes the entry into force of the treaty as between the objecting and the reserving State.⁶⁵

54. The other changes proposed by the Special Rapporteur were relatively minor:

(a) Unanimous acceptance by the parties is required when it “appears from the nature of a treaty, the fewness of its parties or the circumstances of its conclusion that the application of its provisions between all the parties is to be considered an essential condition of the treaty”;⁶⁷

(b) The obligation to raise an objection to a reservation within a period of 12 months is limited to States parties only;⁶⁸

(c) Several procedural or drafting simplifications were introduced.

55. However, the Special Rapporteur rejected the suggestion by the Japanese⁶⁹ and British⁷⁰ Governments that he should include a provision clearly drawing a distinction between a reservation and an interpretative declaration, stating that declarations “are not reservations and appear to concern the interpretation rather than the conclusion of treaties”.⁵⁹ Although some members raised that point again during the discussions of the Commission,⁷¹ he subsequently maintained his position.⁷² In its commentary to the final version of article 2, however, the Commission explained that a “declaration” made by a State when it signed, ratified, accepted, approved or acceded to a treaty “may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted”.⁷³

⁶⁶ This emerges in particular from paragraph 10 of the commentary to article 19 (*ibid.*, p. 52), the meaning of which is not, however, absolutely clear and was not elucidated during the debates.

⁶⁷ Article 19, para. 2 (*ibid.*, p. 54).

⁶⁸ Article 20, para. 4 (*ibid.*).

⁶⁹ *Ibid.*, p. 49 and document A/CN.4/175 and Add.1-4.

⁷⁰ *Ibid.*, p. 49.

⁷¹ See, for example, the statements by Messrs Verdross and Ago, *Yearbook ... 1965*, vol. I, 797th and 798th meetings, pp. 151-152, paras. 36-44, and pp. 161-162, paras. 68-76, respectively.

⁷² *Ibid.*, 799th meeting, p. 165, paras. 11-19.

⁷³ *Yearbook ... 1966*, vol. II, pp. 189-190, document A/6309/Rev.1, Commentary to draft article 2, para. (11).

⁵⁹ *Ibid.*, p. 50.

⁶⁰ *Ibid.*, p. 47 (Poland).

⁶¹ *Ibid.*, p. 46 (Denmark).

⁶² *Ibid.*, p. 48 (Argentina).

⁶³ *Ibid.*, pp. 46-48 (Canada, the United Kingdom of Great Britain and Northern Ireland and the United States of America).

⁶⁴ *Ibid.*, p. 51.

⁶⁵ *Ibid.*, p. 54.

56. Subject to last-minute drafting amendments in 1966,⁷⁴ the final text of the articles on reservations⁷⁵ was provisionally adopted in 1965,⁷⁶ although the final commentary was published only the following year with the draft articles as a whole.⁷⁷ The Commission did not discuss the structure of the draft again and the “flexible” system adopted in 1962 was not questioned. Following lengthy and difficult discussions, however, major changes were made to the new proposals by the Special Rapporteur.

57. The most important changes are the following:

(a) Draft article 16, now restricted to the “formulation of reservations”, makes compatibility with the object and purpose of the treaty one of the general conditions to which the right to formulate a reservation is subject,⁴⁹ this same principle was applied by ICJ in its 1951 advisory opinion in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case.¹⁰ The above-mentioned ambiguity (para. 45 above) is far from having been dispelled, however, since the Commission stated in its commentary that:

The admissibility or otherwise of a reservation under paragraph (c) [which establishes the requirement of compatibility], on the other hand, is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States; and this paragraph has, therefore, to be read in close conjunction with the provisions of article 17 regarding acceptance of and objection to reservations.⁷⁸

(b) In draft article 17, paragraph 2,⁷⁹ the words “limited number of the *contracting* States*” are replaced by the words “limited number of the *negotiating* States*”. There is thus no longer any reference to “the circumstances” of the conclusion of the treaty and, in particular, the concept of the nature of the treaty is replaced by that of its object and purpose.

(c) A clarification is added in draft article 17, paragraph 4 (b), which provides that

an objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States *unless a contrary intention is expressed by the objecting State**⁸⁰

⁷⁴ Ibid., vol. I (Part Two), 887th and 892nd meetings, respectively pp. 292–293, paras. 64–67, and pp. 326–327, paras. 101–106.

⁷⁵ These articles were renumbered as follows: article 16 (Formulation of reservations), article 17 (Acceptance of and objection to reservations), article 18 (Procedure regarding reservations), article 19 (Legal effects of reservations) and article 20 (Withdrawal of reservations).

⁷⁶ *Yearbook ... 1965*, vol. I, 796th–800th, 813th, 814th and 816th meetings, pp. 143–178, 263–273 and 283–285.

⁷⁷ *Yearbook ... 1966*, vol. II, pp. 189–190 (footnote 73 above) and pp. 202–209, document A/6309/Rev.1, draft articles 16–21.

⁷⁸ Ibid., p. 207, Commentary to article 16, para. (17).

⁷⁹ Corresponding to article 19, paragraph 2, of the draft articles submitted by the Special Rapporteur.

⁸⁰ See footnote 49 above. The Special Rapporteur himself suggested this addition (*Yearbook ... 1965*, vol. II, p. 55, document A/CN.4/177 and Add.1 and 2).

This opened the door to the possibility that the reserving State and the State that had raised the objection might nevertheless be bound by the treaty. By the same token, the Commission admitted that an objection was not necessarily based on the incompatibility of a reservation with the object and purpose of the treaty.⁸¹

3. THE UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES (1968–1969) AND THE QUESTION OF RESERVATIONS

58. The United Nations Conference on the Law of Treaties was convened by General Assembly resolution 2287 (XXII) of 6 December 1967 and held its two sessions in Vienna from 26 March to 24 May 1968 and from 9 April to 22 May 1969. Although the provisions ultimately adopted were largely based on the proposals of the Commission, it is no exaggeration to say that, together with the “all States” clause and *jus cogens*, the question of reservations gave rise to one of the main discussions which divided the participating States and on which the Conference spent the most time.⁸²

59. Although some States expressed a preference during the Conference not for the traditional system, but for closer checking of reservations, and even submitted amendments along those lines, the text finally adopted embodies the “flexible” system and even makes it more flexible on some important points. Thus, the Conference adopted an amendment proposed by Poland to article 16 (b),⁸³ designed to authorize additional reservations, as appropriate to a treaty listing certain implied reservations if the list is not exhaustive; article 16 (c) was also amended accordingly. And, in particular, on the basis of an amendment proposed by the Union of Soviet Socialist

⁸¹ “[O]bjections are sometimes made to reservations for reasons of principle or policy without the intention of precluding the entry into force of the treaty between the objecting and reserving States” (*Yearbook ... 1966*, vol. II, p. 207, document A/6309/Rev.1, Commentary to article 17, para. (21)).

⁸² See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), pp. 106–138, 21st–25th plenary meetings; *ibid.*, *Second Session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), pp. 1–42, 1st–6th plenary meetings, pp. 179–180, 33rd plenary meeting, and pp. 218–222, 85th plenary meeting; and *ibid.*, *First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969* (United Nations publication, Sales No. E.70.V.5), Reports of the Committee of the Whole (A/CONF.39/14 and A/CONF.39/15), pp. 111–113, 132–142 and 239–240. See also the proposals and amendments submitted to the Plenary Conference, *ibid.* (A/CONF.39/14), pp. 265–267, as well as the analytical compilation of comments and observations made in 1966 and 1967 with respect to the final draft articles on the law of treaties, prepared by the Secretariat (A/CONF.39/5 (vol. I)), pp. 158–172.

⁸³ Corresponding to article 16 (b) of the 1969 Vienna Convention. See *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969* (United Nations publication, Sales No. E.70.V.5), Reports of the Committee of the Whole (A/CONF.39/14), p. 134.

Republics,⁸⁴ the presumption established by article 17, paragraph 4 (b) (see also paragraph 57 (c) above), was reversed in the corresponding article of the 1969 Vienna Convention,⁸⁵ which adopts the principle that an objection to a reservation does not preclude the entry into force of the treaty as between the reserving and objecting States unless the latter has “clearly expressed” the contrary intention. Article 21, paragraph 3, of the Convention was also amended accordingly. Strangely enough, the expert consultant, Sir Humphrey Waldock, did not object to that change, considering that “the problem was merely that of formulating a rule one way or the other”.⁸⁶

60. The articles of the 1969 Vienna Convention relating to reservations are as follows:

PART I. INTRODUCTION

...

Article 2. USE OF TERMS

1. For the purposes of the present Convention:

...

(d) “reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

...

PART II. CONCLUSION AND ENTRY INTO FORCE OF TREATIES

...

SECTION 2. RESERVATIONS

Article 19. FORMULATION OF RESERVATIONS

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20. ACCEPTANCE OF AND OBJECTION TO RESERVATIONS

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of

the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless the contrary intention is definitely expressed by the objecting State;

(c) an act expressing a State’s consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21. LEGAL EFFECTS OF RESERVATIONS AND OF OBJECTIONS TO RESERVATIONS

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Article 22. WITHDRAWAL OF RESERVATIONS AND OF OBJECTIONS TO RESERVATIONS

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

Article 23. PROCEDURE REGARDING RESERVATIONS

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the

⁸⁴ *Ibid.*, pp. 265–266, proposals and amendments submitted to the Plenary Conference (A/CONF.39/L.3). Previous amendments along the same lines, proposed by Czechoslovakia, Syria and the USSR (*ibid.*, Reports of the Committee of the Whole (A/CONF.39/14)), pp. 133 and 135, had earlier been rejected by the Committee of the Whole.

⁸⁵ Article 20, para. 4 (b).

⁸⁶ *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 34, para. 74, 10th plenary meeting. The reversal of the presumption may, however, seem less innocuous.

treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

CONCLUSION

61. This brief survey of the preparatory work on the provisions of the 1969 Vienna Convention relating to reservations calls for the following comments:

(a) Their gestation was laborious and difficult; often lively differences of opinion between the members of the Commission and between States and groups of States were, in many cases, settled only by means of compromises based on judicious ambiguities;

(b) The most remarkable of these ambiguities results from the exact role of the “criterion” of the compatibility of the reservation with the object and purpose of the treaty, to which the Convention “doctrinally” pays tribute, but from which it does not draw any clear-cut conclusions;

(c) Despite resistance and hesitation, the history of these provisions shows a definite trend towards an increasingly stronger assertion of the right of States to formulate reservations;

(d) The system finally adopted might be characterized more as “consensual” than as “flexible” in the sense that, ultimately, the contracting States may change the system of reservations and objections as they see fit and practically without restriction, either in the treaty itself or, if the treaty is silent in this regard and except in the case of treaties whose integrity must be preserved for some reason and of the constituent instruments of international organizations, through interrelated unilateral instruments.

B. Succession of States in respect of treaties

62. A short while after the adoption of the 1969 Vienna Convention, Sir Humphrey Waldock, who, in 1967, had been appointed Special Rapporteur on succession of States in respect of treaties, submitted his third report on the topic to the Commission.⁸⁷ The report contained a draft article 9 on “Succession in respect of reservations to multilateral treaties”, its purpose being to determine the position of the successor State in regard to reservations, acceptances and objections.⁸⁸

63. After referring to certain “logical principles” and noting that the—still developing—practice of depositar-

ies was not wholly consistent with them, the Special Rapporteur concluded “that a flexible and pragmatic approach to the problem of succession in respect of reservations is to be preferred”.⁸⁹

64. Accordingly, he proposed that rules should be adopted to reflect:

(a) A presumption in favour of succession to the reservations of the predecessor State unless the successor State has expressed a contrary intention or unless, by reason of its object and purpose, the reservation is appropriate only to the predecessor State (art. 9, para. 1);

(b) The possibility for the successor State to formulate new reservations, in which case (i) the successor State is considered to have withdrawn any different reservations made by the predecessor State; and (ii) the provisions of the treaty itself and of the 1969 Vienna Convention apply to the reservations of the successor State (para. 2);

(c) The application of these rules, *mutatis mutandis*, to objections to reservations (para. 3 (a)), although, “in cases falling under Article 20, paragraph 2, of the Vienna Convention no objection may be formulated by a successor State to a reservation which has been accepted by all the parties to the treaty” (para. 3 (b)).⁸⁸

65. The proposals were examined only in 1972 and did not give rise to very lively discussions.⁹⁰ The Commission endorsed the pragmatic and flexible approach to the treatment of reservations and objections⁹¹ recommended by its Special Rapporteur (see paras. 63–64 above). Apart from drafting changes, it made only one really substantive amendment to his draft: draft article 15 (which replaced draft article 9), paragraph 1 (a), stipulated that only a reservation “incompatible” with that of the predecessor State on the same subject (and no longer a “different” reservation) replaced it.⁹²

66. However, in his first report in 1974, Sir Francis Vallat, who had been appointed Special Rapporteur, endorsed a proposal made by Zambia and the United Kingdom and returned if not to the letter at least to the spirit of the Sir Humphrey Waldock’s proposal, though he described the change in question as minor.⁹³ Subject to a further drafting change, the Commission agreed with him on that point.⁹⁴

⁸⁹ *Ibid.*, pp. 47 and 50, Commentary, paras. (2) and (11) respectively.

⁹⁰ *Yearbook ... 1972*, vol. I, 1166th, 1167th and 1187th meetings, pp. 92–99 and 213–214.

⁹¹ *Ibid.*, vol. II, p. 264, document A/8710/Rev.1.

⁹² *Ibid.*, p. 260.

⁹³ *Yearbook ... 1974*, vol. II (Part One), p. 3, document A/CN.4/278 and Add.1–6, in particular p. 54, para. 287.

⁹⁴ *Ibid.*, document A/9610/Rev.1, p. 222 (art. 19).

⁸⁷ *Yearbook ... 1970*, vol. II, p. 25, document A/CN.4/224 and Add.1.

⁸⁸ *Ibid.*, pp. 46–52.

67. Moreover, the text emerged from its consideration in the Drafting Committee⁹⁵ somewhat “pruned”. In particular, paragraph 3 (b) of draft article 9 (see para. 64 above), which, it was rightly said, dealt with the general law applicable to reservations and was not concerned with a problem specific to State succession, was deleted.

68. On the other hand, it is interesting to note that the Special Rapporteur did not take up two other sets of proposals put forward with some insistence by a few States, namely, proposals made, *inter alia*, by the Australian, Belgian, Canadian and Polish Governments to reverse the presumption (of continuity) in paragraph 1, and the wish expressed by the Polish Government for an express provision that the successor State would not automatically succeed to the objections of the predecessor State to reservations formulated by third States.⁹⁶ The Commission did not endorse those suggestions either.⁹⁷

69. This provision gave rise to little discussion at the United Nations Conference on Succession of States in respect of Treaties, which met in Vienna from 4 April to 6 May 1977 and from 31 July to 23 August 1978. Even though some States again proposed that the presumption in draft article 9, paragraph 1, should be reversed having regard to the “clean slate” principle,⁹⁸ the Committee of the Whole, and then the Conference itself, approved the article on reservations (which had become article 20) as proposed by ILC, apart from some very minor drafting adjustments.

70. The relevant article of the 1978 Vienna Convention reads:

Article 20. Reservations

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession under article 17 or 18, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject-matter as that reservation.

2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty under article 17 or 18, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of subparagraph (a), (b) or (c) of article 19 of the Vienna Convention on the Law of Treaties.

3. When a newly independent State formulates a reservation in conformity with paragraph 2, the rules set out in articles 20 to 23 of

⁹⁵ *Ibid.*, vol. I, pp. 112–118, 1272nd meeting and pp. 239–240, 1293rd meeting.

⁹⁶ *Ibid.*, vol. II (Part One) (footnote 93 above), respectively pp. 52–53, paras. 278–286 and p. 54, para. 289.

⁹⁷ *Ibid.*, vol. I (footnote 95 above), p. 118, and vol. II (Part One) (footnote 94 above), p. 226.

⁹⁸ See *Official Records of the United Nations Conference on Succession of States in respect of Treaties, 4 April–6 May 1977 and 31 July–23 August 1978*, vol. III (United Nations publication, Sales No. E.79.V.10), pp. 115–116. See also the analytical compilation of comments of Governments on the final draft articles on succession of States in respect of treaties prepared by the Secretariat (A/CONF.80/5 and Corr.1, pp. 227–230).

the Vienna Convention on the Law of Treaties apply in respect of that reservation.

71. It is interesting to note that this article, whose drafting gave rise to little discussion, sets forth, in a concise manner, the rules governing succession of States to reservations (but does not deal with the question of what to do about objections to reservations formulated by the predecessor State) (see para. 68 above). Otherwise, it simply refers to articles 19 to 23 of the 1969 Vienna Convention (see para. 60 above),⁹⁹ whose authority is thus strengthened, and confirms the open, flexible and consensual approach adopted in 1969 (see para. 61 above).

C. Treaties concluded between States and international organizations or between two or more international organizations

72. In accordance with the recommendation set forth in the resolution adopted by the United Nations Conference on the Law of Treaties relating to article 1 of the 1969 Vienna Convention¹⁰⁰ and in General Assembly resolution 2501 (XXIV) of 12 November 1969, the Commission decided, in 1970, to include in its general programme the question of treaties concluded between States and international organizations or between two or more international organizations; and, in 1971, it appointed Paul Reuter Special Rapporteur for the topic.

73. In 1975, the Special Rapporteur submitted to the Commission his fourth report, the first to deal with reservations at length.¹⁰¹ In the general commentary to section 2 (Reservations), the Special Rapporteur made comments of a general nature that should be quoted at length, since they shed light on all the subsequent discussions.

74. The Special Rapporteur first stated the principle that the inclusion in the draft articles of provisions on reservations met a logical need in law, but that it should be of only limited practical interest:

Articles 19 to 23 of the 1969 Convention, dealing with reservations, are clearly one of the principal parts of the Convention, on account of both their technical preciseness and the great flexibility which they have introduced into the régime of multilateral conventions. It must therefore be admitted at the outset that analogous provisions prepared with the object of the present draft articles in mind are only of limited immediate practical interest. It has been said, and should be constantly repeated, that treaties concluded by international organizations are almost always bilateral treaties, for which reservations may come into play in theory but are of no interest in practice. The few multilateral treaties to which international organizations are

⁹⁹ The actual referral procedure was, however, sharply criticized in the Commission, but the objection related to methodology, not to substance: see *Yearbook ... 1972*, vol. I, pp. 98–99, 1168th meeting, and, pp. 213–214, 1187th meeting; *ibid.*, vol. II, p. 265, document A/8710/Rev.1; and *Yearbook ... 1974*, vol. I, pp. 115 and 117, 1272nd meeting.

¹⁰⁰ See *Official Records of the United Nations Conference on the Law of Treaties ...* (footnote 82 above) (document A/CONF.39/26, pp. 281 *et seq.*).

¹⁰¹ See *Yearbook ... 1975*, vol. II, p. 25, document A/CN.4/285, in particular pp. 36–38.

parties are all treaties which fall under the provisions of article 20, paragraph 2; in other words, they only allow a very limited play to the reservations mechanism. Multilateral treaties open to a large number of signatories constitute the area in which reservations have a real practical function, and it is well-known that at present there are still very serious obstacles to the accession of international organizations to such treaties. To devote draft articles to reservations, therefore, meets a logical need which is only beginning to emerge in concrete form.¹⁰²

75. Having made that comment, the Special Rapporteur nonetheless considered that there was no valid reason for denying international organizations the right to formulate reservations on the same conditions as States so long as they had been fully accepted into the treaty regime as “parties”, to enable them to defend their own interests. He did not hide the fact that this principle could lead to “all sorts of complications”, but he considered that that was part of a more general problem, involving the risks of overlapping jurisdiction as between the organization and its member States, and this explained “why it cannot be accepted without precautions that an organization should be party to a treaty at the same time as its own members”.¹⁰³

76. Consequently the Special Rapporteur submitted, without any special commentary, draft articles 19 to 23, which were closely modelled on the corresponding provisions of the 1969 Vienna Convention, subject only to minor drafting changes.¹⁰¹

77. The discussion of the draft articles at the twenty-seventh session of the Commission¹⁰⁴ revealed how difficult the problems they caused were. The two main problems were summarized by the Special Rapporteur in his fifth report, which was submitted in 1976 and dealt entirely with reservations:

The first may be summed up as follows: is it necessary to provide, in certain cases and on certain points, for a régime fundamentally different from that of the Vienna Convention? The second, which goes beyond the scope of the problem of reservations but arises very clearly in that connexion, is the following: what provisions are needed to define clearly the respective spheres of application of the draft articles and the 1969 Vienna Convention, especially when a treaty originally designed to establish treaty relations between States and international organizations loses that character wholly or partially?¹⁰⁵

78. With regard to the first point, it suffices to recall that the Commission finally decided not to adopt a rigid position of principle. As it states in its final commentary to the draft articles,

it sought to take a balanced view denying organizations some of the facilities granted to States by the Vienna Convention and applying to organizations certain rules whose flexibility had been considered appropriate for States alone. However, it has maintained for international organizations the benefit of the general rules of consensuality

wherever that presented no difficulties and seemed to be consistent with certain trends emerging in the modern world.¹⁰⁶

79. The response of the Commission to the first problem raised by the Special Rapporteur (see para. 77 above) testifies to this pragmatic and balanced approach, which has no other purpose than to meet the needs “of the modern world”.

80. As a first step, the Special Rapporteur, responsive to the forthright views stated by some members of the Commission,¹⁰⁷ thoroughly revised his draft articles 19 and 20, making them much less accommodating of the freedom to make reservations:¹⁰⁸ the new draft article 19 reversed the presumption and stated the principle that any reservation was prohibited unless:

(a) It was expressly authorized by the treaty (para. 1 (a));

(b) It was “expressly accepted by all the States and international organizations parties” to the treaty (para. 1 (b)); or

(c) If the international organizations were parties to the treaty on the same footing as States, under the conditions laid down in the 1969 Vienna Convention.

81. The Commission did not take a definitive position in 1975¹⁰⁹ and, the following year, the Special Rapporteur made new proposals, reverting to the principle of the “[f]reedom to formulate reservations combined with a number of exceptions for treaties between two or more international organizations, and the application to reservations of an express authorization régime with certain exceptions for treaties between States and international organizations”,¹¹⁰ in order to take into consideration the difference of nature between States and organizations and to prevent organizations from formulating reservations affecting the rights or duties of States.¹¹¹

82. These proposals were accepted in principle by the Commission after protracted discussion at its twenty-ninth session.¹¹² But the system adopted was profoundly transformed and complicated in its details,¹¹³ since it resulted in a separation of the regime applicable to reservations to treaties concluded between several organizations—aligned with that of the 1969 Vienna Convention—and the regime applicable to reservations to treat-

¹⁰⁶ See *Yearbook ... 1982*, vol. II (Part Two), p. 13, para. 43.

¹⁰⁷ In particular, Mr. Ushakov: see *Yearbook ... 1975*, vol. I (footnote 104 above), p. 239, 1348th meeting.

¹⁰⁸ *Ibid.*, p. 246, 1350th meeting.

¹⁰⁹ *Yearbook ... 1975*, vol. II, pp. 170–171, document A/10010/Rev.1, para. 135.

¹¹⁰ *Yearbook ... 1976*, vol. II (Part One) (footnote 105 above), para. 12 (c).

¹¹¹ *Ibid.*, p. 140, para. 15.

¹¹² See *Yearbook ... 1977*, vol. I, pp. 71 *et seq.*, 1429th–1435th, 1446th, 1448th, 1451st and 1464th meetings.

¹¹³ *Ibid.*, vol. II (Part Two), pp. 96–98 and 105–115.

¹⁰² *Ibid.*, General commentary on section 2, para. (1).

¹⁰³ *Ibid.*, para. (4).

¹⁰⁴ See *Yearbook ... 1975*, vol. I, pp. 237–249, 1348th–1350th meetings.

¹⁰⁵ See *Yearbook ... 1976*, vol. II (Part One), p. 137, document A/CN.4/290 and Add.1, particularly p. 139, para. 11.

ties concluded between organizations and States, which was restrictive for organizations and liberal for States (arts. 19 and 19 *bis*); the same separation was made in the cases of objections (art. 19 *ter*) and of the acceptance of reservations (arts. 20 and 20 *bis*).

83. After the adoption of the draft articles on first reading, the Special Rapporteur was prompted to re-examine it in his tenth report in 1981¹¹⁴ in the light of the comments of States and international organizations. Declining to consider any possibilities other than the ones envisaged in the draft articles, although some States had invited him to do so, “because such an investigation would not be in the spirit of the Vienna Convention, which sought to allow practice of some measure of freedom so that the general principles laid down in the Convention could be given concrete application”,¹¹⁵ The Special Rapporteur came out in favour of the maintenance of the draft articles with some clarification and simplification of the text.

84. However, following discussions which were again difficult,¹¹⁶ the Commission reverted, essentially, to the provisions which had originally been proposed by the Special Rapporteur (see para. 76 above) and which sought to transpose the rules contained in draft articles 19 to 23 of the 1969 Vienna Convention (see para. 60 above)—by means of an addition to article 19 (*a*)¹¹⁷—subject to three substantive differences affecting article 20:¹¹⁸

(a) The removal from paragraph 2 of all reference to the limited number of negotiating States;

(b) The deletion of paragraph 3 concerning the constituent instruments of international organizations; and

(c) The omission of any period for the acceptance of a reservation by an international organization, remedies for the problems resulting from this omission being left to the practice.

85. After further discussion¹¹⁹ and for reasons connected with the adoption of a draft article 5 correspond-

ing to article 5 of the 1969 Vienna Convention,¹²⁰ the Commission restored paragraph 3 of article 20, but, for the rest of the text, approved the 1981 draft articles in 1982.¹²¹ This text was transmitted with the relevant commentary to the General Assembly, which, in its resolution 39/86 of 13 December 1984, convened the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, which was held in Vienna from 18 February to 21 March 1986.

86. Moreover, annexed to its resolution 40/76 of 11 December 1985, the General Assembly transmitted to the Conference “a list of draft articles of the basic proposal, for which substantive consideration is deemed necessary” (these were the ILC draft articles). This list included articles 19 (Formulation of reservations) and 20 (Acceptance of and objection to reservations), which had been the subject of various comments and observations by States and international organizations.¹²²

87. Several amendments were submitted to articles 19 and 20 at the Conference itself. These amendments consisted of:

(a) Deleting the new language added to article 19 (*a*) (see para. 60 above);

(b) Limiting the right of international organizations to formulate reservations to the area of their competence as such or to reservations compatible with their constituent instruments;

(c) Setting a period during which organizations may formulate objections to reservations;

(d) Restoring, in article 20, paragraph 2, the idea that unanimity of acceptance is required when such a requirement is made necessary not only by the object and purpose of the treaty, but also by the limited number of negotiating participants.

88. At the end of the discussion—which focused mainly on the question of the extent to which, for the purposes of these provisions, international organizations could be assimilated to States and enjoy the same rights and have the same duties as States—the Conference adopted articles that assimilated organizations more closely to States,¹²³ something the draft articles of the Commission

¹¹⁴ See *Yearbook ... 1981*, vol. II (Part One), p. 43, document A/CN.4/341 and Add.1, in particular pp. 56–64.

¹¹⁵ *Ibid.*, p. 59, para. 64.

¹¹⁶ See *Yearbook ... 1981*, vol. I, pp. 28–54 and 263–265, 1648th–1651st and 1692nd meetings.

¹¹⁷ It was made clear that a reservation was possible unless “the reservation is prohibited by the treaty or it is otherwise established that the negotiating States and negotiating organizations were agreed that the reservation is prohibited*” (see *Yearbook ... 1981*, vol. II (Part Two), p. 137, draft article 19, para. 1 (*a*)). The commentary on the draft article does not give any explanation of this change; however, see the explanation given by Mr. Reuter in 1986 at the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (A/CONF.129/16 (vol. I), 11th meeting, paras. 29–32).

¹¹⁸ See *Yearbook ... 1981*, vol. II (Part Two), pp. 138–139.

¹¹⁹ See *Yearbook ... 1982*, vol. I, pp. 177–178 and 316, 1727th and 1748th meetings.

¹²⁰ Article 5 of the 1969 Vienna Convention reads as follows: “The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.”

¹²¹ See *Yearbook ... 1982*, vol. II (Part Two), pp. 32–37.

¹²² See the analytical compilation of comments and observations by States and principal international intergovernmental organizations on the final draft articles on the law of treaties between States and international organizations or between international organizations, prepared by the Secretariat (A/CONF.129/5 and Add.1), pp. 137–144.

¹²³ Especially with regard to the acceptance period (art. 20, para. 5).

did not do, and were more closely modelled on the articles of the 1969 Vienna Convention.

89. The relevant articles of the 1986 Vienna Convention read as follows:

PART I. INTRODUCTION

...

Article 2 USE OF TERMS

1. For the purposes of the present Convention:

...

(d) "reservation" means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization;

...

PART II. CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 2. RESERVATIONS

Article 19 FORMULATION OF RESERVATIONS

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20 ACCEPTANCE OF AND OBJECTION TO RESERVATIONS

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the contracting States and contracting organizations or, as the case may be, by the contracting organizations unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and negotiating organizations or, as the case may be, of the negotiating organizations and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance of a reservation by a contracting State or by a contracting organization constitutes the reserving State or international organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force for the reserving State or organization and for the accepting State or organization;

(b) an objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization unless a contrary intention is definitely expressed by the objecting State or organization;

(c) an act expressing the consent of a State or of an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one contracting State or one contracting organization has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21 LEGAL EFFECTS OF RESERVATIONS AND OF OBJECTIONS TO RESERVATIONS

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State or international organization.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State or an international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation.

Article 22 WITHDRAWAL OF RESERVATIONS AND OF OBJECTIONS TO RESERVATIONS

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

Article 23 PROCEDURE REGARDING RESERVATIONS

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

90. The main problems encountered during the preparatory work on these provisions were of a technical nature and related, in this case, to the difficulties of transposing to international organizations the rules applicable to States or

of combining them or to difficulties of an ideological and doctrinal nature owing to the hostility of certain States—mainly the industrialized countries with, at the time, centrally planned economies—to the notion of according broad competence to organizations, a hostility which seemed to lose its edge as the work progressed. On the other hand, the rules on reservations contained in the 1969 Vienna Convention were not in principle contested at any stage. The reaffirmation of these rules in the 1986 Vienna Convention further strengthens their authority.

CHAPTER II

Brief inventory of the problems of the topic¹²⁴

91. In his first report on the law of treaties, Sir Hersch Lauterpacht noted that “[t]he subject of reservations to multilateral treaties is one of unusual—in fact baffling—complexity and it would serve no useful purpose to simplify artificially an inherently complex problem”.¹²⁵ Like an echo almost 30 years later, Mr. Paul Reuter, Special Rapporteur, noted in turn that the question of reservations had always been a thorny and controversial issue, and even the provisions of the Vienna Convention had not eliminated all those difficulties.¹²⁶

92. In general, authors share this view and emphasize that the Vienna Conventions of 1969, 1978 and 1986 have allowed major uncertainties to persist with regard to the legal regime applicable to reservations. Moreover, such uncertainties are well demonstrated by the often vacillating and unclear practice of States and international organizations, especially when they are confronted with difficult concrete problems when acting as depositaries.¹²⁷

93. The very abundance of literature devoted to reservations to treaties testifies to the fact that doctrine is consistently confusing with regard to problems which are highly technical and extremely complex, but of exceptional practical importance. There is hardly any need to recall, in this connection, the abundance of articles devoted to reservations in works dealing with the law of treaties as a whole,¹²⁸ and even in the treaties and manuals on general international law. To this should be added the large number of monographs devoted to the study of national practice in the area of reservations, to reservations to a particular convention or a particular type of treaty, or to some specific issues. The relevant bibliography is proof of the abundance of these doctrinal works, often of high academic quality, whose “flow rate” has not slowed since 1969—quite the contrary.

94. In other words, although it can legitimately be maintained that the regime of reservations, as it has emerged from the 1969 Vienna Convention and subsequent conventions, constitutes a success (see chapter III below), many questions nevertheless persist and the implementation of the regime has not always proceeded without problems; and for a quarter of a century, the solutions to these problems found by practice and jurisprudence have certainly helped to complicate even further the problems of the topic.

95. In a very pragmatic manner and without attempting at this stage to incorporate these elements into a global statement of the problems, this present report does endeavour in the following sections to present an inventory of the problems pending owing, either to ambiguities in the provisions on reservations in the Vienna Conventions on the Law of Treaties, or to gaps in these provisions.

¹²⁴ This chapter consists of a revised, corrected and expanded version of Part 2 of the outline submitted in 1993 (see footnote 5 above), pp. 228–237.

¹²⁵ See *Yearbook ... 1953*, vol. II (footnote 25 above), p. 124.

¹²⁶ *Yearbook ... 1981*, vol. II (Part One) (footnote 114 above), p. 56, para. 53. See also *Yearbook ... 1982*, vol. II (Part Two), p. 32, General commentary to section 2 of the draft articles, para. (1).

¹²⁷ In accordance with the Commission’s usual working methods, the Under-Secretary-General for Legal Affairs, the Legal Counsel of the United Nations, at the request of the Special Rapporteur, sent a letter on 14 December 1994 to his colleagues in all the specialized agencies, the Council of Europe, the Organization of American States and the Organization of African Unity, requesting them to communicate any relevant information about the practice of their organization with regard to reservations. As of 15 May 1995, the following organizations had responded to this request: Council of Europe, Food and Agriculture Organization of the United Nations, International Civil Aviation Organization, International Labour Organization, International Maritime Organization, International Monetary Fund, International Telecommunication Union, Organization of American States and World Intellectual Property Organization. In addition, there is a wealth of documentation produced by the Secretariat on the practice of the Secretary-General of the United Nations. It was not possible to use all this information in this report; it nevertheless shows that many problems persist with regard to reservations and it will be particularly useful for the further consideration of the topic.

¹²⁸ See more particularly, and only as examples, among the most current works on the law of treaties: Bastid, *Les traités dans la vie internationale: conclusion et effets*, pp. 71–77; Combacau, *Le droit des traités*, pp. 53–63; Elias, *The Modern Law of Treaties*, pp. 27–36; McNair, *The Law of Treaties*, pp. 158–177; Reuter, *Introduction to the Law of Treaties*, pp. 77–85; Rosenne, *Developments in the Law of Treaties 1945–1986*, pp. 424–436; and Sinclair, *The Vienna Convention on the Law of Treaties*, pp. 51–82.

A. The ambiguities of the provisions relating to reservations in the Vienna Conventions on the Law of Treaties

96. It has been endlessly reiterated that the question of reservations to multilateral treaties has been one of the most controversial subjects in contemporary international law.¹²⁹ These controversies have been both doctrinal and political¹³⁰ and, as pointed out above (see paras. 45, 51, 57 and 61 above), the differences have been overcome only by compromises based on ambiguities or carefully judged silences. The ambiguity is most obvious with respect to the permissibility of reservations and to their effects, since the second problem, that of effects, is closely linked to the regime of objections.

1. THE PERMISSIBILITY OF RESERVATIONS

97. In the 1993 outline on the law and practice relating to reservations to treaties, the current Special Rapporteur had stated that to his mind the “determination of the validity of reservations” was probably the point on which “the ambiguity of the provisions of the 1969 and 1986 Vienna Conventions is most obvious”.¹³¹ The term “validity of reservations” was criticized at the time by Mr. D. W. Bowett, who thought that the notion confused two different questions, namely permissibility of a reservation, and the opposability of a reservation (i.e. whether it can be invoked against another party).

98. Since the Commission used this term in its report on the work of its forty-fifth session,¹³² the representative of the United Kingdom stated in the Sixth Committee of the General Assembly on 2 November 1993 that:

His delegation experienced some unease over the Commission’s use of the term “validity of reservations” in paragraph 428 of its report. While the context indicated what the Commission had in mind, the wording used could be interpreted as presupposing the possibility that a statement conditioning the consent of an adhering State to be bound by a treaty might by some means be held to be a nullity. In fact, article 2 (d) of the Vienna Convention, by referring to a reservation not only as a “unilateral” statement which “purported” to achieve an exclusion or modification of treaty terms, but even more so articles 19 *et seq.*, in their careful references to “formulation” of reservations, made it plain that any such statement was ipso facto a “reservation”, but that its legal effect remained to be determined by the rules which followed. That emerged with great clarity from the Commission’s commentary on articles 17 to 19 of the 1962 draft and explained why, in the usage of the Vienna Convention, even the cases expressly prohibited, or those incompatible with the object and purpose of a treaty,

were referred to in article 19 as “reservations”, and why article 21 referred to a reservation “established” with regard to another party.¹³³

99. In fact, to the mind of the current Special Rapporteur, the word “validity” was fairly neutral and did indeed encompass the question of the opposability of the reservation which, in his view, was closely linked to the question of the legal regime of objections, even though it did not necessarily depend exclusively on that regime. Moreover, if the word “permissibility” seemed more appropriate, there was no problem in using it. It was in fact more accurate.

100. However, it must be borne clearly in mind that the explanations offered both by Mr. Bowett and by the British Government in support of their opposition to use of the word “validity” assumed the prior solution of the problem which lay at the centre of the controversies in that matter. This is the problem: can the question of the permissibility or impermissibility of a reservation be decided “objectively” and in the abstract or does it depend in the end on a subjective determination by the contracting States? To take a concrete example: can a reservation which obviously clashes with the object and purpose of the treaty, or even a reservation prohibited by the treaty, but accepted by all the other parties to the treaty, be described as an “impermissible” reservation?

101. The reply implicit in the explanations mentioned above is in the affirmative: for Mr. Bowett and for the British Government, such a reservation alone is a nullity which means that the reservation is impermissible and the question of opposability arises only at a second stage and, it appears, only in respect of permissible reservations. This, moreover, was the thesis argued by Mr. Bowett in 1977:

The issue of “permissibility”¹³⁴ is the preliminary issue. It must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of whether, as a matter of policy, other Parties find the reservation acceptable or not. The consequence of finding a reservation “impermissible” may be either that the reservation alone is a nullity (which means that the reservation cannot be accepted by a Party holding it to be impermissible) or that the impermissible reservation nullifies the State’s acceptance of the treaty as a whole.¹³⁵

102. This particularly authoritative opinion represents the quintessence of one of the doctrinal standpoints, which has been described as the “permissibility school”, in contrast to the “opposability school”.¹³⁶ For writers

¹²⁹ See Ruda, *loc. cit.*, p. 101. See also Sinclair, *The Vienna Convention on the Law of Treaties*, p. 77.

¹³⁰ As Cox suggested in 1952, there can be little doubt that “the source of much of the doctrinal discord which followed the [1951] Court’s opinion is really to be found in the ‘Cold War’” (“Reservations to multipartite conventions”, p. 29).

¹³¹ See *Yearbook ... 1993*, vol. II (Part One) (footnote 5 above), p. 231, para. 21.

¹³² The Commission had stated that “the validity of reservations” was “a question which encompasses that of the conditions for the lawfulness of reservations and that of their applicability to another State” (see *Yearbook ... 1993*, vol. II (Part Two), p. 96, para. 428).

¹³³ See *Official Records of the General Assembly, Forty-eighth Session, Sixth Committee*, 24th meeting, para. 42, and corrigendum.

¹³⁴ It is not obvious that “permissibility” and “lawfulness” are absolute synonyms.

¹³⁵ See Bowett, “Reservations to non-restricted multilateral treaties”, p. 88. The British Government seems to exclude the second possibility.

¹³⁶ See Koh, “Reservations to multilateral treaties: how international legal doctrine reflects world vision”, pp. 71–116, *passim*, in particular, pp. 75–77; see also Redgwell, “Universality or integrity? Some reflections on reservations to general multilateral treaties”, in particular, pp. 263–269; and Sinclair, *The Vienna Convention on the Law of Treaties*, p. 81, footnote 78.

who claim allegiance to this second school, in the Vienna Convention system, “the validity of a reservation depends solely on the acceptance of the reservation by another contracting State”. Hence, article 19 (c) is seen “as a mere doctrinal assertion, which may serve as a basis for guidance to States regarding acceptance of reservations, but no more than that”.¹³⁷

103. It is certainly too early for the Commission to come out in favour of one or other of these theses or to try to reconcile them. They have been mentioned briefly here only to show the importance of the doctrinal debate which was and is still generated by the reservations provisions of the 1969 and 1986 Vienna Conventions.

104. It is certain that, if these two theses were pushed to their limits, they would have very different practical consequences. For example, according to the “opposability” thesis, it could be argued that dispute settlement organs, whether jurisdictional or not, ought to refrain from ruling on the permissibility of a reservation if there is no objection by the other parties.¹³⁸ In contrast, the “permissibility” thesis might give the impression that an objection to a reservation which is incompatible with the object and purpose of the treaty or prohibited by the treaty has no particular effect, since the reservation is in any event null and void.

105. The issues underlying the doctrinal differences described briefly above are difficult and, once again, there can be no question of resolving them at this preliminary stage—while acknowledging that they must be resolved. Moreover, it may be asked whether the analysts,¹³⁶ by emphasizing the conflicts between the two “schools”, of “opposability” and of “permissibility”, have not exaggerated their differences. They certainly start from different analyses of articles 19 and 20 of the 1969 and 1986 Vienna Conventions, but: (a) they do have a number of common positions, which prompt the adher-

ents of the two theses to ask themselves often identical questions; (b) the essential difference in the replies to these questions is that the supporters of opposability think that permissibility and opposability go hand in hand (hence, often, the use of the word “validity”), whereas the permissibility enthusiasts think that these are clearly separate problems which must be examined in sequence; (c) in all cases, however, the will of the contracting States must prevail, but, depending on the standpoint, the emphasis will be placed on the initial will of the negotiators or on the subsequent will of the States making reservations or objections.

106. All the writers who have studied the problem acknowledge that there is a presumption in favour of the permissibility of reservations. That is, moreover, consistent with the clear text of article 19 of the two Vienna Conventions, of 1969 and of 1986, and is confirmed by study of the preparatory work (see paras. 38 and 53 above).

107. Everybody also agrees that this presumption is not invulnerable and that it falls if the reservation is prohibited explicitly (art. 19 (a)) or implicitly (art. 19 (b)) by the treaty, or if it is “incompatible with the object and purpose of the treaty”(art. 19 (c)).¹³⁹

108. It remains to be seen—and it is here that the real problems arise—on the one hand, how to determine whether these conditions are met and, on the other hand, what the effects may be of a reservation which would be impermissible according to these criteria.

109. On the first point—the compatibility of the reservation with the provisions of the treaty relating to reservations (art. 19 (a) and (b))—problems can arise, in particular, when the reservation is vague and general.¹⁴⁰ But it is primarily the determination of the compatibility of the reservation with the object and purpose of the treaty which causes the problems. As Reuter put it: “If the treaty is silent, the only prohibited reservations are those which would be incompatible with its ‘object and purpose’, a concept again used by the Vienna Conventions, although its interpretation remains as uncertain as when it first appeared in the Court’s Advisory Opinion of 1951.”¹⁴¹ Therefore, it would no doubt be appropriate for the Commission to undertake a study of the very notion of object and purpose of the treaty.¹⁴²

¹³⁷ Ruda, loc. cit., p. 190. For similar standpoints, see Combacau, op. cit., p. 60; Gaja, “Unruly treaty reservations”, pp. 313–320; Imbert, *Les réserves aux traités multilatéraux: évolution du droit et de la pratique depuis l’avis consultatif donné par la Cour internationale de Justice le 28 mai 1951*, pp. 134–137; Reuter, op. cit., p. 74; and Zemaneck, “Some unresolved questions concerning reservations in the Vienna Convention on the Law of Treaties”, pp. 331–333.

¹³⁸ This is not the case in practice. See, for example, the judgements of the European Court of Human Rights in the *Belilos* case (*Series A: Judgments and Decisions*, vol. 132, *Judgment of 29 April 1988*, Registry of the Court, Council of Europe, Strasbourg, 1988, paras. 50–60), the *Weber* case (ibid., vol. 177, *Judgment of 22 May 1990*, Registry of the Court, Council of Europe, Strasbourg, 1990), the *Loizidou v. Turkey (Preliminary Objections)* case (ibid., vol. 310, *Judgment of 23 March 1995*, Registry of the Court, Council of Europe, Strasbourg, 1995), and the decision of the European Commission of Human Rights in the *Chrysostomos et al.* case (*Decisions and Reports*, March 1991, *Revue universelle des droits de l’homme*, vol. 3, No. 3, 1991, p. 193). See also General Comment No. 24 (1994) adopted by the Human Rights Committee on 2 November 1994, on issues relating to reservations made upon ratification or accession to the International Covenant on Civil and Political Rights or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, annex V, in particular para. 18). The peculiar nature of human rights treaties might, however, limit the value of these precedents.

¹³⁹ It can be added that the presumption also falls if the integrality of the treaty is an essential condition for its application and if all the parties have not accepted the reservation (art. 20, para. 2) or if the competent organ of an international organization has not accepted a reservation to its constituent instrument (art. 20, para. 3); but in these two cases it is undeniable that the permissibility of the reservation depends exclusively on its acceptance.

¹⁴⁰ See Schabas, “Reservations to human rights treaties: time for innovation and reform”, pp. 39–82.

¹⁴¹ Op. cit., p. 82.

¹⁴² Which is found in other provisions of the 1969 and 1986 Vienna Conventions, in particular in articles 18, 31 (para. 1) and 60 (para. 1).

110. Still from this standpoint, it can be further noted that these uncertainties are not dispelled, but are, on the contrary, intensified, by article 20, paragraph 2, of the 1969 and 1986 Vienna Conventions, which reintroduces the criterion of the object and purpose of the treaty with respect to restricted multilateral treaties (“plurilateral” treaties) and seems to imply *a contrario* that “a reservation running counter to the object and purpose of a treaty may be authorized if it is accepted by all the parties”.¹⁴³ Moreover, the definition of these treaties themselves—and, therefore, the conditions of application of article 20, paragraph 2—remains extremely uncertain.¹⁴⁴

111. However, it is “downstream” of this first category of problems that the most difficult questions arise; these are also the questions which generate most doctrinal discussion (see paras. 100–104 above).

112. Let us suppose that a reservation seems “impermissible”, either because it is prohibited by the treaty or because it is incompatible with the treaty’s object or purpose. What happens then?

(a) Must the reservation be regarded as void, but the expression of consent to be bound by the treaty as valid?

(b) On the contrary, does the impermissibility of the reservation affect the reliability of the expression of consent itself?

(c) Does the impermissibility of the reservation produce effects independently of any objections which may be raised to it?

(d) At most, have the other contracting States (or international organizations) an obligation in such circumstances to raise an objection to an impermissible reservation?

(e) Or may they, rather, accept such a reservation, either expressly or tacitly?

113. These, it seems, are some of the main questions which arise in connection with the permissibility of reservations and which will perhaps receive the attention of the Commission.

114. However, four points must be made clear:

(a) The questions raised above (paras. 109, 110 and 112) are, in the Special Rapporteur’s opinion, the principal and most difficult questions, but they are not necessarily the only ones; others remain not entirely resolved. For example, who is competent to determine the permissibility of a reservation (including a reserva-

tion to the constituent instrument of an international organization), whether a reservation can be partly impermissible or whether a State making an impermissible reservation may, once its impermissibility has been determined, either regard itself as freed from its treaty obligations or formulate a new reservation,¹⁴⁵ etc.?

(b) The purpose of this present report is not to outline answers to these questions; it is only to note that they arise and that it would certainly be useful to give some thought in the future to possible answers to them;

(c) To this end, the Special Rapporteur proposes, if the Commission agrees, to undertake a systematic study of the practice of States and international organizations. However, the possibility of such a study proving a disappointment cannot be ruled out: a preliminary cursory review seems to show that this practice is relatively scarce and that there are *prima facie* uncertainties;

(d) Furthermore, the debate is far from being a purely doctrinal one and, whatever the uncertainties of practice—or because of them—these questions worry States and international organizations acting as depositaries.¹²⁷ The Committee of Legal Advisers on Public International Law of the Council of Europe, meeting in Strasbourg in March 1995, took up the question of reservations to multilateral treaties; the discussion, introduced by an Austrian working paper, once again focused essentially on the question of the permissibility of reservations and the effects of an impermissible reservation.¹⁴⁶

2. THE REGIME FOR OBJECTIONS TO RESERVATIONS (THE OPPOSABILITY OF RESERVATIONS)

115. The doctrinal controversy referred to above (para. 114) has significant repercussions on the regime for objections to reservations. It is probably not overstating the case to say that, for those who espouse the thesis of opposability (see para. 102 above), the answers to questions about the permissibility of reservations (see para. 112 above), which are wholly subjective, are to be found in the provisions of article 20 of the 1969 and 1986 Vienna Conventions:

The validity of a reservation depends, under the Convention’s system, on whether the reservation is or is not accepted by another State, not on the fulfilment of the condition for its admission on the basis of its compatibility with the object and purpose of the treaty.¹⁴⁷

The advocates of the permissibility thesis on the other hand, take it for granted that an impermissible reserva-

¹⁴³ Reuter, *op. cit.*, p. 82. See also Tomuschat, “Admissibility and legal effects of reservations to multilateral treaties—comments on arts. 16,17”, p. 479.

¹⁴⁴ See Imbert, “Les réserves aux traités multilatéraux . . .”, pp. 109–120, and Dehaussy, “Le problème de la classification des traités et le projet de convention établi par la Commission du droit international des Nations Unies”.

¹⁴⁵ See the consequences of the *Belilos* case (footnote 138 above). See, for example, Redgwell, *loc. cit.*, pp. 267–268.

¹⁴⁶ Subsequent to the meeting, the Committee decided the following: “The Secretariat [of the Council of Europe] will submit [the Austrian document—CAHDI (1995)] together with a copy of the meeting report, to the Special Rapporteur of ILC indicating at the same time that the Committee takes a keen interest in this issue and was willing to contribute to the study.” (CAHDI (95)5, 18 April 1995, para. 34.)

¹⁴⁷ Ruda, *loc. cit.*, p. 190.

tion is not opposable to other contracting States or international organizations; thus

The issue of opposability is the secondary issue and pre-supposes that the reservation is permissible. Whether a party chooses to accept the reservation, or object to the reservation, or object to both the reservation and the entry into force of the treaty as between the reserving and the objecting State, is a matter for a policy decision and, as such, not subject to the criteria governing permissibility and not subject to judicial review.¹⁴⁸

116. Irrespective of the merits (or weakness) of each of these theses, it is certain that these contrasting positions reflect the doctrinal unease that the representatives of States (see in particular paragraph 114 (*d*) above) seem to share with regard to the regime for the acceptance of reservations and objections to reservations which was introduced by articles 20 and 21 of the 1969 Vienna Convention, was restated in the 1986 Convention and is, to say the least, lacking in clarity.

117. An initial problem¹⁴⁹ is to determine whether the counterpart to the freedom in principle to formulate reservations (see paras. 38, 53 and 106 above) is an equivalent freedom to make objections to reservations. Although arguments both for and against can be found in the body of their texts, the Vienna Conventions are silent on the matter and leave the door open to the most extreme propositions. It can, for example, be argued that an objection is possible only to an impermissible reservation—in other words, the objecting State must be guided by the same rule as the reserving State, namely, the need to preserve the object and purpose of the treaty—or, conversely, that only a permissible reservation is open to objection, since, in any event, an impermissible reservation would be null and void. The question of freedom of objections seems to be particularly difficult to resolve as practice may not be of much help, for States generally refrain from justifying their objections or, if they do so, give reasons that are very vague and difficult to interpret.¹⁵⁰ The question also arises whether States are not, or should not be, required to justify their objections.¹⁵¹

118. When an objection has been formulated, the question that arises is what effect it has. In order not to pre-judge the answer to that question—which is advisable at this preliminary stage—it is necessary, once again, to distinguish between objections to *permissible* reservations, on the one hand, and to *impermissible* reservations, on the other.

119. The 1969 Vienna Convention makes no such distinction, merely providing that “an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless the contrary intention is definitely

expressed by the objecting State”.¹⁵² In this case, “the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation”.¹⁵³

120. It may, however, be asked whether these rules can and should be applied when the reservation is impermissible—that is to say, contrary to the provisions of the treaty relating to reservations or incompatible with its object and purpose. In other words, can the objection have the paradoxical result of “cloaking” the impermissibility and, ultimately—apart only from the provisions excluded by the reservation—have the same effect as acceptance, that is to say, make the reserving State a party to the treaty vis-à-vis the objecting State? That is tantamount to conferring on the objection a value which is comparable to that of an interpretative declaration, seeing the matter in the best possible light.¹⁵⁴

121. Also, regardless of whether the objection is made to a permissible reservation or to an impermissible reservation, the question arises whether the all-or-nothing system that seems to result from the provisions referred to above (para. 119) must be rigidly applied if, on the basis of the principle that “the greater includes the lesser”, the objecting State could not permit the entry into force as between itself and the reserving State only of particular parts of the treaty designated by it. Such a solution would, moreover, lead to a further question: in that case, would the reserving State be required to submit to the will of the objecting State or could it, in turn, make an “objection to the objection” or refuse to regard the treaty as being in force with that State?

122. These questions are not just a matter of speculation and we have seen, “in treaty practice, some attempts on the part of the objecting States to give to their objections some effects that are not equivalent to those pertaining to acceptance of reservations”,¹⁵⁵ but without, however, going so far as to exclude the entry into force of the treaty as a whole with the reserving State. A conventional basis for such practices, which are apparently still at the tentative stage, may be found in the expression used in article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions, which stipulates that “the provisions to which the reservation relates do not apply ... *to the extent of the reservation**”. However, it is not always

¹⁵² Article 20, paragraph 4 (*b*). The wording of article 20, paragraph 4 (*c*), of the 1986 Vienna Convention is the same apart from an added reference to contracting organizations.

¹⁵³ 1969 Vienna Convention, art. 21, para. 3.

¹⁵⁴ See Reuter, *op. cit.*, p. 84. Similarly, in addition to the decision of 30 June 1977 in the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic (Channel Islands case)* (United Nations, *Collection of Arbitral Judgements*, vol. XVIII (Sales No. E/F.80.V.7), pp. 130 *et seq.*), see Koh, *loc. cit.*, pp. 102–103; Nisot, “Les réserves aux traités et la Convention de Vienne du 23 mai 1969”, p. 203; Ruda, *loc. cit.*, p. 199; Sinclair, *The Vienna Convention on the Law of Treaties*, pp. 76–77; and Zemanek, *op. cit.*, pp. 332–333.

¹⁵⁵ Gaja, *op. cit.*, p. 327. See also Edwards Jr., “Reservations to treaties”, pp. 399–400, and Zemanek, *op. cit.*, pp. 335–336.

¹⁴⁸ Bowett, “Reservations ...”, p. 88.

¹⁴⁹ Which the permissibility and opposability schools solve in completely opposite ways.

¹⁵⁰ See Redgwell, *loc. cit.*, pp. 275 *et seq.*, and Zemanek, *op. cit.*, p. 334.

¹⁵¹ See Bowett, “Reservations...” p. 75.

easy to determine “the extent of the reservation” and difficult problems have arisen in this regard, particularly in connection with objections made by Sweden and other States to the Syrian and Tunisian reservations to the 1969 Vienna Convention itself.¹⁵⁶ Once again, therefore, it might be useful to attempt to explain the meaning of the words “the extent of the reservation” in the light of the practice followed by States.

123. Furthermore, the problem does not arise only with regard to objections to reservations. Article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions uses the same expression with respect to the legal effect of the reservation itself (which means that it also applies in the case of reservations accepted).

124. While the doctrinal backdrop which sheds light on (or obscures!) the problems dealt with in this section cannot be completely disregarded, it should certainly not be allowed to “impress”. Without claiming to put an end to the controversy, the purpose of the above discussion was simply to highlight the ambiguities in the provisions of the 1969 and 1986 Vienna Conventions relating to reservations and to pinpoint the main questions that seem to arise. To recapitulate, these questions are as follows:

(a) What is the precise meaning of the expression “compatibility with the object and purpose of the treaty”?

(b) When should a convention be regarded as a limited multilateral treaty (art. 20, para. 2)?

(c) Is an impermissible reservation null and void in itself and does its nullity give rise (or not give rise) to the nullity of the expression of consent by the State (or international organization) to be bound?

(d) Is an impermissible reservation null and void regardless of the objections that may be made?

(e) Can the other contracting States or international organizations accept an impermissible reservation?

(f) What are the effects of such acceptance?

(g) If due note has been taken (by whom?) of the impermissibility of a reservation, can the reserving State replace it with another reservation or withdraw from the treaty?

(h) Are the contracting States free to formulate objections irrespective of the impermissibility of the reservation?

(i) Must they, or should they, indicate the grounds for their objections?

(j) What exactly are the effects of an objection to a permissible reservation?

(k) And to an impermissible reservation?

(l) How are such effects distinguishable from the effects of an acceptance of the reservation where the objecting State does not clearly express the intention that the treaty should not enter into force as between it and the reserving State?

(m) In such a case, can the objecting State exclude the applicability of treaty provisions other than those covered by the reservation?

(n) And is the reserving State required to accept such exclusions?

(o) Lastly, what is the precise meaning of the expression “to the extent of the reservation”?

125. This list of questions, which is the outcome of a superficial examination of practice and also of an analysis of the provisions of the 1969 and 1986 Vienna Conventions, is certainly not exhaustive. Rather, some of the questions are closely interlinked and overlap to a considerable extent, whereas others are more self-contained. There is no doubt that the replies to these questions are uneven in their complexity and, while some are quite obvious, others appear *prima facie* to be almost impossible to find if approached without preconceived ideas. Nonetheless, the list gives some idea of the extent of the problems to which the ambiguities in the wording of the “treaty of treaties” give rise. There are, in addition, problems that were not dealt with in 1969 and 1986 and the main ones will be listed far more briefly in the section that follows.

B. Gaps in the provisions relating to reservations in the Vienna Conventions on the Law of Treaties

126. The Vienna Conventions of 1969 and 1986 leave a number of general problems unsolved, neglect problems connected with the specific object of certain treaties and remain silent on the drawbacks of certain treaty techniques. The 1978 Vienna Convention, for its part, completely skips over certain problems that may arise in connection with reservations in the event of State succession.

1. SOME GAPS OF A GENERAL NATURE

(a) *Reservations to bilateral treaties and interpretative declarations*

127. Satisfactory in so far as it goes, the definition of “reservation” common to the 1969 Vienna Convention (art. 2, para. 1 (d)), the 1978 Convention (art. 2, para. 1 (j)) and the 1986 Convention (art. 2, para. 1 (d)) has omissions that give rise to uncertainties which can often be very awkward. The first point left in the dark, while more irritating in theory than important in practice, concerns the possibility of formulating reservations to bilateral treaties. The problem nevertheless arises as a result of the amendment by the United Nations Conference on the Law of Treaties of the title of Part II, section 2, of the

¹⁵⁶ See De Visscher, “Une réserve de la République arabe de Syrie à la Convention de Vienne (1969) sur les traités”, as well as Edwards Jr., loc. cit., p. 400; Imbert, *Les réserves aux traités multilatéraux* ..., p. 265; and Sinclair, *The Vienna Convention on the Law of Treaties*, p. 77.

1969 Vienna Convention (“Reservations” instead of “Reservations to multilateral treaties”); the ambiguity of the *travaux préparatoires*;¹⁵⁷ and the view of some authors who accept the fact that “reservations may come into play in theory” for bilateral treaties.¹⁵⁸

128. Of much greater practical concern is the distinction between reservations and the interpretative declarations which States seem to resort to with increasing frequency and on which the Conventions are silent.¹⁵⁹

129. The conclusion to be drawn from recent jurisprudence is that nominalism must be set aside on this point and that an interpretative declaration must be taken to be a genuine reservation if it is consistent with the definition given in the conventions. In this connection, reference is made to the decision in the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic (Channel Islands case)*,¹⁶⁰ the report of the European Commission of Human Rights in the *Temeltasch* case,¹⁶¹ the judgements of the European Court of Human Rights in the *Belilos* case¹⁶² and the *Loizidou v. Turkey* case;¹⁶³ and the decision of the Human Rights Committee in the cases of *T. K. v. France*

¹⁵⁷ See Edwards Jr., loc. cit., pp. 402–405.

¹⁵⁸ See the fourth report of the Special Rapporteur, Mr. Paul Reuter (footnote 101 above), p. 36, General commentary on section 2 of the draft articles, para. (1).

¹⁵⁹ See, especially, McRae, “The legal effects of interpretative declarations” and, more generally, on the definition of reservations, Gamble Jr., “Reservations to multilateral treaties: a macroscopic view of State practice”, pp. 373–376; Piper, “Reservations to multilateral treaties: the goal of universality”, pp. 299–300; Ruda, loc. cit., pp. 103–108; Sinclair, *The Vienna Convention on the Law of Treaties*, pp. 51–54; and Tomuschat, loc. cit., pp. 464–466.

¹⁶⁰ See the decision (footnote 154 above), p. 175, and comments by: Bowett, “The arbitration between the United Kingdom and France concerning the continental shelf boundary in the English Channel and south-western approaches”; Boyle, “The law of treaties and the Anglo-French continental shelf arbitration”; Brown, “The Anglo-French continental case”; Imbert, “La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d’Irlande du Nord”; Quéneudec, “L’affaire de la délimitation du plateau continental entre la France et le Royaume-Uni”; Rigaldies, “L’affaire de la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d’Irlande du Nord”; and Zoller, “L’affaire de la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d’Irlande du Nord—Décision du 30 juin 1977”.

¹⁶¹ Council of Europe, European Commission of Human Rights, *Decisions and Reports*, Application No. 9116/80, *Temeltasch v. Switzerland*, vol. 31 (Strasbourg, April 1983), pp. 120–136. See comments by: Cohen-Jonathan and Jacqué, “Activité de la Commission européenne des droits de l’homme”, pp. 524–530; and Imbert, “Reservations to the European Convention on Human Rights before the Strasbourg Commission: (the *Temeltasch* case)”.

¹⁶² The *Belilos* case (footnote 138 above). See the comments by: Cameron and Horn, “Reservations to the European Convention on Human Rights: the *Belilos* case”; Cohen-Jonathan, “Les réserves à la Convention européenne des droits de l’homme (à propos de l’arrêt *Belilos* du 29 avril 1988)”; Bourguignon, “The *Belilos* case: new light on reservations to multilateral treaties”; and Marks, “Reservations unhinged: the *Belilos* case before the European Court of Human Rights”.

¹⁶³ See footnote 138 above.

and *M. K. v. France*.¹⁶⁴ But these decisions also testify to the fact that it is extremely difficult to make a distinction between qualified interpretative declarations and mere interpretative declarations.¹⁶⁵ Furthermore, the legal effects of the latter remain unclear.

(b) *Effects of reservations on the entry into force of a treaty*

130. This important and widely debated question has caused serious difficulties for depositaries and has not been answered in the relevant conventions. The practice which is followed by the Secretary-General in his capacity as depositary and which was amended in 1975,¹⁶⁶ has been the subject of rather harsh doctrinal criticism.¹⁶⁷

131. In addition, in an opinion given in 1982, the Inter-American Court of Human Rights expressed the view that a treaty came into force in respect of a State on the date of deposit of the instrument of ratification or accession, whether or not the State had formulated a reservation.¹⁶⁸ This position was accepted in some circles,¹⁶⁹ but other authors doubted whether it was compatible with article 20, paragraphs 4 and 5, of the 1969 and 1986 Vienna Conventions.¹⁷⁰ There are also grounds for asking whether the solution adopted by the Court reflects the specific nature of the American Convention on Human Rights rather than any general considerations (see paras. 138–142 below).

(c) *Problems unsolved by the Vienna Convention on Succession of States in respect of Treaties*

132. Article 20 of the 1978 Vienna Convention scarcely deals with, much less solves, potential problems arising in connection with reservations in the case of succession of States.

¹⁶⁴ Communications Nos. 220/1987 and 222/1987 (decisions adopted on 8 November 1989) (*Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40)*, vol. II, pp. 118–134, in particular pp. 122–123 and 130–131, para. 8.6). See comment by Cohen-Jonathan, “Note sur les décisions et constatations du Comité des droits de l’homme des Nations Unies relatives à la France (1989)”.

¹⁶⁵ McRae, loc. cit., p. 160. The practice of ILO in respect of declarations on international labour conventions on which no reservations may be made is of particular interest in this regard.

¹⁶⁶ See the *Repertory of Practice of United Nations Organs, Supplement No. 5*, vol. V, covering the period 1 February 1970 to 31 December 1978, art. 102.

¹⁶⁷ See Imbert, *Les réserves aux traités multilatéraux ...*, pp. 277–282, and “À l’occasion de l’entrée en vigueur de la Convention de Vienne sur le droit des traités—réflexions sur la pratique suivie par le Secrétaire général des Nations Unies dans l’exercice de ses fonctions de dépositaire”; see also Han, “The U. N. Secretary-General’s treaty depositary function: legal implications”.

¹⁶⁸ Advisory Opinion OC–2/82 of 24 September 1982, *Inter-American Court of Human Rights, Judgments and Opinions*, Series A, No. 2; see also ILR, vol. 67, 1984, pp. 559–571, and ILM, vol. 22, No. 1 (January 1983), pp. 37–50.

¹⁶⁹ See Rosenne, op. cit., pp. 435–436.

¹⁷⁰ See, for example, Edwards Jr., loc. cit., pp. 401–402, and Gaja, op. cit., pp. 321–322.

133. First, it should be noted that the article is contained in Part III of the Convention, which deals with “newly independent States”; it therefore applies in the case of the decolonization or dissolution of States, whereas the question of the rules applicable in the case of the succession of a State in respect of part of a territory, the uniting of a State or the separation of a State is left aside completely. It is true that, in the first instance, “treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates” (art. 15 (a)). It is equally true that the extension of treaties of the successor State to the territory (art. 15 (b)) appears to entail necessarily the automatic extension of reservations which the latter might have formulated. Problems nevertheless continue to exist with regard to “newly independent States formed from two or more territories”; on this assumption, articles 16 to 29 (and hence article 20) probably apply in principle in accordance with article 30, paragraph 1, but, what if the new State fails to denounce any incompatible reservations at the time when the succession is notified? The same problem occurs in the case of the uniting of States, in respect of which the Convention contains no applicable provisions on reservations.

134. Secondly, while article 20, paragraph 1, provides for the possible formulation of new reservations by the new State and while the effect of paragraph 3 is that third States may formulate objections in that event, it fails to stipulate whether the latter can object to a reservation being maintained. Nonetheless, this may seem logical if it is recognized that, in maintaining a former reservation, the new State is exercising an inherent right and is not acting as though it has the rights of the predecessor State.¹⁷¹

135. Lastly, and this is a serious lacuna, article 20 of the 1978 Vienna Convention makes no reference whatever to succession in respect of objections to reservations—whereas the initial proposals of Sir Humphrey Waldock did deal with this point—and the reasons for this omission are not clear.¹⁷²

2. PROBLEMS CONNECTED WITH THE SPECIFIC OBJECT OF CERTAIN TREATIES OR PROVISIONS

136. Because of their general nature, the main codification conventions neglect, quite legitimately, the particular problems deriving from the specific object and nature of certain categories of treaty. Nevertheless, these problems occur very frequently in certain areas, particularly in connection with constituent instruments of international organizations, treaties relating to human rights and, more generally, directly establishing individual rights and codification treaties themselves (or specific provisions of such a nature).

(a) Reservations to constituent instruments of international organizations

137. Although the 1969 and 1986 Vienna Conventions are not totally silent on this point, common article 20, paragraph 3, is far from resolving all the problems which can and do arise:

(a) The concept of a constituent instrument is not unambiguous and it may be asked whether the rule set out in article 20, paragraph 3, applies to any normative provisions such instruments may include;

(b) Does this rule include interpretative declarations and, if so, who determines their exact nature (see paras. 128–129 above)?

(c) What body is competent to accept reservations of this kind?

(d) What is the exact scope of such acceptance? In particular, are the other member States bound by it and thus prevented from objecting to the reservation?¹⁷³

(b) Reservations to human rights treaties

138. Although it is extremely flexible, the general reservations regime is largely based on the idea of reciprocity,¹⁷⁴ a concept difficult to transpose to the field of human rights or indeed to other fields.¹⁷⁵ As they are intended to apply without discrimination to all human beings, treaties concluded in this field do not lend themselves to reservations and objections and, in particular, the objecting State cannot be released from its treaty obligations vis-à-vis citizens of the reserving State.

139. Thus, in its General Comment No. 24 (1994), paragraph 17,¹⁷⁶ the Human Rights Committee considered that human rights treaties and the International Covenant on Civil and Political Rights specifically, were not a web of inter-State exchanges of mutual obligations. They concerned the endowment of individuals with rights. The principle of inter-State reciprocity had no place; and that “... the operation of the classic rules on reservations is so inadequate ...”¹⁷⁷

¹⁷³ On all these points, see especially, Imbert, *Les réserves aux traités multilatéraux ...*, pp. 120–134, and Mendelson, “Reservations to the constitutions of international organizations”.

¹⁷⁴ See the *Certain Norwegian Loans* case, Judgment of 6 July 1957, *I.C.J. Reports 1957*, p. 24.

¹⁷⁵ See Imbert, *Les réserves aux traités multilatéraux ...*, pp. 250 and 260.

¹⁷⁶ See footnote 138 above.

¹⁷⁷ It has, however, been questioned whether these specific features justify a special legal regime for reservations to human rights treaties: see Schmidt, *Reservations to United Nations human rights treaties—the case of the two Covenants*; see also the comments of the British delegate at the meeting of the Committee of Legal Advisers on Public International Law of the Council of Europe in March 1995 (report of the meeting (footnote 146 above), para. 31).

¹⁷¹ See Marcoff, “Accession à l’indépendance et succession d’États aux traités internationaux”, pp. 345–346.

¹⁷² See Imbert, *Les réserves aux traités multilatéraux ...*, pp. 318–322.

140. More so than other treaties, human rights treaties include monitoring mechanisms and the question is whether these bodies are competent to assess the validity of reservations. The European Commission of Human Rights and the European Court of Human Rights have recognized their own competence in this area because of the “objective obligations” deriving from the European Convention on Human Rights, signed in Rome on 4 November 1950.¹⁷⁸ Similarly, in its General Comment No. 24 (1994), the Human Rights Committee considered that “It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant ... in part because ... it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions”.¹⁷⁶

141. This gives rise to a third problem, namely, what effect does a reservation which has been declared invalid have on participation in a treaty by the reserving State? In the *Belilos* case, the European Court of Human Rights took the view that the reserving State remained, “without question”, a party to the Convention.¹⁷⁹

142. The specific nature of the problems raised by reservations to treaties relating to human rights and humanitarian questions is also clearly apparent in the provisions of the relevant treaties, which have often been subject to differing interpretations. There is an abundance of literature on this subject which it is impossible to comment on at this stage, but which will be of great value for the future work of ILC with regard both to the special problems of reservations to human rights treaties—a concept which is not in itself very precise—and to the legal regime of reservations.¹⁸⁰

¹⁷⁸ See the report of the European Commission of Human Rights in the *Temeltasch* case (footnote 161 above), paras. 63–65, and, though less clearly, the judgements of the European Court of Human Rights in the *Belilos* case (footnotes 138 and 162 above), para. 50, and in the *Weber* case (footnote 138), para. 37, and especially the very recent *Loizidou* judgement (ibid.).

¹⁷⁹ Ibid. For the results of the case, see Flauss, “Le contentieux de la validité des réserves à la CEDH devant le Tribunal fédéral suisse: requiem pour la déclaration interprétative relative à l’article 6 § 1”. See also the *Loizidou* judgement (footnote 138 above) and the report of the European Commission of Human Rights in the *Chrysostomos et al.* case (ibid.).

¹⁸⁰ See, especially: Blay and Tsamenyi, “Reservations and declarations under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees”; Bonifazi, “La disciplina delle riserve alla Convenzione europea dei diritti dell’uomo”; Cassese, “A new reservations clause (article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination)” (see also “Una nuova sulle riserve” and “Su alcune ‘riserve’ alla convenzione sui diritti politici della donna”); Clark, “The Vienna Convention reservations regime and the Convention on Discrimination against Women”, pp. 281–321; Coccia, “Reservations to multilateral treaties on human rights”; Colella, “Les réserves à la Convention de Genève (28 juillet 1951) et au Protocole de New York (31 janvier 1967) sur le statut des réfugiés”; Cook, “Reservations to the Convention on the Elimination of All Forms of Discrimination against Women”; Frowein, “Reservations to the European Convention on Human Rights”; Imbert, “La question des réserves et les conventions en matière de droits de l’homme”; Macdonald, “Reservations under the European Convention on Human

(c) *Reservations to provisions codifying customary rules*

143. Curiously, the 1969 and 1986 Vienna Conventions do not deal with the question of reservations to codification conventions or, to be more precise, codification clauses.

144. Opposing arguments can be put forward on this question. A reservation definitely cannot have any effect on States not parties to the codification treaty in respect of which the reserving State remains bound by the customary rule. This applies even more so to the signatory States to the treaty and this is generally the interpretation placed on the ICJ Judgment of 20 February 1969 in the *North Sea Continental Shelf* cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands).¹⁸¹ However, it has been pointed out that this rule, which would be an additional criterion for the non-validity of reservations under article 19, “is debatable with regard to the intention of the parties to the Convention”¹⁸² and creates a regrettable confusion between *jus cogens* and *jus dispositivum*.¹⁸³

3. PROBLEMS ARISING FROM CERTAIN SPECIFIC TREATY APPROACHES

145. Because they were required to confine themselves to a very general level, the drafters of the 1969 Vienna Convention could not take account of certain specific treaty approaches, some of which developed rapidly from 1969 onwards. Two examples will suffice.

(a) *Reservations and additional protocols*

146. When an additional protocol supplements an existing convention, one of these instruments may contain a reservation clause and the other not, or they may both contain such clauses but the clauses may be incompatible. The situation is relatively rare, but does occur,¹⁸⁴ raising extremely tricky problems.¹⁸⁵ In addition, when ratifying a protocol (or accepting an optional clause), a

Rights”; Marcus-Helmons, “L’article 64 de la Convention de Rome ou les réserves à la Convention européenne des droits de l’homme”; Pilloud, “Les réserves aux Conventions de Genève de 1949”; Ruiz-Moreno, “Reservations to treaties relating to human rights” (for the debate during the fifth-fourth Conference of the International Law Association, see Report of the Fifty-fourth Conference held at The Hague, August 23rd to August 29th, 1970, pp. 596–625F; for the resolutions, ibid., pp. xiv–xv); Schabas, loc. cit.; Schmidt, op. cit.; Shelton, “State practice on reservations to human rights treaties”, pp. 206–234. See also the comments referred to above (footnotes 161–163).

¹⁸¹ *I.C.J. Reports 1969*, pp. 3 *et seq.*, in particular pp. 38–39, para. 63.

¹⁸² Reuter, op. cit., p. 82.

¹⁸³ On this difficult problem, see especially Teboul, “Remarques sur les réserves aux conventions de codification”. See also General Comment No. 24 (1994) of the Human Rights Committee, para. 8 (footnote 138 above), and Schabas, loc. cit.

¹⁸⁴ See the Convention relating to the Status of Refugees (art. 42, para. 1) and the Protocol relating to the Status of Refugees (art. VII), as well as the Single Convention on Narcotic Drugs (arts. 49–50) and the Protocol amending the Single Convention (art. 21).

¹⁸⁵ See Imbert, *Les réserves aux traités multilatéraux ...*, pp. 213–214, and Colella, loc. cit., pp. 451–452.

State may be tempted to formulate a belated reservation to the basic treaty.¹⁸⁶

(b) *Reservations and the bilateralization approach*

147. This approach, frequently taken in conventions relating to private international law, enables States parties to choose their partners and even to establish exceptional arrangements with them. Although used somewhat warily in the past,¹⁸⁷ the system spread rapidly in the 1970s in particular: see articles 21 and 23 of the Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters and article 34 of the Convention on the Limitation Period in the International Sale of Goods. This flexible approach emerged as a “rival” to the reservations approach, but it also raises specific problems concerning the reservations *stricto sensu* which can be formulated concerning these conventions.¹⁸⁸

148. The above remarks do not call for any particular conclusions at this stage. Their purpose was not to outline solutions to the problems posed by the gaps in the 1969, 1978 or 1986 Vienna Conventions, but simply to note that such problems exist. Although the list is undoubtedly far from exhaustive and they are of varying difficulty and importance, the main problems noted above are the following:

(a) Is it legitimate to speak of reservations to a bilateral treaty?

(b) If so, are those reservations subject to a special legal regime?

(c) In what respect(s) does an interpretative declaration differ from a reservation?

(d) Is an interpretative declaration which in fact corresponds to the definition of reservations, subject to the legal rules applicable to reservations?

(e) What are the legal effects of a “genuine” interpretative declaration?

(f) And, more generally, to what legal regime are such declarations subject?

(g) Does the formulation of a reservation to a treaty that has not yet entered into force have an effect on that entry into force when the treaty makes such entry into force conditional on an expression of consent to be

bound by its provisions on the part of a minimum number of States or international organizations?

(h) What legal regime is applicable to reservations when a succession of States takes the form of the creation of a newly independent State formed from two or more territories or in the case of unification of States?

(i) May contracting States formulate an objection to the maintenance of a reservation of the predecessor State by the successor State, *inter alia*, when the reservation appears to them to be incompatible with a new reservation introduced by the successor State?

(j) What is/are the legal regime or regimes applicable to objections to reservations in the context of a succession of States, irrespective of the form it takes?

(k) Should the specific object of certain treaties or treaty provisions lead to a change in the rules applicable to the formulation and to the effects of reservations and objections?

(l) What rules, other than the very general indications given in article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions, are applicable to reservations to constituent instruments of international organizations?¹⁸⁹

(m) Are the rules on reservations appropriate for international human rights instruments?

(n) If not, how should they be adjusted in order to take account of the specific characteristics of such instruments?

(o) Is a reservation to a provision codifying a customary rule of international law admissible?

(p) If so, what would be the effects of such a reservation?

(q) If not, how is one to distinguish a reservation to a codifying rule from a reservation to a peremptory rule of general international law?

149. To this already long, though incomplete, list of questions not covered by the Vienna Conventions can be added others relating to the existence of what one might call “rival” institutions of reservations aimed at modifying participation in treaties, but, like them, putting at risk the universality of the conventions in question (additional protocols, bilateralization, right to selective acceptance of certain provisions, etc.).

¹⁸⁶ See Cohen-Jonathan, “Note sur les décisions ...”; Cohen-Jonathan and Jacqué, “Activités de la Commission européenne des droits de l’homme”, pp. 562–565; and Zanghi, “La déclaration de la Turquie relative à l’art. 25 de la Convention européenne des droits de l’homme”.

¹⁸⁷ See the 1947 General Agreement on Tariffs and Trade.

¹⁸⁸ On this question, see Imbert, *Les réserves aux traités multilatéraux* ..., pp. 199–201; and, in particular, Majoros, “Le régime de réciprocité de la Convention de Vienne et les réserves dans les Conventions de La Haye”.

¹⁸⁹ See, in this connection, the more specific questions raised in paragraph 137 above.

CHAPTER III

The scope and form of the future work of the Commission

150. The topic of the present report is entitled “The law and practice relating to reservations to treaties”. As the Special Rapporteur indicated in the outline prepared in 1993,¹⁹⁰ this title seems rather academic. Moreover, the wording suggests that there might be some opposition between “the law” on the one hand and “practice” on the other. It is true that some practices do not, *prima facie*, seem readily compatible with the rules set forth in the three relevant Vienna Conventions (see para. 159 below), but to oppose the law and practice in this way would be inappropriate; the latter enriches and develops the former and, in the same way as treaty provisions, forms part of the “legal landscape” whose contours ILC is called upon to draw in every detail; and one of the great merits of the “Vienna rules” relating to reservations is their flexibility, which offers the advantage of allowing the law to adapt itself to the requirements of States and international organizations (see para. 166 below).

151. For these various reasons, the Commission may deem it reasonable to choose a title that is as neutral and comprehensive as possible and does not prejudge the results of its work and to propose an amendment along those lines to the General Assembly on the understanding that the title may be changed or made more specific at a later stage if it should appear advisable to limit the scope of the topic. The title might be: “Reservations to treaties”.

152. In any event, it is in this spirit of neutrality and out of a concern not to prejudge either the form or the contents of the work of the Commission that the present report has been drafted and the methodological suggestions set out below formulated. These relate, successively, to the problems arising from the existence of earlier instruments which partially regulate the issue and the achievements of which ought to be preserved and to the form which the work of the Commission on the topic might take.

A. Preserving what has been achieved

153. There is no doubt that the provisions on reservations to be found in the 1969 Vienna Convention did not, at the time of their adoption, constitute an exercise in mere codification. They were then far more a matter of the progressive development of international law and completed the development that started with pan-American practice even before the Second World War, continued with the advisory opinion of ICJ in 1951¹⁹¹ and was consolidated by the change made in 1962 by Sir Humphrey Waldock’s first report (see paras. 35–46

above) and accepted by a majority of the members of the Commission.

154. It may be considered, however, that, with the passage of time, the question whether the rules relating to reservations laid down in 1969 are an aspect of codification or of progressive development has become largely obsolete. On the one hand, the 1969 Vienna Convention consolidated or “crystallized” earlier trends that were already well under way.¹⁹² Moreover and more especially in the 26 years “that have elapsed since the Vienna Convention was opened for signature, the rules regarding reservations stated in that treaty have come to be seen as basically wise and to have introduced desirable certainty”.¹⁹³

155. This consolidation, which is partial (see paras. 160–161 below), is the result of several factors, especially:

(a) The rules reflected the conditions of international society at the time they were adopted;

(b) They were part of a general tendency to make multilateral conventions more flexible and more open;

(c) They were, moreover, adopted almost unanimously at the United Nations Conference on the Law of Treaties;

(d) They were included in the 1986 Vienna Convention (see paras. 88 and 90 above).

156. These considerations have also led States to respect these provisions in the main, whether or not they have ratified the Vienna Convention¹⁹⁴ and even if, like France, they have not signed it. Although disputes in this area have been fewer in number than the uncertainties of the law might suggest, the arbitrators or judges who have had to deal with them often refer, expressly or by implication, to the provisions of the Convention,¹⁹⁵ and it is

¹⁹² See, for example, Baxter, “Treaties and custom”, p. 48.

¹⁹³ See Edwards Jr., *loc. cit.*, p. 365.

¹⁹⁴ See, for example, in the case of the United Kingdom of Great Britain and Northern Ireland, the statements of Sir Ian Sinclair (“The Vienna Convention on the Law of Treaties: the consequences of participation and nonparticipation”, pp. 273–274, and, in the case of the United States of America, those of Mr. Robert E. Dalton (“The Vienna Convention on the Law of Treaties: consequences for the United States”, p. 278. *The Restatement of the Law Third (Foreign Relations Law of the United States)*, vol. 2 (St. Paul, Minn., American Law Institute Publishers, 1987) essentially reiterates the rules of the 1969 Vienna Convention with some additional details designed to meet the requirements of the domestic practice of the United States. See in this connection (with regard to the *Restatement of the Law Second*), Piper, *op. cit.*, p. 317.

¹⁹⁵ See, in particular, the case law referred to above (footnotes 160–164) and the joint dissenting opinion of Judges Onyeama, Dillard, Jiménez

¹⁹⁰ See footnote 5 above.

¹⁹¹ See footnote 10 above.

interesting to note that, even the Human Rights Committee, which rejects the validity of the solutions adopted in 1969 with regard to instruments relating to human rights (see para. 139 above), takes these provisions as the starting point and seems to think that they represent general international law in this field (*ibid.*).

157. It may thus be said that, even if the Vienna Convention was an exercise in progressive development with regard to reservations, the rules established by article 2, paragraph 1 (*d*), and articles 19 to 23 have now acquired customary force.

158. This conclusion can, however, be maintained only subject to verification. The wording of the decisions on which it is based in part is not without ambiguity. For example:

(*a*) In the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic (Channel Islands case)*, the Court of Arbitration refers to the definition of a reservation contained in article 2, paragraph 1 (*d*), of the 1969 Vienna Convention, pointing out that it is accepted by both parties, and seems rather to be making a correlation between the rules of general international law and those laid down in article 21, paragraph 3, of the Convention than to be taking a general position on the value of the Convention as codification;¹⁹⁶ and,

(*b*) In the *Temeltasch* case, the European Commission of Human Rights considers that the Convention *primarily* lays down rules that exist in customary law and is *essentially* in the nature of a codification.¹⁹⁷

159. In addition, State practice, or the practice of some States, and even that of international organizations as depositaries, sometimes contradicts the very terms of the 1969 Vienna Convention. Thus, in a very detailed study, Gaja examines successively, giving examples, the practices relating to:

(*a*) Reservations subsequent to ratification¹⁹⁸ (contrary to the provisions of article 2, paragraph 1 (*d*), and article 19 of the Convention);

(*b*) The disregard States have shown for the provisions of article 19 concerning reservations,¹⁹⁹ although it is true that the wording of this provision is ambiguous (see paras. 108 *et seq.* above);

(*c*) The non-observance of the suspensive condition represented by the one-year time period before a State can become a party to the Convention, as provided for in article 20, paragraph 5;²⁰⁰

(*d*) The effect of objections to reservations,²⁰¹ although, here again, the provisions of article 20, paragraph 4, seem particularly ambiguous (see paras. 117 *et seq.* above).

160. Reference may also be made, and this is only one example among many, to the position of the Secretary-General of the United Nations regarding the time period in which States may raise objections to reservations:

The Secretary-General does not believe that he has any authority, in the absence of new instructions from the General Assembly, to adjust his practice to Vienna Convention rules which would be contrary to his present instructions.²⁰²

161. In any event, the 1969 Vienna Convention has not frozen the law. Regardless of the fact that it leaves behind many ambiguities, that it contains gaps on sometimes highly important points and that it could not foresee rules applicable to problems that did not arise, or hardly arose, at the time of its preparation (see chapter II above), the Convention served as a point of departure for new practices that are not, or not fully, followed with any consistency at the present time. As Edwards Jr. has written:

Calm has been introduced by the Vienna Convention on the Law of Treaties ... However, the Vienna Convention—perhaps the most successful international effort at codification ever undertaken—has not frozen the law. Rather, the rules in the Convention structure its future development.²⁰³

162. Truth to tell, there is but one clear conclusion that can be drawn from the foregoing considerations: the 1969 Vienna Convention is, at one and the same time, the culminating point of a development which began long ago and which consists in facilitating participation in multilateral conventions to the maximum extent while preserving their purpose and their object, and the starting point of a multifaceted and not always consistent practice, which, on the whole, seems to be much more the result of considerations of political expediency based on a case-by-case approach than of firm legal beliefs.

163. The Commission is therefore faced with a choice: either it can go back to the drawing board with the rules adopted in 1969—confirmed in 1986—and in 1978, so that, at one go, the ambiguities can be removed, the gaps filled, and they can be given the consistency they sometimes seem to lack, or it can take it that the treaty rules are well established and simply try to fill the gaps and, where possible and desirable, to remove their ambiguities while retaining their versatility and flexibility.

de Aréchaga and Waldock in the case of *Nuclear Tests (Australia v. France)* (*Order of 20 December 1974*), *I.C.J. Reports 1974*, pp. 312–371, in particular p. 349).

¹⁹⁶ Decision of 30 June 1977 (see footnote 154 above), paras. 55 and 61.

¹⁹⁷ See footnote 161 above.

¹⁹⁸ *Op. cit.*, pp. 310–313.

¹⁹⁹ *Ibid.*, pp. 313–320.

²⁰⁰ *Ibid.*, pp. 320–324.

²⁰¹ *Ibid.*, pp. 324–329.

²⁰² See United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 204, and *Juridical Yearbook 1981* (Sales No. E.84.V.1), p. 150.

²⁰³ *Loc. cit.*, p. 405.

164. There are, undoubtedly, very good arguments in favour of the first limb of that alternative, for instance:

(a) There are considerations of a political nature which, to a large extent, lay at the origin of the—often carefully contrived—ambiguities in the provisions relating to reservations in the 1969, 1986 (see paras. 61, 90 and 96 above) and perhaps even the 1978 Vienna Conventions; but such obstacles to a more consistent approach have no longer obtained since the completion of political decolonization *stricto sensu* and the end of the cold war in particular;

(b) Some of the difficulties encountered derive from the incompatibility that exists, according to some analysts at least, between the various provisions of the 1969 and 1986 Vienna Conventions (for example, between article 19 (c) and article 20, paragraph 4, or article 21, paragraph (3)); it will be possible to overcome these only if their wording is amended;

(c) Even if these rules have acquired customary force, there is nothing to prevent them from being amended; and that is desirable, for some provisions, though clear, are open to criticism.²⁰⁴

165. Notwithstanding the weight of these arguments, the Special Rapporteur is very much attracted by the second approach referred to above (see para. 163), which preserves what has been achieved by existing provisions. Admittedly, such a choice is not without its drawbacks; in particular, the Commission will have to bear with any inconsistencies in the existing provisions and must not attempt to find an “ideal solution”. But, as the Commission noted as far back as 1951, “no single rule uniformly applied can be wholly satisfactory”,²⁰⁵ so that the search for such a solution would inevitably result in a dispersal of rules that would probably be the source of major complications.

166. On the other hand, what should be termed a “modest approach”²⁰⁶ certainly offers great advantages:

(a) Amendment of the existing provisions would run into considerable technical difficulty: a State party to one of the existing conventions in force, or that might become a party, might very well refuse to accept such amendments as could be adopted;²⁰⁷ the result would be a dual legal regime of reservations that would be the source of very great difficulty under international law—at the present stage of its development, there is no means of imposing harmonization of the rules in force;

(b) The view may be taken that the present ambiguities, which are obvious, can be removed if the existing rules are clarified and that they are due not so much to the inconsistency as to the excessive brevity. Consequently, if the Commission could undertake the task of clarifying the existing provisions, that would at least make it possible to overcome most of the difficulties encountered;

(c) In their statements in the Sixth Committee of the General Assembly in 1993 and 1994, the representatives of States, while endorsing the inclusion of the topic of reservations in the ILC agenda (see para. 4 above), expressed their support for the existing provisions.²⁰⁸ Above all, whatever their defects, the rules adopted in 1969 have proved their worth in that, on the one hand, they comply with the objective of flexibility which seems to have the support of States as a whole and, on the other, although their application gives rise to some difficulties, it has never degenerated into a serious dispute and, although, from the standpoint of principle, the protagonists have in some cases remained on opposite sides, they have always been reconciled in practice.

167. One study often quoted shows that the adoption of the 1969 Vienna Convention has not led to an increase in the formulations of reservations and also that, on the whole, those that were formulated concerned relatively minor points.²⁰⁹ However, it must be noted that this study was published in 1980 and that it is evident from the statistics it gives that a number of reservations and objections analysed are what might be termed “cold war” reservations and objections, since a significant proportion of the reservations were made by central and eastern European States and based on ideological grounds—refusing settlement of dispute clauses, for instance—and those grounds in many cases also explain the objections of the “Western” countries. One may therefore think that the new diplomatic deal helps to dedramatize still further the problem of reservations. In a more limited context, this also seems to be confirmed by a recent study by Schmidt on reservations to the International Covenant on Economic, Social and Cultural Rights and on the International Covenant on Civil and Political Rights, which concludes that “[c]ontrary to what the large number of reservations to the Covenants might suggest, ... they do not represent a massive deviation from the obligations of States parties”.²¹⁰

168. Accordingly and regardless of their deficiencies, the provisions already adopted on reservations, which have at least served as a guide to practice, have proved their usefulness and have certainly not made matters worse in that regard. Subject to the reactions of the Sixth Committee, whose special attention it would perhaps be

²⁰⁴ For instance, the presumption of the applicability of the treaty between the reserving State and the objecting State, as laid down in article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions and adopted almost by surprise at the United Nations Conference on the Law of Treaties (1968–1969), is the subject of much lively criticism.

²⁰⁵ See footnote 19 above.

²⁰⁶ But this certainly does not mean that it is the easy way out, as ILC will have to try to find a variety of solutions, compatible with the present provisions.

²⁰⁷ Either as formal amendments or in an additional protocol.

²⁰⁸ The discussions in the Committee of Legal Advisers on Public International Law of the Council of Europe (see para. 114 (d) above) in March 1995 also seem to reflect a majority view to that effect.

²⁰⁹ Gamble Jr., loc. cit., passim; see also Sinclair, *The Vienna Convention on the Law of Treaties*, p. 77.

²¹⁰ Op. cit.

advisable to draw to that point, ILC would probably be well advised to decide to confine its task to filling the gaps and to removing the ambiguities in the existing rules, but without embarking on their amendment.

169. ILC should nonetheless be aware that, by adopting that approach, it would be prevented from proposing amendments to the 1969, 1978 and 1986 Vienna Conventions. That could have drawbacks in the case of certain categories of treaties and, in particular, of the international legal human rights instruments of which the Human Rights Committee recently stated that “the operation of the classic rules on reservations is ... inadequate” (see para. 139 above). However, apart from the fact that this view, which is not unanimously shared,²¹¹ calls for closer examination, it is not impossible to conceive of solutions. It should be borne in mind, in particular, that the rules on reservations which appear in the 1969 and 1986 Vienna Conventions are of a residual nature only; States can derogate from them in the “substantive” conventions they conclude. In the circumstances, the Commission would be entirely free to suggest model clauses adapted to special categories of multilateral treaties and, in particular, to human rights treaties. That suggestion leads to a question as to the forms that the results of the work of the Commission on the topic of reservations to treaties might take.

B. The form that the results of the work of the Commission might take

170. Under the terms of article 1, paragraph 1, of its statute, the Commission “shall have for its object the promotion of the progressive development of international law and its codification”. But there are many ways of performing that function and, while the statute speaks of “drafts” with regard both to progressive development and to codification,²¹² it imposes no particular form on them.

171. It is true that, in respect of progressive development, article 15 of the statute seems to assign the Commission the task of drafting conventions, but, in fact, the dividing line between codification and progressive development has never been clear-cut and, in view of the uncertainties of practice on at least some aspects of the subject under consideration, it would definitely be impossible to establish such a line in the present case. It has happened in the past, moreover, that, in carrying out certain tasks, the Commission has not prepared a proper set of draft articles; this was the case, in particular, as far back as the question of reservations to multilateral conventions, which, in 1951, was dealt with in a chapter of the report of the Commission to the General Assembly in the conclusions in which the Commission suggested the practice to be adopted with regard to “reservations to multilateral conventions, especially those of which the

Secretary-General of the United Nations is the depositary” (see para. 20 above), but those suggestions were not submitted formally as a set of draft articles with commentaries.

172. In its resolution 48/31 of 9 December 1993 (see para. 5 above), the General Assembly left in abeyance the question of the form to be given to the work of the Commission on the topic pending the submission of a preliminary study. The Commission will therefore probably have to send the Assembly some recommendations on the matter following its discussion of the present report.

173. In any event, many options seem to be available and General Assembly resolution 48/31 has not ruled out any given solution. Here again, the Commission has to make a choice.

174. It should also be noted that its decision on the final form of its work is quite independent of the decision it will take on the content of that work (see para. 163 above). Or, rather, while it is obvious that, if the Commission proposes amendments to existing conventions, its recommendations should take the form of a draft convention, a decision to “preserve what has been achieved” will leave the issue of form entirely open.

175. Under this approach, the one preferred by the Special Rapporteur (see paras. 165–168 above), one possibility would be to prepare draft protocols to existing conventions, it being understood that the conventions are not to be amended, but, rather, that the provisions adopted in 1969, 1978 and 1986 are to be supplemented and refined. Then, theoretically, the above-mentioned complications (see para. 166 above), which would be the result of the coexistence of incompatible rules in force between two groups of States, would no longer arise. States that ratified the protocol or protocols would simply be bound by clearer and more detailed rules than those that were parties only to the “basic” conventions.

176. Another way of achieving the same result would be to formulate a set of consolidated draft articles on reservations to treaties by combining, in a single text, provisions scattered throughout the three relevant Vienna Conventions and new rules intended to refine and supplement them. It would then be up to the General Assembly to determine the fate of that draft. However, even if it was to become a “Convention on the Law of Reservations to Treaties”, it would theoretically not conflict with existing conventions, since it would merely reproduce their provisions word for word.

177. There is one fairly strong argument in favour of choosing one of these two solutions: it is precisely that these treaty rules exist and it might seem appropriate to continue along the same lines and consolidate the treaty regime for reservations.

178. As indicated above (see paras. 170–174), however, the Commission is by no means bound to prepare a

²¹¹ See footnote 177 above.

²¹² See, in particular, articles 16, 21 and 22 of the statute.

proper set of draft articles in the form either of a draft protocol or of a “consolidated” convention. It can just as easily opt for only a detailed study of the problems involved or even an article-by-article commentary on existing provisions, a sort of guide to the practice of States and international organizations on reservations. Such a document would carry the weight of a text formally endorsed by the Commission and might subsequently be the subject of a recommendation by the General Assembly. This approach also offers a number of advantages. More easily than a formal set of articles, it would allow the specific features of certain types of treaty to be taken fully into consideration, especially as the Commission would

simultaneously be adopting model clauses for various situations (see para. 169 above).²¹³

179. Even if the Commission leaned towards the more classical solutions of one or more sets of draft articles (see paras. 175 and 177 above), nothing would stop it from recommending the inclusion of any model clauses it might adopt in future multilateral conventions on specific topics for which the application of general rules would seem inappropriate.

²¹³ These clauses might derogate from existing law, since they would be intended for inclusion in specific conventions, but they would not call in question the provisions of existing conventions.

Conclusion

180. The provisions of the 1969, 1978 and 1986 Vienna Conventions relating to reservations certainly have their weaknesses, but they also offer the great advantage of flexibility and adaptability. In the Special Rapporteur’s view, it would be regrettable to go back on solutions that have proved their worth in order to take up instead an abstract line of thinking and to search for an ideal solution that probably does not exist.

181. On the other hand, and herein lies the crux of the issue, it would certainly be advantageous to fill the gaps in existing texts and, insofar as possible, to do away with

their ambiguities. Yet that endeavour, which is useful and salutary in many respects, must be carried out prudently and with due regard for the flexibility that facilitates the broadest possible participation in multilateral conventions, while simultaneously safeguarding their basic objectives.

182. There are several ways of achieving this goal—draft articles additional to existing treaties, “consolidated” draft articles, a “guide to practice”, model clauses or a combination of these approaches. It is up to ILC, in close consultation with the Sixth Committee, to determine which are the most appropriate.

**STATE SUCCESSION AND ITS IMPACT ON NATIONALITY
OF NATURAL AND LEGAL PERSONS**

[Agenda item 7]

DOCUMENT A/CN.4/467

**First report on State succession and its impact on nationality of natural and legal persons,
by Mr. Václav Mikulka, Special Rapporteur**

[Original: English/French]
[17 April 1995]

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Introduction

A. Historical review

1. PREVIOUS WORK BY THE COMMISSION
ON THE TOPIC OF STATE SUCCESSION

1. The topic of succession of States and Governments is one of the topics that the Commission selected at its first session, in 1949, with a view to their codification.¹ Pursuant to the recommendation which the General Assembly made in its resolution 1686 (XVI) of 18 December 1961, the Commission, at its fourteenth session, in 1962, listed the topic of succession of States and Governments among its priorities. The Commission decided further to establish a Sub-Committee on Succession of States and Governments which would be responsible for preparing a preliminary report containing suggestions as to the scope of the topic, approaches to studying it and means of providing the necessary documentation.

2. At its fifteenth session, in 1963, the Commission considered the report of the Sub-Committee, and decided that succession of Governments would be considered at that stage only to the extent necessary to complete the study on State succession. The Commission endorsed the broad outline, the order of priority of the headings and the division of the topic recommended by the Sub-Committee, namely: succession in respect of treaties, succession in respect of rights and duties resulting from other sources than treaties (revised in 1968 to read “Succession in respect of matters other than treaties”) and succession in respect of membership of international organizations.

3. The Commission, after having unanimously approved the Sub-Committee’s report,² appointed Mr. Manfred Lachs as Special Rapporteur for the topic of succession of States and Governments. Following the resignation of

¹ *Yearbook ... 1949*, p. 281.

² *Yearbook ... 1963*, vol. II, pp. 260–262, document A/CN.4/160.

Mr. Lachs, the Commission decided, at its nineteenth session, in 1967, to divide the topic into three main headings in accordance with the broad outline set forth in the report of the Sub-Committee in 1963. The Commission appointed Sir Humphrey Waldock as Special Rapporteur for succession in respect of treaties and Mr. Mohammed Bedjaoui as Special Rapporteur for succession in respect of matters other than treaties. The Commission decided to leave aside, for the time being, the third aspect of the topic.

4. Following Sir Humphrey Waldock's resignation, the Commission decided, at its twenty-fifth session, in 1973, to appoint a new Special Rapporteur, Sir Francis Vallat, to succeed him for the topic. In accordance with the decision taken in 1963, it was agreed that priority should be given to the study on State succession and that succession of Governments should be considered only to the extent necessary to complete the study on State succession.

5. The question of nationality, which was covered by a broader title, namely, "Status of the inhabitants", was at first part of the second aspect of the topic,³ namely, "Succession in respect of matters other than treaties".

6. This second aspect was considered by the Commission from 1968 to 1981, with some preliminary comments being made on State succession during the debate on the first report of the Special Rapporteur at the twentieth session, in 1968. In view of its breadth and complexity, it was later narrowed down to the economic aspects of succession. Nationality was not included therein.⁴

7. While two sets of draft articles prepared by the Commission under the first two headings mentioned above led to the adoption of the Vienna Convention on Succession of States in respect of Treaties and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts, other aspects of State succession were left aside by the Commission for more than one decade.

2. PREVIOUS WORK BY THE COMMISSION ON THE TOPIC OF NATIONALITY

8. In the work of the Commission, the topic of nationality has its own history, separate from that of State succession. While the topic "Nationality, including statelessness" was also included in 1949 in the list of topics selected for codification, it was not given priority by the Commission.

³ See the first report of the Special Rapporteur on succession of States in respect of rights and duties resulting from sources other than treaties (*Yearbook ... 1968*, vol. II, document A/CN.4/204, paras. 133–137).

⁴ See *Yearbook ... 1968*, vol. II, pp. 220 and 221, document A/7209/Rev.1, paras. 73 and 78.

9. At the fourth session of the Commission in 1952, further to Economic and Social Council resolution 304 D (XI) of 17 July 1950, a draft convention on the nationality of married persons was submitted to the Commission by Mr. Manley O. Hudson, who had been appointed in 1951 as Special Rapporteur for the topic of nationality, including statelessness. This draft followed very closely the terms proposed by the Commission on the Status of Women and approved by the Council. However, ILC was of the opinion that the question of the nationality of married women could only be considered in the broader context of the whole subject of nationality.⁵

10. With regard to the topic of elimination of statelessness, the Commission, further to Economic and Social Council resolution 319 B III (XI) of 11 August 1952, considered at its fourth session, in 1952, a working paper on statelessness.⁶ The Commission requested the Special Rapporteur to prepare a draft convention on the elimination of statelessness in the future and one or more draft conventions on the reduction of future statelessness. At its fifth session, in 1953, the Commission adopted, on the basis of a report containing draft articles submitted by Mr. Roberto Córdova, the new Special Rapporteur appointed in 1952, replacing Mr. Hudson, two draft conventions, one on the elimination of future statelessness and the other on the reduction of future statelessness, which were then transmitted to Governments for comment.

11. The United Nations Conference on the Elimination or Reduction of Future Statelessness, of which the first session was held in Geneva in 1959 and the second in New York in 1961, adopted, on the basis of the second draft convention of the Commission referred to above, the Convention on the Reduction of Statelessness, which entered into force on 13 December 1975.

12. With regard to present statelessness, the Commission in 1954 formulated its proposals in seven articles with commentaries and submitted them to the General Assembly as part of its final report on the topic of nationality, including statelessness.⁷ It further decided, accordingly, to "defer any further consideration of multiple nationality and other questions relating to nationality".⁸

⁵ Nevertheless, other organs of the United Nations system have continued their consideration of the question of the nationality of married women. After the articles of the draft convention prepared by the Commission on the Status of Women had been finalized by the Third Committee, the General Assembly, in its resolution 1040 (XI) of 29 January 1957, adopted the Convention on the Nationality of Married Women, which entered into force on 11 August 1958.

⁶ Submitted by the Special Rapporteur, *Yearbook ... 1952*, vol. II, annex III, pp. 13 *et seq.*

⁷ *Yearbook ... 1954*, vol. II, p. 148, para. 37.

⁸ *Ibid.*, p. 149, para. 39.

3. INCLUSION OF THE TOPIC “STATE SUCCESSION AND ITS IMPACT ON NATIONALITY OF NATURAL AND LEGAL PERSONS” IN THE AGENDA OF THE COMMISSION

13. At its forty-fifth session, in 1993, the Commission decided to include in its agenda as one of two new topics the question of State succession and its impact on nationality of natural and juridical persons.⁹ The General Assembly, in the light of the situation prevailing in Eastern Europe, endorsed this proposal in its resolution 48/31 of 9 December 1993.

14. At its forty-sixth session, in 1994, the Commission appointed the present Special Rapporteur for the topic.¹⁰ The General Assembly, in its resolution 49/51 of 9 December 1994, endorsed the intention of the Commission to undertake work on the topic and, at the same time, requested the Secretary-General to invite Governments to submit, by 1 March 1995, relevant materials including national legislation, decisions of national tribunals and diplomatic and official correspondence relevant to the topic.

B. Delimitation of the topic

15. The topic of nationality, as envisaged in the first report by the Special Rapporteur on succession of States in respect of rights and duties resulting from sources other than treaties,¹¹ was part of the broader problem of the status of the inhabitants which, in addition to the question of the nationality of natural persons, has also to encompass that of conventions of establishment. The task which the Commission has now undertaken differs from the one defined in 1968 in two respects: first, it does not refer to the issue of conventions of establishment (which has become anachronistic); secondly, it encompasses the issue of the nationality of legal persons, which had not been mentioned explicitly in 1968.

16. In order to define in a substantive way the relation between the topic under consideration and the two topics studied previously by the Commission, namely, State succession and nationality, including statelessness, it is useful to recall the statement contained in the first report of the Special Rapporteur, Mr. Bedjaoui, namely:

In all cases of succession, traditional or modern, there is in theory no succession or continuity in respect of nationality. The successor State does not let the inhabitants of the territory retain their former nationality. This is a manifestation of its sovereignty.¹²

In contrast to international treaties or debts, where one State replaces another in an international legal relation subject to transfer, the relation of the State to the individual which is covered by the concept of nationality excludes a priori any notion of “substitution” or “devolu-

tion”. Nationality, like sovereignty, is always inherent. By its nature, therefore, nationality is not a “successional matter” as, for example, State treaties, property and debts, and so on, are.

17. The questions which the Commission must study in the context of the present topic are, of course, part of the branch of international law dealing with nationality. By their nature, they are very similar to those which the Commission has already considered under the topic “Nationality, including statelessness”. However, they differ from it in two respects: on the one hand, the vision of the Commission is broader than before—it is not limited to the topic of statelessness (although this is of paramount importance), but covers all of the issues resulting from changes of nationality. On the other hand, the scope of consideration is limited to changes of nationality resulting from State succession. Changes of nationality should therefore be considered exclusively in relation to changes of sovereignty. What is involved is the phenomenon often termed “collective naturalizations”.¹³

18. Owing to the progress made in its previous work in the area of the progressive development and codification of international law in respect of nationality and of State succession, the Commission is able to approach consideration of the present topic with a deeper knowledge of the relationship between nationality issues and issues of State succession.

19. The topic under consideration relates also to another question: that of the continuity of nationality, which arises in the context both of the present topic and of diplomatic protection, a topic included in the 1949 list which has never been considered. It is for the Commission to decide whether and to what extent this issue should be considered in the context of the present topic.

C. Working method

20. Consideration of the topic “State succession and its impact on nationality of natural and legal persons”, as defined by General Assembly resolution 49/51, falls into the category of special assignments. The Assembly has, on some occasions, requested the Commission to consider specific texts or to prepare reports on specific legal issues without any consideration being given to the drafting of a convention on the topic or any decision being taken as to the final form which the outcome of the work should take.¹⁴ The Commission has always decided in

¹³ See, for example, article 13 of the Code of Private International Law (Bustamante Code).

¹⁴ Thus, at the express request of the General Assembly, the Commission studied the following topics: draft Declaration on the Rights and Duties of States (1949), formulation of the Nürnberg Principles (1950), question of an international criminal jurisdiction (1950), question of defining aggression (1951), reservations to multilateral conventions (1951), draft code of crimes against the peace and security of mankind (1954), extended participation in general multilateral treaties concluded under the auspices of the League of Nations (1962), question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law (1972) and review of the multilateral treaty-making process (1979).

⁹ See *Yearbook ... 1993*, vol. II (Part Two), p. 97, para. 440.

¹⁰ *Yearbook ... 1994*, vol. II (Part Two), p. 179, para. 382.

¹¹ *Yearbook ... 1968*, vol. II, p. 94, document A/CN.4/204.

¹² *Ibid.*, p. 114, para. 133.

such cases that it was free to adopt special methods with which to accomplish special assignments, rather than conform to the methods envisaged by its statute for the ordinary work of progressive development and codification.

21. In the view of the Special Rapporteur, the Commission should, in dealing with the present topic, retain this flexible approach in respect of the working method.

D. Form which the outcome of the work on this topic might take

22. When the Commission, at its forty-fifth session, included the topic "State succession and its impact on nationality of natural and legal persons" in its agenda, it expressed the view that "[t]he outcome of the work ... could for instance be a study or a draft declaration to be adopted by the General Assembly", and decided that the final form of the work would be determined at a later stage.¹⁵

23. The General Assembly endorsed the decision of the Commission to include in its agenda the new topics on the understanding that the final form to be given to the results of the work will be decided after a preliminary study is presented to the Assembly.¹⁶

24. The history of the Commission shows that its work undertaken under the heading of special assignments has culminated either in a simple report or in draft articles with commentaries, as, for instance, in the case of the draft Declaration on Rights and Duties of States, the formulation of the Nürnberg Principles, the draft Code of Crimes against the Peace and Security of Mankind and the draft articles on the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law. In the last of the above-mentioned cases, the draft served as the basis for the Convention on the Prevention and Punishment of

Crimes against Internationally Protected Persons, including Diplomatic Agents.

25. As a first step, the work of the Commission on the topic will have the character of a study to be presented to the General Assembly in the form of a report. In the view of the Special Rapporteur, the Commission will only be able to discuss meaningfully the form of the final outcome of the work after it has conducted an in-depth study of the topic.

E. Terminology used

26. In its work on the codification and progressive development of the law concerning succession of States in respect of treaties and matters other than treaties, the Commission has consistently borne in mind the desirability of using, as far as possible, common definitions and common basic principles, without ignoring or neglecting the specific characteristics of each topic. The Special Rapporteur therefore considers that in order to ensure uniformity of terminology, the Commission should continue to use the definitions it formulated previously in the context of the two conventions on succession of States, especially as regards the basic concepts, defined in article 2 of the two conventions as follows:

(a) "Succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "Predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "Successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "Date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

(e) "Newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible;

(f) "Third State" means any State other than the predecessor State or the successor State.

27. As the Commission explained in its commentary to those provisions, the term "succession of States" is used "as referring exclusively to *the fact of the replacement of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event*".¹⁷ At that time, the Commission considered

¹⁵ See *Yearbook ... 1993*, vol. II (Part Two), p. 97, para. 439. The Commission thus took into consideration certain hesitations as to the form of the outcome of the work, as expressed in the preliminary note on the topic submitted at the forty-fifth session, as follows: "[T]he drafting of a convention ... might face the risk of the same kind of problems the Commission faced during the work on the previous State succession topics (such as lengthy codification work, the problem of applying the convention to new States which are not parties to it, and the like)" (*ibid.*, vol. II (Part One), p. 223, document A/CN.4/454, para. 28). This view, however, was not shared by the entire Commission.

¹⁶ See General Assembly resolutions 48/31 (para. 7) of 9 December 1993 and 49/51 of 9 December 1994, paragraph 6 of which reads as follows:

"6. Endorses the intention of the International Law Commission to undertake work on the topics 'The law and practice relating to reservations to treaties' and 'State succession and its impact on nationality of natural and legal persons', on the understanding that the final form to be given to the work on these topics shall be decided after a preliminary study is presented to the General Assembly, and, in connection with the latter topic, requests the Secretary-General to invite Governments to submit, by 1 March 1995, relevant materials including national legislation, decisions of national tribunals and diplomatic and official correspondence relevant to the topic;"

¹⁷ *Official Records of the United Nations Conference on Succession of States in respect of Treaties, Vienna, 4 April–6 May 1977 and 31 July–23 August 1978*, vol. III (United Nations publication, Sales No. E.79.V.10), p. 6.

that the expression “in the responsibility for the international relations of territory” was preferable to other expressions such as “in the sovereignty in respect of territory”, because it was a formula commonly used in State practice and more appropriate to cover in a neutral manner any specific case independently of the particular status of the territory in question. The Commission stated that the word “responsibility” should be read in conjunction with the words “for the international relations of territory” and was not intended to convey any notion of “State responsibility”,¹⁷ a topic under study by the Commission at that time.

28. The meanings attributed to the terms “predecessor State”, “successor State” and “date of the succession of States” were merely consequential upon the meaning

given to “succession of States” and did not appear to the Commission to require any comment. With regard to the expression “newly independent State”, the Commission deemed it useful to note that it signified “a State which has arisen from a succession of States in a territory which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible”,¹⁸ no distinction being drawn among the various cases of emergence to independence. The definition excludes cases concerning the emergence of a new State as a result of a separation of part of an existing State or of a uniting of two or more existing States.

¹⁸ Ibid.

CHAPTER I

Current relevance of the topic

29. As one eminent author recognized, “[t]he effect of change of sovereignty upon the nationality of the inhabitants of [the] territory [concerned] is one of the most difficult problems in the law of State succession”.¹⁹ Nevertheless, the same author stressed, as early as 1956, that “[u]pon this subject, perhaps more than any other in the law of State succession, codification, or international legislation, is urgently demanded. It is undesirable that as a result of change of sovereignty persons should be rendered stateless against their wills. It is equally undesirable that persons who have only an accidental relationship with absorbed territory should be invested with a nationality which they do not want.”²⁰

30. The change of nationality resulting from State succession is a matter of great importance because it occurs on a collective basis and has numerous serious consequences for the persons involved. Nationality is a precondition for the exercise of a number of political and civil rights. But this matter also has important implications with respect to the exercise of the sovereign powers of the States concerned, i.e. the successor and predecessor State. Thus, the employment of alien officials or alien control of natural resources or public utilities after the date of succession of States may constitute a real problem.²¹ Moreover, the loss of the nationality of the predecessor State and the difficulties connected to the acquisition of the nationality of the successor State may lead to many human tragedies.

31. But as this matter belongs primarily to the sphere of internal law, no serious attempt has ever been made to set up a universal instrument providing for a uniform solution to the problem. Nor has the Commission been anx-

ious to deal with the problem of nationality in relation to that of State succession, which it discussed for nearly 20 years.²² Nationality has once again become an issue of special interest for the international community against the backdrop of the emergence of new States and, in particular, the dissolution of States in Eastern Europe. The manner in which problems relating to nationality in the context of State succession are being resolved has become a matter of concern to the international community. Nationality problems, and in particular the problem of statelessness, have attracted the attention of a number of governmental and non-governmental organizations, academic institutions and international forums, including the High Commissioner on National Minorities of the Organization (previously Conference) for Security and Cooperation in Europe,²³ the Arbitration Commission of the European Community Conference on Yugoslavia,²⁴ the United Nations High Commissioner for Refugees,²⁵

²² See the initial debate in 1963, during which Mr. Rosenne suggested the exclusion from the topic of certain questions and Mr. Castrén expressed the view that it was not possible to exclude such questions as nationality. Mr. Castrén acknowledged, however, that in the working paper he had prepared as a member of the Sub-Committee on Succession of States and Governments, he had perhaps gone too far in suggesting the study of all questions relating to the legal status of the local population coming under the territorial and personal jurisdiction of the new State (*Yearbook ... 1963*, vol. II, document A/5509, annex II, p. 260).

²³ See the recommendations by the High Commissioner on National Minorities upon his visits to Estonia, Latvia and Lithuania (CSCE Communication No. 124 of 23 April 1993).

²⁴ See opinion No. 2 of 11 January 1992, reproduced in ILM, vol. 31 (1992), p. 1497. For comments on opinion No. 2, see Pellet, “Note sur la Commission d’arbitrage de la Conférence européenne pour la paix en Yougoslavie”, pp. 339–341.

²⁵ UNHCR is particularly concerned with the question of statelessness in the context of State succession. Its contribution takes two forms: organization of seminars and symposiums, and provision of technical assistance for the drafting of laws on nationality with a view to avoiding cases of statelessness.

¹⁹ O’Connell, *The Law of State Succession*, p. 245.

²⁰ Ibid., p. 258.

²¹ Donner, *The Regulation of Nationality in International Law*, pp. 250–252.

the Council of Europe and its Commission for Democracy through Law.²⁶

32. Several international meetings involving scholars and legal experts from different countries have dealt with these issues, including the following: Round table on nationality, minorities and State succession in Eastern Europe, organized by the International Law Centre of the University of Paris X in Nanterre, on 3–4 December 1993; Workshop on international law and nationality laws in the former USSR, organized by UNHCR in cooperation with the International Institute of Humanitarian Law, at Divonne-les-Bains, France, on 25–26 April 1994; Seminar on nationality, minorities and State succession in Eastern Europe, organized by the International Law Centre of the University of Paris X and the Czech Society of International Law in Prague, from 22 to 24 September 1994;²⁷ Workshop on nationality matters, organized by the International Organization for Migration in cooperation with UNHCR in Dagomis, Russian Federation, in October 1994; Workshop on Citizenship, Statelessness and the Status of Aliens in the Commonwealth of Independent States and Baltic States, organized by the Government of Finland and the Office of UNHCR in Helsinki, from 12 to 15 December 1994.

33. During the last few years, in a number of States confronted with problems of State succession or of resumption of independence, new nationality laws have been adopted, or nationality laws dating from the period prior to the Second World War have been re-enacted.²⁸

²⁶ The work of the Commission for Democracy through Law on the question of nationality in the context of State succession is still at a very preliminary stage.

²⁷ For the proceedings of the seminar, see “Nationalité, minorités et succession d’États en Europe de l’Est”, *Cahier du CEDIN*, No. 10 (Paris, 1996).

²⁸ As of the date of submission of the present report, only a few States had responded to the request of the Secretary-General for the submission of relevant materials, including national legislation, decisions of national tribunals and diplomatic and official correspondence relevant to the topic of State succession and its impact on nationality.

34. With the growth in the number of new States, the rules on State succession have found a new material sphere of application.²⁹ This justifies the effort to shed more light on the rules concerning nationality which might be applicable in the event of State succession.

Thus, the following enumeration of national legislation is based not only on the replies of Governments but also on other available sources and cannot be considered as exhaustive:

(a) Croatia: Law on Croatian nationality of 28 June 1991; Law on amendments and supplements to the Law on Croatian nationality of 8 May 1992;

(b) Czech Republic: Law on acquisition and loss of citizenship of 29 December 1992;

(c) Eritrea: Eritrean Nationality Proclamation No. 21/1992 of 6 April 1992;

(d) Estonia: Law on citizenship (1938), re-enacted by the resolution of the Supreme Council on the application of the Law on Citizenship of 26 February 1992; Law on Estonian language requirements for applicants for citizenship of 10 February 1993;

(e) Latvia: Law on citizenship (1919), re-enacted by the resolution of the Supreme Council on the renewal of the Republic of Latvia citizens’ rights and fundamental principles of naturalization of 15 October 1991;

(f) Lithuania: Law on citizenship of 5 December 1991; resolution of the Supreme Council of the Republic of Lithuania on the procedure for implementing the Republic of Lithuania law on citizenship of 11 December 1991;

(g) Slovenia: Law on citizenship of 5 June 1991;

(h) Slovakia: Law on acquisition and loss of citizenship of 19 January 1993.

For legislation on the issue of nationality, including the effects of State succession on nationality, previously compiled by the Codification Division, Office of Legal Affairs of the Secretariat, see “Laws concerning nationality”, *United Nations Legislative Series* (ST/LEG/SER.B/4) (Sales No. 1954.V.1) and supplement thereto (ST/LEG/SER.B/9) (Sales No. 1959.V.3), and “Materials on succession of States in respect of matters other than treaties” (ibid. (ST/LEG/SER.B/17) (Sales No. E/F.77.V.9)).

²⁹ As for the content of such rules, the Arbitration Commission of the European Community Conference on Yugoslavia has stated that “the phenomenon of State succession is governed by the principles of international law, from which the Vienna Conventions [on State succession] of 23 August 1978 and 8 April 1983 have drawn inspiration”, opinion 1, reproduced in *ILM*, vol. 31 (1992), p. 1495.

CHAPTER II

Nationality—concept and function

35. The problem of nationality is closely linked to the phenomenon of population as one of the constitutive elements of the State, because “[i]f States are territorial entities, they are also aggregates of individuals”.³⁰ While statehood is contingent on the existence of at least some permanent population, nationality is contingent on deci-

sions of the State. And, being in fact “a manifestation of sovereignty, nationality is jealously guarded by States”.³¹

36. Before any further thoughts are developed concerning the concept of nationality, a clear distinction must be made between the nationality of individuals and that of legal persons. The fundamental difference between the

³⁰ Crawford, *The Creation of States in International Law*, p. 40.

³¹ Chan, “The right to a nationality as a human right: the current trend towards recognition”, p. 1.

concept of the nationality of an individual (natural person) and that of a legal person has been explained by a number of authors.

All natural persons can possess the quality of a national, although in fact some of them, referred to as stateless persons, do not possess that quality in any country ... Legal persons, on the other hand, being persons created by law, are viewed as possessing a nationality. But this term then expresses a concept which is quite different, to the point where it has been denied that the term 'nationality' in this context has any value other than that of an image. Nevertheless, it continues to be used in positive law, but the subject-matter is too closely linked to the concept of legal personality for study of one to be dissociated from that of the other.³²

A. Nationality of natural persons

37. The nationality of individuals is most often seen as a legal bond between the individual and the State. According to Jennings and Watts, the "[n]ationality of an individual is his quality of being a subject of a certain state".³³ Batiffol and Lagarde consider that, according to current thinking, legal nationality is "the juridical attachment of a person to the population forming a constitutive element of a State. This attachment subjects the national to the so-called personal competence of that State, which is enforceable against other States".³⁴ The Draft Convention on Nationality prepared by Harvard Law School³⁵ defines nationality as "the status of a natural person who is attached to a State by the tie of allegiance"³⁶ while, for O'Connell, the "expression 'nationality' in international law is only shorthand for the ascription of individuals to specific States for the purpose either of jurisdiction or of diplomatic protection. In the sense that a person falls within the plenary jurisdiction of a State, and may be represented by it, such a person is said to be a national of that State".³⁷

38. The various components of the concept of nationality have been identified by ICJ in a definition which states that nationality is:

a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.³⁸

³² Batiffol and Lagarde, *Droit international privé*, pp. 97–98.

³³ Jennings and Watts, *Oppenheim's International Law*, p. 851.

³⁴ Batiffol and Lagarde, *op. cit.*, p. 95.

³⁵ "Part I. Nationality", *Supplement to AJIL*, vol. 23, special number, April 1929, pp. 13 *et seq.*

³⁶ *Ibid.*, p. 22.

³⁷ O'Connell, *State Succession in Municipal Law and International Law*, p. 498.

³⁸ *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 4, at p. 23. As Jennings and Watts point out, the "last part of this passage does not entirely reflect the situation which exists in cases of dual nationality" (*op. cit.*, p. 854).

39. Aside from the meaning given to the concept of nationality at the international level, there can be various categories of "nationals" at the level of internal law:

... a state's internal laws may distinguish between different kinds of nationals—for instance, those who enjoy full political rights, and are on that account named citizens, and those who are less favoured, and are on that account not named citizens. In some Latin-American countries, for example, the expression "citizenship" has been used to denote the sum total of political rights of which a person may be deprived, by way of punishment or otherwise, and thus lose citizenship, without being divested of nationality as understood in international law. In the United States, while the expression "citizenship" and nationality are often used interchangeably, the term "citizen" is, as a rule, employed to designate persons endowed with full political and personal rights within the United States, while some persons—such as those belonging to territories and possessions which are not among the states forming the Union—are described as "nationals". They owe allegiance to the United States and are United States nationals in the contemplation of international law; they do not possess full rights of citizenship in the United States. It is their nationality in the wider sense, not their citizenship, which is internationally relevant. In the Commonwealth it is the citizenship of the individual states of the Commonwealth which is primarily of importance for international law, while the quality of a "British subject" or "Commonwealth citizen" is primarily relevant only as a matter of the internal law of the countries concerned.

"Nationality", in the sense of citizenship of a certain state, must not be confused with "nationality" as meaning membership of a certain nation in the sense of race.³⁹

40. However, other examples may be cited:

Since nationality defines the population constituting the internal order vis-à-vis the external order, the possible modalities concerning the participation of nationals in internal legal affairs, in particular as regards political rights, is of little importance. Thus the distinction between French citizens and French subjects, "indigenous inhabitants of the colonies", has had no effect with regard to nationality, for the latter, as well as the former, were part of the population forming a constitutive element of the French State. The Act of 7 May 1946 sanctioned the situation by providing that "all nationals of the overseas territories (including Algeria) possess the quality of citizen", while adding "special laws shall establish the conditions in which they shall exercise their rights as citizens".

The 1946 Constitution (art. 81) had, however, introduced the quality of "citizen of the French Union", possessed by French men and women, citizens of protected or associated States and inhabitants of associated territories ... The 1958 Constitution, on the other hand, stated that "there is only a citizenship of the Community" (art. 77).

The term *ressortissants* has been used to express a concept whereby certain aliens who are more or less permanently dependent on the sovereignty concerned are approximated to nationals. Those involved were essentially individuals belonging to a protectorate or a country under mandate: Tunisians and Moroccans were said to be "French *ressortissants*", although they did not possess French nationality ...

It should be noted, however, that this never involved more than the granting to certain aliens rights which were refused to others; from the legal standpoint, they remained aliens.⁴⁰

41. The existence of different categories of nationality within a State has been a phenomenon specific to the federal States of Eastern Europe: the Soviet Union, Yugoslavia and Czechoslovakia. Thus, at the time of the creation of the Czechoslovak Federation, in 1969, Czech

³⁹ Jennings and Watts, *op. cit.*, pp. 856–857.

⁴⁰ Batiffol and Lagarde, *op. cit.*, pp. 99–100.

and Slovak nationalities were introduced parallel to Czechoslovak nationality, which originally had been the only nationality. Law No. 165/1968 establishing a formal distinction between the (federal) Czechoslovak nationality and that of each of the two republics forming the Federation opened the way for the adoption by the two republics of their own laws on nationality: Law No. 206/68 of the Slovak National Council and Law No. 39/69 of the Czech National Council.⁴¹

42. The introduction of citizenship of the two republics was based on the principle of *jus soli*, whereas the federal legislation, like the Czechoslovak legislation which preceded the date of the creation of the Federation, was based on the principle of *jus sanguinis*. The traditional principle of *jus sanguinis* was nevertheless used to determine the nationality of children under 15 years old.

43. A recent noteworthy development is the establishment by the Treaty on European Union (Treaty of Maastricht) of a “citizenship of the Union”. Under the terms of article 8, “[e]very person holding the nationality of a member State shall be a citizen of the Union”. The question whether an individual possesses the nationality of a member State is to be settled solely by reference to the national law of that State.

44. Moreover, the concept of nationality or of the term “national” may, for the purposes of a particular treaty, have yet another meaning. Thus, for example, the Peace Treaty of St. Germain-en-Laye and other peace treaties of 1919 use the term “*ressortissant*” as a notion wider than that of “national”.⁴² Many agreements for the settlement of claims contain special definitions to identify the nationals whose claims are being settled.⁴³

45. The notion or the concept of nationality may be defined in widely different ways depending on whether the problem is approached from the perspective of internal (municipal) or international law. For the function of nationality is, in each case, different. Seen from the second perspective, to the extent that individuals are not direct subjects of international law, nationality is the medium through which they can normally enjoy benefits from international law. For only nationals automatically enjoy the advantages of the diplomatic protection and the set of rules—whether convention or not—accepted by States in their mutual relations for the benefit of their nationals. Nationality is also a prerequisite for the full enjoyment of human rights.

⁴¹ The Czech law and the Slovak law on nationality were amended by Laws Nos. 92/1990 and 88/1990 of the Czech National Council and the Slovak National Council respectively.

⁴² See, for example, the *National Bank of Egypt v. Austro-Hungarian Bank* case (*Annual Digest of Public International Law Cases*, 1923–1924 (London), vol. 2, 1933, case No. 10).

⁴³ See, for example, article VII of the agreement between the Islamic Republic of Iran and the United States of America concerning the settlement of claims in the *Hostages* case (ILM, vol. 20, No. 1 (January 1981), p. 232).

B. Nationality of legal persons

46. By way of analogy with the position of individuals, legal persons (corporations) are to have a nationality as well. As in the case of an individual, the existence of the bond of nationality is necessary for the purposes of application of international law in relation to a legal person, and, most often, for the purposes of diplomatic protection.⁴⁴

47. Corporations are usually considered to possess the nationality of the State under the laws of which they have been incorporated and to which they owe their legal existence, insofar as it is a matter of municipal law to determine whether an entity has legal personality at all,⁴⁵ and what the effects of such determination are. Consequently, if a company incorporated under the laws of one State establishes, under the laws of another, a subsidiary as a separate legal person, in principle the two companies will have different nationalities for the purposes of international law. As ICJ observed in the *Barcelona Traction* case:

The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has registered office. These two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist.⁴⁶

Thus, in many cases the traditional criterion of the company’s place of incorporation and location of its registered office just establishes a *prima facie* presumption of the bond of nationality between the company and the State.

48. There is a limit to the analogy that can be drawn between nationality of individuals and the nationality of corporations. Most authors warn that:

While sometimes convenient, [this analogy] may often be misleading: those rules of international law which are based upon the nationality of individuals are not always to be applied without modification in relation to corporations. Various considerations militate against attributing to the nationality of corporations the same consequences as attach to the nationality of individuals: these include the manner in which corporations are created, operate and are brought to an end, their development as legal entities distinct from their shareholders, the inapplicability to companies of the essentially personal conception of allegiance which underlies the development of much of the present law regarding nationality, the general absence in relation to companies of any nationality legislation to provide a basis in municipal law for the operation of rules of international law, the great variety of forms of

⁴⁴ See Caflisch, “La nationalité des sociétés commerciales en droit international privé”, pp. 119 *et seq.*

⁴⁵ In some exceptional cases, where the State has brought the company’s existence to an end, the company may nevertheless be regarded by other States as continuing to exist. See Seidl-Hohenveldern, *Corporations in and under International Law*, pp. 29–38 and 51–54.

⁴⁶ *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment of 5 February 1970, *I.C.J. Reports 1970*, p. 42.

company organization, and the possibilities for contriving an artificial and purely formal relationship with the state of “nationality”.⁴⁷

49. There exists no rigid notion of nationality with respect to legal persons, and different tests of nationality are used for different purposes. For this reason, it is a usual practice of States to provide, expressly in a treaty or in their domestic laws, which legal persons may enjoy the benefits of treaty provisions reserved to “nationals” or to define “national” companies for the purposes of application of national laws in specific fields (fiscal law, labour law, etc.). Owing to the fact that legal persons

⁴⁷ Jennings and Watts, *op. cit.*, pp. 860–861.

may have links with several States, the establishment of the “national” status of a company involves a balancing of various factors.

50. The above remarks lead to the question of whether it is useful to undertake the study of the impact of State succession on the nationality of legal persons in parallel with the study concerning the nationality of natural persons, and, in particular, whether the study of problems of nationality of legal persons has the same degree of urgency as the study of problems concerning the nationality of individuals. The obvious alternative for the Commission is to separate the two issues and to study first the most urgent one—that of the nationality of natural persons.

CHAPTER III

Roles of internal law and international law

A. Internal law

51. In the literature, it is generally accepted that “it is not for international law but for the internal law of each state to determine who is, and who is not, to be considered its national”.⁴⁸ The State, and the State alone, is entitled to decide that an individual is or is not its national. “[N]ationality is essentially an institution of the internal laws of states, and the international application of the notion of nationality in any particular case must be based on the nationality law of the state in question.”⁴⁹ The law of each State “determines who are its nationals, both on the basis of origin and as regards the conditions governing the acquisition or subsequent loss of its nationality”.⁵⁰

52. The principle that it is for each State to determine under its own law who are its nationals was confirmed by article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws. This principle was also asserted by PCIJ in its advisory opinion with regard to the *Nationality Decrees issued in Tunis and Morocco*,⁵¹ and in its opinion on the question concerning the *Acquisition of Polish nationality*,⁵² and it was reiterated by ICJ in the judgment on the *Nottebohm* case.⁵³

53. There is therefore a broad consensus in both the literature and the practice of the courts in favour of recognizing that nationality is governed essentially by internal law. This conclusion remains valid in cases where the

⁴⁸ *Ibid.*, p. 852.

⁴⁹ *Ibid.*, p. 853.

⁵⁰ Batiffol and Lagarde, *op. cit.*, p. 93. According to Crawford, “[i]t appears that the grant of nationality is a matter which only States by their municipal law (or by way of treaty) can perform. Nationality is thus dependent upon statehood, not the reverse” (*op. cit.*, p. 40).

⁵¹ *P.C.I.J., Series B, 1923, No. 4*, p. 24.

⁵² *Ibid.*, No. 7, p. 16.

⁵³ See footnote 38 above.

acquisition of nationality is settled by treaty or when the national law lists as one of the means of acquisition of nationality acquisition under an international treaty.⁵⁴ In fact, this is simply a reference, by national law, to a qualification for or criterion of acquisition agreed to among States which is applied as *lex specialis* in relation to the basic criteria established by law.

54. The role of internal law as the principal source of nationality is also recognized in cases of changes of nationality resulting from a succession of States, often termed “collective naturalizations”. Article 13 of the Bustamante Code, for example, stipulates that:

In collective naturalizations, in case of the independence of a State, the law of the acquiring or new State shall apply, if it has established in the territory an effective sovereignty which has been recognized by the State trying the issue, and in the absence thereof that of the old State, all without prejudice to the contractual stipulations between the two interested States, which shall always have preference.

In the same vein, O’Connell refers to the practice of English courts, concluding that:

... the question to what State a person belongs must ultimately be settled by the municipal law of the State to which he claims or is alleged to belong. It is the municipal law of the predecessor State which is to determine which persons have lost their nationality as a result of the change; it is that of the successor State which is to determine which persons have acquired its nationality.⁵⁵

55. At the same time, however, according to the opinion of some writers, there are “perhaps exceptional, cases where individuals may possess a nationality for international purposes in the absence of any applicable national-

⁵⁴ See, for example, article 3 of the Citizenship Act of Slovenia. See also O’Connell, *The Law of State Succession*: “Even if a treaty provides that inhabitants of absorbed territory are to become nationals of the successor State the enactment is ineffective until embodied in municipal law”, p. 249, footnote 3, referring to Graupner, “Nationality and State succession”, p. 94.

⁵⁵ *State Succession in Municipal Law ...*, p. 501.

ity law”.⁵⁶ This begs the question whether the existence of two distinct concepts of nationality—one under municipal law and another under international law—is accepted. This issue has a special importance in the context of State succession, when considerable time can elapse between the “date of the State succession” and the adoption of the nationality law of the successor State. O’Connell describes this situation in the following words:

While the State concerned must first claim jurisdiction over the individual, or to represent him internationally, before he will actually be ascribed to it, it does not follow that such a person is regarded as a national by the State concerned, for, as in the case of Israel between 1948 and 1952, the State may lack a domestic conception of nationality. It would be fallacious to assume that, because international law permissively ascribes certain individuals to successor States in virtue of a change of sovereignty, these automatically become nationals in the eyes of municipal law, for the most international law can do is to approve or disapprove of a claim by successor States to bring individuals within their plenary jurisdiction, or of a claim to represent them in diplomatic matters.⁵⁷

56. If the concept of nationality for international purposes is to be considered as generally accepted, what are its elements and what exactly is its function?

B. International law

1. LIMITATIONS ON THE DISCRETIONARY POWER OF THE STATE

57. Although nationality is essentially governed by internal legislation, it is of direct concern to the international order. State sovereignty in the determination of its nationals does not mean, of course, the absence of all rational constraints. The legislative competence of the State with respect to nationality is not absolute.⁵⁸ The various authorities which established the principle of State freedom also affirmed the existence of limits to that freedom.

58. Thus, in its advisory opinion in the case concerning *Nationality Decrees issued in Tunis and Morocco*,⁵¹ PCIJ emphasized that the question whether a matter was solely within the jurisdiction of a State was essentially a relative question, depending on the development of international relations, and it held that even in respect of matters which in principle were not regulated by international law, the right of a State to use its discretion may be restricted by obligations which it may have undertaken towards other States, so that its jurisdiction becomes limited by rules of international law.⁵⁹

59. The commentary to article 2 of the Draft Convention on Nationality of 1929 prepared by the Harvard Law School asserts that the power of a State to confer its nationality is not unlimited.³⁵ As stated in article I of the

Convention on Certain Questions relating to the Conflict of Nationality Laws, signed in The Hague in 1930, while it is for each State to determine under its own law who are its nationals, such law shall be recognized by other States “in so far as it is consistent with international conventions, international custom and the principles of law generally recognised with regard to nationality”.

60. The impact of the rules of international law in the area of nationality is of particular importance in cases of State succession. “Collective naturalizations” give rise to many problems, in view of the number of persons—sometimes the whole population—affected by the change. The complexity and urgency of these problems vary depending on the nature of the territorial change (transfer of territory, secession, dissolution of a State or uniting of States) and the manner (whether or not peaceful) in which it came about. But to what extent can international law claim ascendancy? Is it conceivable that an international authority, or at least the rules to which States are subject, would play a role in the allocation of individuals among different States in order to preclude either statelessness or positive conflicts?

61. According to the predominant opinion, the role of international law with respect to nationality is very limited. The function of international law is at the most to delimit the competence of the predecessor State to retain certain persons as its nationals and of the successor State to claim them as its own. International law cannot prescribe that such persons change their nationality, either automatically or by submission. While, on the one hand, it places restrictions upon the categories of persons whose nationality is claimed by the successor State, on the other hand, because of the restrictive character of its operation, international law “cannot dictate to the predecessor State whether or not it is obliged to retain these persons as its nationals”.⁶⁰ By delimiting the competence of States to ascribe their nationality to individuals, international law permits “some control of exorbitant attributions by states of their nationality, by depriving them of much of their international effect”. Thus, “the determination by each state of the grant of its own nationality is not necessarily to be accepted internationally without question”.⁶¹

62. The most commonly quoted example in this respect is the *Nottebohm* case, in which ICJ stated that:

a State cannot claim that the rules [pertaining to the acquisition of nationality] it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual’s genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.⁶²

63. The necessary conclusion is that the function of international law with respect to nationality is, in princi-

⁵⁶ Jennings and Watts, *op. cit.*, p. 853, footnote 10.

⁵⁷ *State Succession in Municipal Law ...*, p. 498.

⁵⁸ Batiffol and Lagarde, *op. cit.*, pp. 69–70.

⁵⁹ See Jennings and Watts, *op. cit.*, p. 852.

⁶⁰ O’Connell, *State Succession in Municipal Law ...*, p. 499.

⁶¹ Jennings and Watts, *op. cit.*, p. 853.

⁶² *Nottebohm* case (footnote 38 above), p. 23.

ple, a negative function. In any event, international law cannot directly remedy the flaws of internal legislation, that is to say it cannot substitute for internal legislation indicating who are and who are not nationals of the State. There is no doubt that ICJ considered *Nottebohm* a national of Liechtenstein in accordance with that country's internal law.⁶³

64. The function of international law is, therefore, in the first place, to delimit the competence of States, or in other words to eliminate as regards third States the consequences of an exaggerated or abusive exercise by a State of its legislative competence with respect to nationality. However, there is a long-recognized limitation deriving from human rights which should be added to this limitation. This point had already been raised in connection with the preparations for the 1930 Hague Codification Conference.⁶⁴ The development, after the Second World War, of international norms for the protection of human rights gave the rules of international law a greater say in the area of nationality. By virtue of these norms and principles, some of the processes of internal law, such as those leading to statelessness or any type of discrimination, have become questionable at the international level.

65. According to the Inter-American Court of Human Rights, while the conferment and regulation of nationality falls within the jurisdiction of the State, this principle is limited by the requirements imposed by international law for the protection of human rights.⁶⁵ Unlike the first category of limitations discussed above, the substantive question in this case is not whether the State exercises its discretionary power within the scope of its territorial or personal competence, but whether it does so in a manner consistent with its international obligations in the field of human rights. But, it must be stated once again, the international norms which give rise to this second category of limitations do not affect the validity of the national legislation and its effectiveness within the State. (The question of the State's international responsibility for non-fulfilment of its obligations in the area of human rights protection has been left aside.)

66. States are therefore subject to two types of limitations in the area of nationality, the first type relating to the delimitation of competence between States (whose non-compliance with the rules results in the non-enforceability against third States of the nationality thus

conferred) and the second, to the obligations associated with the protection of human rights (whose non-observance entails international responsibility).

2. FORMS OF INTERVENTION OF INTERNATIONAL LAW

67. International law intervenes through both customary and conventional rules. The sovereignty of the State in the determination of its nationals must therefore be exercised within the limits imposed by general international law and by international treaties. The Convention on Certain Questions relating to the Conflict of Nationality Laws refers to "international conventions, international custom, and the principles of law generally recognised with regard to nationality", and PCIJ alluded to existing treaties in the two opinions previously cited (para. 52 above). But neither the Convention nor the opinions indicate specific rules of positive international law which would have the effect of limiting the freedom of States.

68. Some customary rules which relate to the consequences resulting from nationality from the standpoint of third States have been developed in the context of diplomatic protection. It is in this context that the principle of effective nationality has emerged in international law. According to this principle, which was endorsed by the judgment of ICJ in the *Nottebohm* case, if nationality is to be enforceable against third States, an effective and genuine link must exist between the State and the individual concerned. A naturalization based on an insufficiently effective link does not oblige other States to recognize the right of the State which conferred naturalization to exercise diplomatic protection on behalf of that individual.

69. A survey of bodies of national legislation fails to reveal anything very conclusive about the existence of customary rules of public international law with respect to nationality. It is, however, established that a State cannot grant its nationality of origin to a person who has no link with it, on the basis of *jus sanguinis* or *jus soli*, a conclusion which has but limited practical import for the solution of the real problems arising in connection with State succession. It is therefore the case that customary international law offers only a few guidelines to States for the formulation of their legislation on nationality.

70. While the rules of customary law are still at the elementary stage and provide a merely rudimentary basis, international conventions and treaties are more developed. They often aim at a harmonization of national legislations, with a view to eliminating the unfortunate consequences which result from the use by States of differing processes of acquisition or loss of nationality. Some of these consequences—such as statelessness—are considered more serious than others—such as double nationality—for the international community.

71. There has been for some time an effort to reduce, through the adoption of international conventions, the instances of statelessness or, where that is not possible, to

⁶³ In the same vein, see also Jennings and Watts, op. cit., p. 856: "... where the effects in international law of a state's grant of nationality are limited, the individual will still be a national of that state for purposes of its own laws."

⁶⁴ "The scope of municipal laws governing nationality must be regarded as limited by consideration of the rights and obligations of individuals and of other States." (League of Nations, *Conference for the Codification of International Law: Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. I (Nationality) (C.73.M.38.1929.V), reply of the United States of America, p. 16).

⁶⁵ "Proposed amendments to the naturalization provisions of the political Constitution of Costa Rica", Advisory Opinion OC-4/84, ILR (Cambridge), vol. 79, 1989, p. 283.

render the position of stateless persons less difficult. The Hague Codification Conference of 1930 adopted a number of provisions aimed at reducing the possibility of statelessness, as well as a unanimous recommendation to the effect that it was desirable that, in regulating questions of nationality, States should make every effort to reduce cases of statelessness as far as possible. Among the multilateral treaties relating to this problem the following instruments must be mentioned: the Convention on Certain Questions relating to the Conflict of Nationality Laws, signed in The Hague in 1930, its Protocol relating to a Certain Case of Statelessness and its Special Protocol concerning Statelessness as well as the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness.

72. The problems resulting from dual nationality are addressed in the Convention on Certain Questions relating to the Conflict of Nationality Laws and its Protocol relating to Military Obligations in Certain Cases of Double Nationality, in the Convention on Nationality of the League of Arab States and in the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, concluded between the States members of the Council of Europe in 1963. The issue of dual nationality may, moreover, give rise to specific problems in some States (namely those with a large immigrant population) and may therefore also require regulation on a bilateral basis.⁶⁶

73. While only very few provisions of the above conventions directly address the issue of nationality in the context of State succession (as, for example, article 10 of the Convention on the Reduction of Statelessness), they cannot be deemed as simply irrelevant in such situations. First of all, they provide useful guidance to the States concerned by offering solutions which can *mutatis mutandis* be used by national legislators in search of solutions to problems arising from territorial change. Secondly, they may, when the parties thereto include the

⁶⁶ See, for example, paragraph 5 of the Joint Communiqué on the normalization of relations between China and Malaysia (ILM, vol. XIII, No. 4 (July 1974), p. 877).

predecessor State, be formally binding upon successor States in accordance with the relevant rules of international law governing State succession in respect of treaties. These instruments can thus add to the general limitations imposed by customary rules of international law on the discretion of the successor State in the field of nationality.

74. Other international treaties directly concerned with problems of nationality in cases of State succession have played an important role, in particular after the First World War. They have established, in a relatively uniform way, the criteria for acquiring the nationality of successor States. The most frequently used criterion was that of domicile or habitual residence. Examples of such treaty provisions include articles 4 and 6 of the Treaty between the Principal Allied and Associated Powers and Poland.⁶⁷ The treaties adopted after the First World War provided, at the same time, for the recognition, by the defeated States, of a new nationality acquired *ipso facto* by their former nationals under the laws of the successor State and for the consequent loss of the allegiance of these persons to their country of origin.⁶⁷ These multilateral treaties have been supplemented by bilateral agreements between the States concerned.⁶⁸

C. Principles of law generally recognized with regard to nationality

75. As was stated earlier, the Convention on Certain Questions relating to the Conflict of Nationality Laws includes “the principles of law generally recognised with regard to nationality” among the limitations to which the freedom of States is subjected in the area of nationality. But the Convention remains silent with respect to the precise content of this concept, which the Commission might therefore attempt to spell out in its study of the subject.

⁶⁷ See “Laws concerning nationality” (footnote 28 above), pp. 589–593.

⁶⁸ See, for example, the Treaty between the Austrian Republic and the Czechoslovak Republic with regard to citizenship and to the protection of minorities of 7 June 1920 (League of Nations, *Treaty Series*, vol. III, p. 189).

CHAPTER IV

Limitations on the freedom of States in the area of nationality

A. Principle of effective nationality

76. It is widely accepted that, as in the case of naturalization in general,

[t]here must be a sufficient link between the successor State and the persons it claims as its nationals in virtue of the succession, and the sufficiency of the link might be tested if the successor State attempted to exercise a jurisdiction over those persons in circumstances disapproved of by international law, or attempted to represent them diplo-

matically; provided, that is, there is some State competent to protest on behalf of the persons concerned.⁶⁰

Such a link may, in cases of State succession, have special characteristics. No doubt,

[t]erritory, both socially and legally, is not to be regarded as an empty plot: territory (with obvious geographical exceptions) connotes population, ethnic groupings, loyalty patterns, national aspirations, a part of humanity, or, if one is tolerant of the metaphor, an organism. To

regard a population, in the normal case, as related to particular areas of territory, is not to revert to forms of feudalism but to recognize a human and political reality, which underlies modern territorial settlements.⁶⁹

77. A number of writers on the topic of State succession who hold the view that the successor State may be limited in its discretion to extend its nationality to persons who lack a genuine link with the territory concerned base their argument on the ICJ decision in the *Nottebohm* case.

78. In its judgment, the Court indicated what considerations have been regarded as relevant in establishing a genuine connection, as follows:

International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.⁷⁰

79. The Court's judgment admittedly elicited some criticism, although the principle of effective nationality as such was not challenged. In particular, the *Nottebohm* judgment was reproached for not furnishing any criterion by which to establish the effectiveness of an individual's link with a State.⁷¹ It has been argued, in particular, that the Court had transferred the requirement of an effective connection from the context of dual nationality to a situation involving only one nationality and that a person who had only one nationality should not be regarded as disentitled to rely on it against another State because he/she had no effective link with the State of nationality but only with a third State. The point has also been made that the Court did not, in its judgment, adequately consider the implications of its adoption of the theory of "genuine link" in matters of diplomatic protection—which raised the question of the extent to which the State of which a person possessed purely formal nationality could protect him/her as against a State other than that of which he/she enjoyed effective nationality. It has also been stressed that it remained unclear whether the "genuine link" principle applied only to the acquisition of nationality by naturalization.

80. The concept of genuine link has a long history behind it. Different tests for genuine link have been considered or applied, such as domicile, residence or birth, both in general or in the context of changes of sovereignty.

⁶⁹ Brownlie, *Principles of Public International Law*, p. 664.

⁷⁰ *Nottebohm* case (footnote 38 above), p. 22.

⁷¹ The Italian-United States Conciliation Commission, in the *Flegenheimer* case, in 1958, went even further and said that it was not in its power to deny the effects at the international level of a nationality conferred by a State, even without the support of effectivity, except in cases of fraud, negligence or serious error (see UNRIIAA, vol. XIV (Sales No. 65.V.4), p. 327).

Thus, article 84 of the Treaty of Versailles stated that "German nationals habitually resident in any of the territories recognised as forming part of the Czecho-Slovak State will obtain Czecho-Slovak nationality *ipso facto* ...". But, as often pointed out, "[a]lthough habitual residence is the most satisfactory test for determining the competence of the successor State to impress its nationality on specified persons, it cannot be stated with assurance to be the only test admitted in international law".⁷²

81. Some authors have favoured the test of birth in the territory concerned as proof of a "genuine link", on the basis of which the successor State would be entitled to impose its nationality on those inhabitants of the territory born in it. This, however, is not broadly accepted. Nevertheless, in the case of *Romano v. Comma*, in 1925, the Egyptian Mixed Court of Appeal relied on this doctrine when it held that a person born in Rome and resident in Egypt became, as a result of the annexation of Rome in 1870, an Italian national.⁷³

82. The need for the existence of certain links between an individual and a State as a basis for conferring nationality was emphasized by various members of ILC during the debates on the elimination and reduction of statelessness.⁷⁴ The discussions envisaged the application of the genuine link principle for purposes of naturalization in general rather than in the specific context of State succession. In this respect, the question arises whether the application of the genuine link concept in the event of State succession presents any particularities in comparison with its application to traditional cases of naturalization. Another question is whether the criteria for establishing a genuine link could be further clarified and developed.

83. If views vary among commentators as to the use of this or that criterion, it seems to be because they have in mind different types of State succession. Yet, in drawing conclusions based on a particular type of State succession, they tend to express themselves in general terms, as if such conclusions applied in all situations. Similar problems can arise from the simplistic classification of the various types of State succession into two categories, namely "universal" and "partial" succession.

84. The genuine link concept can give rise, in the context of State succession, to yet another delicate problem from the point of view of the individual concerned: as has happened in some recent cases of dissolutions in Eastern Europe, a series of State successions may occur on the same territory during the lifetime of a particular generation. The criterion for granting nationality to the inhabitants of the territory concerned may be different in each case, leading to surprising or even absurd results and considerable personal hardship.

⁷² O'Connell, *State Succession in Municipal Law* ..., p. 518.

⁷³ *Annual Digest of Public International Law Cases, 1925-1926* (London), vol. 3, 1929, case No. 195, p. 265.

⁷⁴ See *Yearbook ... 1953*, vol. I, passim.

B. Protection of human rights

85. It seems to be generally accepted that, in parallel with the rules on the delimitation of the competence of States with regard to nationality, some obligations of States in the area of human rights impose additional limits on the exercise of their discretion when it comes to granting or withdrawing their nationality. This holds true for naturalizations in general as well as in the particular context of State succession. The importance of this category of limitations increased considerably after the Second World War as a result of the impetus given to the protection of human rights. This is one of the more remarkable attributes of the developing legal framework in which recent cases of succession are set.

86. Unlike the successor States which appeared after the First World War, the successor States born of the most recent dissolutions are confronted with a substantial number of multilateral conventions. These conventions—especially, where appropriate, those on nationality, including the reduction of statelessness, and the protection of human rights—to which some predecessor States had become parties, are binding on successor States under the rules of international law governing succession of States in respect of treaties. Moreover, some successor States (including those of the USSR) have acceded to human rights instruments that impinge on the resolution of nationality questions, instruments to which the predecessor State had not become a party.

87. The obligations of States in the field of the protection of human rights put into question, above all, techniques leading to statelessness or to any kind of discrimination. Article 15 of the Universal Declaration of Human Rights,⁷⁵ provides:

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

In the light of that provision, it is necessary to study carefully the precise limits of the discretionary competence of the predecessor State to deprive of its nationality the inhabitants of the territory it has lost, as well as the question whether an obligation of the successor State to grant its nationality to the inhabitants concerned can be deduced from the principle above. In the Special Rapporteur's view, it is no longer possible to maintain without any reservation the traditional opinion expressed by O'Connell, according to which, "[u]ndesirable as it may be that any persons become stateless as a result of a change of sovereignty, it cannot be asserted with any measure of confidence that international law, at least in its present stage of development, imposes any duty on the successor State to grant nationality".⁷⁶ The view that "apart from treaty a new State is not obliged to extend its

nationality to *all* persons resident on its territory"⁷⁷ reflects a more cautious approach in this respect. It seems to allow an *a contrario* conclusion that, as far as at least some inhabitants are concerned, such an obligation does exist. The contours of these obligations may vary according to the types of territorial changes.

88. In addition to possible obligations arising for States from the principles quoted above, article 8 of the Convention on the Reduction of Statelessness provides that a contracting State "shall not deprive a person of his nationality if such deprivation would render him stateless". Furthermore, according to article 9 of the same convention, the State "may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds". In the event of State succession, this provision must be understood as a prohibition of any arbitrary policy on the side of the predecessor State when withdrawing its nationality from the inhabitants of the territory affected by State succession. The question, moreover, arises whether—and if so which—obligations incumbent upon successor States could possibly be deduced from these provisions.

89. As stated by one author, "[an] arbitrary change of nationality on the transfer of territory may have a number of different meanings. It may mean that the rule that nationality changes *ipso facto* with the change of sovereignty has an element of arbitrariness ... [E]thnic options based on the subjective test of 'race', for example, may be arbitrary in the sense that they are contrary to the prohibition of discrimination based on 'race, sex, language, or religion', as expressed in article 1 (3), of the Charter [of the United Nations] and subsequent international instruments".⁷⁸ Thus, the application of such criteria could be objected to on the basis of fundamental human rights standards. The international community has recently manifested on several occasions its concern about such practices and has endeavoured in competent multilateral forums to ensure that the States concerned adopt measures fully compatible with contemporary international law. Thus, as stressed by the same author, "the primary purpose of the law of State succession is to ensure social and political stability at a time when the transfer of sovereign power is conducive to instability. Stability in this case may mean the refusal of a right of option of nationality, contrary to humanitarian considerations".⁷⁸

⁷⁵ General Assembly resolution 217 A (III).

⁷⁶ See *State Succession in Municipal Law* ..., p. 503.

⁷⁷ Crawford, *op. cit.*, p. 41.

⁷⁸ Donner, *op. cit.*, pp. 261–262.

CHAPTER V

Categories of succession

90. Contrary to the opinion that “no help is to be derived from the categories of the law of state succession”,⁷⁹ the Special Rapporteur holds the view that the study which the Commission is called upon to prepare must address separately the problems of nationality arising in the context of different types of territorial changes. Such a case-by-case analysis will reveal whether it is appropriate to maintain that “[m]ost of the principles referred to in connection with universal succession apply, *mutatis mutandis*, to the effects of partial succession on nationality”.⁸⁰

91. In the context of its work on the topic of succession of States in respect of treaties, the Commission concluded that “for the purpose of codifying the modern law of succession of States in respect of treaties it would be sufficient to arrange the cases of succession of States under three broad categories: (a) succession in respect of part of territory; (b) newly independent States; (c) uniting and separation of States”.⁸¹ These categories were maintained by the diplomatic conference and are incorporated in the Vienna Convention on Succession of States in respect of Treaties.

92. For the purposes of the draft articles on succession of States in respect of matters other than treaties, the Commission deemed that, in view of the characteristics and requirements peculiar to the subject, particularly as

⁷⁹ Brownlie, *op. cit.*, p. 661.

⁸⁰ Weis, *Nationality and Statelessness in International Law*, pp. 144–145. The author nevertheless subjects the above statement to two qualifications: “(a) questions of nationality will, in cases of partial succession, more frequently be regulated by treaty; and (b) since the predecessor State continues to exist, two nationalities, the nationality of the predecessor and that of the successor State, are involved. There thus arises not only the question of acquisition of the new nationality, but also that of the loss of the old nationality” (*ibid.*).

⁸¹ *Yearbook ... 1974*, vol. II (Part One), p. 176, document A/9610/Rev.1, para. 71. In the 1972 provisional draft articles on succession of States in respect of treaties adopted by the Commission at its twenty-fourth session (see *Yearbook ... 1972*, vol. II, pp. 230 *et seq.*, document A/8710/Rev.1, chap. II, sect. C), four distinct types of State succession were envisaged: (a) transfer of part of territory; (b) case of newly independent States; (c) uniting of States and dissolution of unions; and (d) secession or separation of part or parts of one or more States. However, at its twenty-sixth session, in 1974, the Commission, during the second reading of the draft articles, made some changes which, on the one hand, clarified and developed the first type of succession and, on the other, merged the last two types. First of all, the case of transfer of part of territory was termed “succession in respect of part of territory”. The Commission added to this type the case where “territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State” (see *Yearbook ... 1974*, vol. II (Part One), p. 208, document A/9610/Rev.1, chap. II, sect. D, art. 14). With this formula, the Commission intended to cover the case of a non-self-governing territory which achieves its decolonization by integration with a State other than the colonial State. Such cases are assimilated, for the purposes of succession of States in respect of treaties, to the first type of succession, “succession in respect of part of territory”. In addition, the Commission reclassified the last two types of State succession under a single heading entitled “Uniting and separation of States”.

regards State property, some further precision in the choice of categories was necessary. Consequently, as regards succession in respect of part of territory, the Commission decided that it was appropriate to distinguish and deal separately in the draft articles with three cases: (a) the case where part of the territory of a State is transferred by that State to another State; (b) the case where a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, that is, the case of a non-self-governing territory which achieves its decolonization by integration with a State other than the colonial State; (c) the case where a part of the territory of a State separates from that State and unites with another State. Also, as regards the uniting and separation of States, the Commission found it appropriate to distinguish between the “separation of part or parts of the territory of a State” and the “dissolution of a State”.⁸² These categories were approved by the diplomatic conference and are at the basis of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

93. In the judgement of the Special Rapporteur, for the purposes of the current study of State succession and its impact on nationality of natural and legal persons, it would be appropriate to keep the categories which the Commission adopted for the codification of the law of succession of States in respect of matters other than treaties rather than those it arrived at when considering the topic of succession of States in respect of treaties. The reason for so doing is quite straightforward: during the consideration of the current topic, the question of the continuity or discontinuity of the international personality of the predecessor State in cases of secession or dissolution of States has direct implications in the area of nationality. The issues which arise in the first case are by nature substantially different from those which arise in the second case. Moreover, there is a need for an additional adjustment to the categories as prepared by the Commission: for cases of uniting of States, a distinction is required between the situation in which a State unites freely with another State, consequently disappearing as a subject of international law, while the other State continues to exist as a subject of international law—“absorption” hypothesis—and the situation in which the two predecessor States unite to form a new subject of international law and therefore both disappear as sovereign States.

94. In view of the current requirements of the international community and since the decolonization process has now been completed, the Commission could limit its study to issues of nationality which arose during that process insofar as study of them sheds light on nationality issues common to all types of territorial changes.

⁸² *Yearbook ... 1981*, vol. II (Part Two), para. 75 in fine.

95. Like the previous work of the Commission on the topic of State succession, the current study of the impact of State succession on nationality of natural and legal persons should also apply “only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations”.⁸³ As stated in the commentary to article 6 of the draft articles on succession of States in respect of treaties, the Commission “[i]n preparing draft articles for the codification of

the rules of international law relating to normal situations naturally assumes that those [draft] articles are to apply to facts occurring and situations established in conformity with international law ... Only when matters not in conformity with international law call for specific treatment or mention does it deal with facts or situations not in conformity with international law”.⁸⁴ Accordingly, the current study should not deal with questions of nationality which might arise, for example, in cases of annexation by force of the territory of a State.

⁸³ See article 3 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

⁸⁴ Official Records of the United Nations Conference on Succession of States in respect of Treaties ... (footnote 17 above), p. 12.

CHAPTER VI

Scope of the problem under consideration

96. In order to establish the precise framework of the preliminary study, it would be appropriate to delimit the scope of the problem *ratione personae*, *ratione materiae* and *ratione temporis*.

A. Scope of the problem *ratione personae*

97. The first problem is that of the definition of the categories of persons whose nationality is presumed to be affected as a consequence of State succession. According to widespread opinion, “it is not at all certain which categories of persons are susceptible of having their nationality affected by change of sovereignty”.¹⁹ This uncertainty is largely due to the fact that many authors try to answer this question *in abstracto*, as if there existed a unique and simple response which would apply to all categories of territorial changes.

98. By “persons ... susceptible of having their nationality affected” one must understand all individuals who could potentially lose the nationality of the predecessor State, as well as all individuals susceptible of being granted the nationality of the successor State. It is obvious that the two categories of persons will not necessarily be identical.

99. Determining the category of individuals affected by the loss of the nationality of the predecessor State is easy in the event of total State succession, when the predecessor State or States disappear as a result of the change of sovereignty: all individuals possessing the nationality of the predecessor State lose this nationality as an automatic consequence of that State’s disappearance. But determining the category of individuals susceptible of losing the predecessor State’s nationality is quite complex in the case of partial State succession, when the predecessor State survives the change. In the latter case, it is necessary to distinguish among three groups of individuals possessing the nationality of the predecessor State: those

born in the territory affected by the change of sovereignty and resident there at the date of the change, those born elsewhere but temporarily or permanently resident in the territory affected by the change, and those born in the territory affected by the change but temporarily or permanently absent at the date of the change. Within the last category a distinction must be made between those individuals residing in the territory which remains part of the predecessor State and those individuals residing in a third State.

100. The delimitation of categories of persons susceptible of acquiring the nationality of the successor State is not less difficult. In the event of total State succession, such as the absorption of one State by another State or the unification of States, when the predecessor State or States respectively cease to exist, all nationals of the predecessor State or States are candidates for the acquisition of the nationality of the successor State. But the inhabitants of the territory subject to State succession include, in addition, stateless persons residing in that territory at the date of succession. “Persons habitually resident in the absorbed territory who are nationals of foreign [third] States and at the same time not nationals of the predecessor State cannot be invested with the successor’s nationality. On the other hand, stateless persons so resident there are in the same position as born nationals of the predecessor State. There is an ‘inchoate right’ on the part of any State to naturalize stateless persons resident upon its territory.”⁸⁵

101. In the case of dissolution of a State, to which the above considerations equally apply, the situation becomes more complicated owing to the fact that two or more successor States appear and the range of individ-

⁸⁵ O’Connell, *The Law of State Succession*, pp. 257–258.

uals susceptible of acquiring the nationality of each particular successor State has to be defined separately. It is obvious that there will be overlaps between the categories of individuals susceptible of acquiring the nationality of the different successor States.

102. Similar difficulties will arise with the delimitation of the categories of individuals susceptible of acquiring the nationality of the successor State in the event of secession or transfer of a part or parts of territory.

B. Scope of the problem *ratione materiae*

103. *Ratione materiae*, the preliminary study should deal with questions of loss of the nationality of the predecessor State and acquisition of the nationality of the successor State and with questions of conflict of nationalities susceptible of resulting from State succession, namely statelessness (negative conflict) and double or multiple nationality (positive conflict). Problems of statelessness or double nationality can arise both in the relations between the predecessor State and the successor State and in the relations between two or more successor States. Lastly, the question of option of nationality should also be considered in the context of the preliminary study.

1. LOSS OF NATIONALITY

104. The study should also aim at clarifying the extent to which the loss of the nationality of the predecessor State occurs automatically, as a logical consequence of the succession of States, and the extent to which international law obliges the predecessor State to withdraw its nationality from the inhabitants of the territory concerned or, on the contrary, limits the discretionary power of that State to withdraw its nationality from certain categories of individuals susceptible of changing nationality.

2. ACQUISITION OF NATIONALITY

105. The study should answer the following questions: first, whether the successor State is required to confer its nationality on the population of the territory affected by the change of sovereignty; and, secondly, whether international law imposes limits—to be defined—on the discretionary power of the successor State as regards the collective naturalization of the population.

3. CONFLICT OF NATIONALITIES

106. The answers which the study will provide to the above questions should furnish a basis for evaluating the extent to which contemporary international law guards against conflicts of nationalities, both positive (double or multiple nationality) and negative (statelessness). The Commission might also investigate whether the States concerned (the predecessor State and the successor State or States) are required to negotiate and settle nationality questions by mutual agreement with a view to warding off conflicts of nationalities, especially statelessness.

4. OPTION

107. The role of the right of option in the resolution of problems concerning nationality in cases of State succession is closely related to the function that international

law attributes to the will of individuals in this field. There is substantial doctrinal support for the conclusion that the successor State is entitled to extend its nationality to those individuals susceptible of acquiring such nationality by virtue of the change of sovereignty, irrespective of the wishes of those individuals. Nevertheless, the right of option was provided for in a substantial number of international treaties, some of which have been mentioned above. In exceptional cases, this right was granted for a considerable period of time, during which affected individuals enjoyed a kind of dual nationality.⁸⁶

108. For the majority of authors, the right of option can be deduced only from a treaty. Some authors, however, tend to assert the existence of an independent right of option as an attribute of the principle of self-determination.⁸⁷

109. The right of option was also quite recently envisaged by the Arbitration Commission of the European Community on Yugoslavia. The Arbitration Commission recalled that, by virtue of the right to self-determination, every individual may choose to belong to whatever ethnic, religious or language community he or she wishes. In the Arbitration Commission's view, one possible consequence of this principle might be for the members of the Serbian population in Bosnia and Herzegovina and Croatia to be recognized under agreements between the Republics as having the nationality of their choice, with all the rights and obligations which that entails with respect to the States concerned.²⁴

110. The function which contemporary international law attributes to the option of nationality is among the issues that should be further clarified in the preliminary study.

C. Scope of the problem *ratione temporis*

111. It follows from the title of the topic under consideration that ILC is required to study the question of nationality solely in relation to the phenomenon of State succession. The scope of the study therefore excludes questions relating to changes of nationality which occur prior to or as a result of events or acts prior to the date of the succession of States. As a corollary, the scope of this study might also have excluded all questions relating to the acquisition or loss of nationality after the date of the succession of States. It should not be forgotten, however, that, in the majority of cases, successor States take time to adopt their laws on nationality and that in the interim period, between the date of the succession of States and the date of the adoption of the law on nationality, human life continues, children are born, individuals marry, and so forth. There may therefore be problems concerning nationality which, although not resulting directly from the change of sovereignty as such, nevertheless deserve the attention of the Commission.

⁸⁶ See the Exchange of letters and declarations adopted on 19 March 1962 at the close of the Evian talks, constituting an agreement between France and Algeria (Paris and Rocher Noir, 3 July 1962), United Nations, *Treaty Series*, vol. 507, pp. 25 *et seq.*, at pp. 35 and 37.

⁸⁷ See Kunz, "L'option de nationalité" and "Nationality and option clauses in the Italian Peace Treaty of 1947".

CHAPTER VII

Continuity of nationality

112. The rule of the continuity of nationality is a part of the regime of diplomatic protection.⁸⁸ According to this rule, it is necessary that from the time of the occurrence of the injury until the making of the award, the claim belongs continuously and without interruption to a person having the nationality of the State putting such claim forward. The essence of the rule is to prevent the individual from choosing a powerful protecting State through a shift of nationality.⁸⁹

113. Neither the practice nor the doctrine gives a clear answer to the question of the relevance of this rule in the event of involuntary changes brought about by State succession. There are good reasons to believe that, in the

case of State succession, this rule may be modified, because, as was stated by President Verzijl in the *Pablo Najera* case:

In the case of collective changes of nationality on the basis of a succession of States, the legal situation must be weighed far less inflexibly than is customary in arbitral practice in normal cases of individual change of nationality by the deliberate act of the person concerned.

114. Since the problem of continuity of nationality is closely associated with the regime of diplomatic protection, the question arises whether it should be brought within the scope of the current study. It seems unlikely that the topic of regime of diplomatic protection will be placed on the agenda of the Commission in the near future and there is therefore no risk of overlap. In the circumstances, it would be beneficial to analyse the question of continuity of nationality in the context of the preliminary study which the General Assembly has asked the Commission to prepare.

⁸⁸ See, for example, Brownlie, *op. cit.*, p. 481.

⁸⁹ UNRIAA, vol. V (Sales No. 1952.V.3), p. 488.

CHECKLIST OF DOCUMENTS OF THE FORTY-SEVENTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/463	Provisional agenda	Mimeographed. For agenda as adopted, see <i>Yearbook ... 1995</i> , vol. II (Part Two), p. 12, para. 12.
A/CN.4/464 and Add.1–2	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-ninth session of the General Assembly	Mimeographed.
A/CN.4/465	Filling of a casual vacancy (article 11 of the statute: note by the Secretariat)	Reproduced in the present volume.
A/CN.4/465/Add.1	Idem—Addendum to the note by the Secretariat: candidature and curriculum vitae	Mimeographed.
A/CN.4/466	Thirteenth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	Reproduced in the present volume.
A/CN.4/467	First report on State succession and its impact on nationality of natural and legal persons, by Mr. Václav Mikulka, Special Rapporteur	Idem.
A/CN.4/468	Eleventh report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur	Idem.
A/CN.4/469 [and Corr.1] and Add.1–2	Seventh report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur	Idem.
A/CN.4/470 [and Corr.1–2]	First report on the law and practice relating to reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	Idem.
A/CN.4/471	Liability regimes relevant to the topic of “International liability for injurious consequences arising out of acts not prohibited by international law”: survey prepared by the Secretariat	Idem.
A/CN.4/L.505	Draft Code of Crimes against the Peace and Security of Mankind—Proposal by Mr. E. Vargas Carreño: article 21	Reproduced in <i>Yearbook ... 1995</i> , vol. II (Part Two), p. 26, para. 96, footnote 55.
A/CN.4/L.506 [and Corr.1]	Draft Code of Crimes against the Peace and Security of Mankind—Titles and texts of articles adopted by the Drafting Committee on second reading: parts one (arts. 1, 2, 4, 5, 5 bis, 6, 6 bis, and 8–13) and two (arts. 15 and 19)	Text reproduced in <i>Yearbook ... 1995</i> , vol. I, 2408th meeting, pp. 196 <i>et seq.</i> , para. 1.
A/CN.4/L.507	Report of the Working Group on State succession and its impact on the nationality of natural and legal persons	Reproduced in <i>Yearbook ... 1995</i> , vol. II (Part Two), p. 113.
A/CN.4/L.508	International liability for injurious consequences arising out of acts not prohibited by international law—Titles and texts of articles adopted by the Drafting Committee at the forty-seventh session of the Commission: articles A [6], B [7], C [8 and 9] and D [9 and 10]	Mimeographed.
A/CN.4/L.509 [and Corr.1]	Draft report of the International Law Commission on the work of its forty-seventh session: chapter II (Draft Code of Crimes against the Peace and Security of Mankind)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10)</i> . The final text is reproduced in <i>Yearbook ... 1995</i> , vol. II (Part Two).
A/CN.4/L.510	International liability for injurious consequences arising out of acts not prohibited by international law: report of the working group	Mimeographed.
A/CN.4/L.511 and Add.1	Draft report of the International Law Commission on the work of its forty-seventh session: chapter V (International liability for injurious consequences arising out of acts not prohibited by international law)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Fiftieth session, Supplement No. 10 (A/50/10)</i> . The final text is reproduced in <i>Yearbook ... 1995</i> , vol. II (Part Two).

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.512 and Add.1	Idem: chapter IV (State responsibility)	Idem.
A/CN.4/L.513	State responsibility—Titles and texts of articles adopted by the Drafting Committee: part three and annex	Text reproduced in <i>Yearbook ... 1995</i> , vol. I, 2417th meeting, pp. 252 <i>et seq.</i> , para. 1.
A/CN.4/L.514	Draft report of the International Law Commission on the work of its forty-seventh session: chapter III (State succession and its impact on the nationality of natural and legal persons)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10)</i> . The final text is reproduced in <i>Yearbook ... 1995</i> , vol. II (Part Two).
A/CN.4/L.515	Report of the Planning Group: programme, procedures and working methods of the Commission, and its documentation	Mimeographed.
A/CN.4/L.516	Draft report of the International Law Commission on the work of its forty-seventh session: chapter VI (The law and practice relating to reservations to treaties)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Fiftieth session, Supplement No. 10 (A/50/10)</i> . The final text is reproduced in <i>Yearbook ... 1995</i> , vol. II (Part Two).
A/CN.4/L.517	Idem: chapter I (Organization of the session)	Idem.
A/CN.4/L.518	Idem: chapter VII (Other decisions and conclusions of the Commission)	Idem.
A/CN.4/L.519	Idem—Chapter V (International liability for injurious consequences arising out of acts not prohibited by international law): draft articles provisionally adopted so far by the Commission	Idem.
A/CN.4/L.520	Idem—Chapter IV (State responsibility): draft articles, with commentaries, adopted by the Commission for inclusion in part three and the annex thereto	Idem.
A/CN.4/L.521 and Add.1	Idem: draft commentaries to articles 11, 13 and 14 of Part Two	Idem.
A/CN.4/SR.2378– A/CN.4/SR.2425	Provisional summary records of the 2378th to 2425th meetings	Mimeographed. The final text is reproduced in <i>Yearbook ... 1995</i> , vol. I.