

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION

1996

Volume II
Part One

Documents of the forty-eighth session

UNITED NATIONS



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NOTE

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References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook ...*, followed by the year (for example, *Yearbook ... 1995*).

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-eighth 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	Ad Hoc Committee of Legal Advisers on Public International Law
ECE	Economic Commission for Europe
FAO	Food and Agriculture Organization of the United Nations
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ILO	International Labour Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
ITU	International Telecommunication Union
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
UNEP	United Nations Environment Programme
UNHCR	Office of the United Nations High Commissioner for Refugees
WHO	World Health Organization
WIPO	World Intellectual Property Organization

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<i>Collected Courses ...</i>	<i>Collected Courses of The Hague Academy of International Law</i>
<i>I.C.J. Reports</i>	<i>ICJ, Reports of Judgments, Advisory Opinions and Orders</i>
ILM	<i>International Legal Materials</i>
ILR	<i>International Law Reports</i>
<i>P.C.I.J., Series A</i>	<i>PCIJ, Collection of Judgments (Nos. 1–24, up to and including 1930)</i>
<i>Recueil des cours...</i>	<i>Recueil des cours de l'Académie de droit international de La Haye</i>
UNRIAA	<i>United Nations, Reports of International Arbitral Awards</i>

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NOTE CONCERNING QUOTATIONS

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

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

STATE RESPONSIBILITY

[Agenda item 2]

DOCUMENT A/CN.4/476 and Add.1*

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

[Original: English]
[14 and 24 May 1996]

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* Incorporating document A/CN.4/476/Corr.1.

Introduction

1. The object of the present report is to address a few issues to which the Special Rapporteur hopes the Commission will give some further thought before completing, as planned, the first reading of the draft articles.¹ The issues in question, some of which are interrelated, concern only

¹ For the text of parts one to three of the draft articles, see *Yearbook ... 1996*, vol. II (Part Two), pp. 58–65.

parts two and three of the draft. The main issues among these relate to matters that the Commission will consider in the course of its forty-eighth session—in plenary, in the Drafting Committee, or in both—with regard to the legal regime of the consequences of the internationally wrongful acts singled out as crimes in article 19 of part one of the draft articles as adopted on first reading.

CHAPTER I

Problems relating to the regime of internationally wrongful acts singled out as crimes in article 19 of part one of the draft articles

2. Although this is neither the place nor the time to resume the 1995 debate on the crucial problem of internationally wrongful acts as distinguished from delicts in article 19 of part one as adopted on first reading, a few clarifications seem indispensable. These clarifications focus on: (a) the fate of article 19 of part one and of the distinction between “delicts” and “crimes” within the framework of the first reading phase; and (b) the substantive as well as the procedural, institutional consequences of crimes in the light of the 1995 debate.

A. The fate of draft article 19 of part one

3. The Special Rapporteur believes that draft article 19 of part one as adopted in 1976 should remain what it is, namely, an integral part of the first reading of the draft articles that the Commission intends to complete in the forty-eighth session.

4. First, this is the clear decision which emerged, at the forty-seventh session, from two informal consultations and decisively from two formal votes. A clear majority of the Commission adopted that view. Secondly, the proposal made in the Sixth Committee of the General Assembly to include in the Assembly’s instructions to the Commission a mandate to postpone until the second reading consideration of the consequences of the wrongful acts in question did not meet with the Sixth Committee’s approval. The proposed draft paragraph that would have reduced article 19 of part one to the status of a “dead branch” during the whole period between the first and second readings of the draft articles was thus rejected by the Assembly.

5. It follows that a serious effort should be made by the Commission, at its forty-eighth session, to cover, by adequate provisions in parts two and three, the consequences of international crimes of States. The fate of draft article 19 and of the distinction between “delicts” and “crimes” should be decided, in the Special Rapporteur’s view, only after the membership of the United Nations has expressed itself in its comments on completion of the first reading of the entire set of draft articles.

6. The Special Rapporteur is of course aware that draft article 19 as adopted is far from perfect. The original drawbacks noted since the outset by a number of commentators are even more perceptible at present after 20 years, especially when dealing with the difficult prob-

lem of the consequences of the breaches in question. They are likely to be even more clearly perceptible by the time the second reading has been undertaken. None of those drawbacks, however, would warrant a virtual rejection of the article at the present stage or justify a hasty, superficial treatment of the consequences of the grave internationally wrongful acts in question.

7. Having first done his best to explore the matter thoroughly and then to comply, by means of his seventh report,² with the mandate received from the Commission in 1994, the Special Rapporteur has little to add to the merits of the distinction or to the terminological issue of whether the term “crime” is justified or appropriate.

8. Irrespective of the terminological issue, with regard to which the Drafting Committee may try to find, if it is really necessary, a temporary solution in 1996, the practice of States shows clearly that internationally wrongful acts of a very serious nature and dimension meet with severe reactions on the part of States acting individually or collectively. No obstacle can be found either in the maxim *societas delinquere non potest* or in the consideration that to label the conduct of a State as criminal would involve the people of that State. Both objections are dealt with in the Special Rapporteur’s sixth³ and seventh reports and the report of the Commission to the General Assembly on the work of its forty-seventh session.⁴ In both documents, due account is taken of the distinction between the State as currently personified by its rulers, on the one hand, and the State’s population, on the other hand.

² *Yearbook ... 1995*, vol. II (Part One), p. 3, document A/CN.4/469 and Add.1 and 2.

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

⁴ See *Yearbook ... 1995*, vol. II (Part Two), pp. 48–49, paras. 261 and 263. As stated by a number of members, “it was preferable to designate a specific conduct of States as criminal and to regulate the consequences through judicial review and the introduction of substantive rules to spare the population of the criminal State extreme hardship rather than to leave the whole area unregulated, concealing the punitive element under the guise of restitution or guarantees against repetition. It was mentioned, in this connection, that some States had been subjected to penal consequences, sometimes exceeding those usually attached to crimes, without their actions being designated as crimes”.

B. The special and additional substantive consequences of crimes

1. A GENERAL POINT

9. Irrespective of the solution that will be adopted with regard to the terms to be used, the forty-seventh session's debate on the special or additional consequences of the internationally wrongful acts in question shows that the 1995 proposals concerning those consequences "met"—to use the terms of the Commission's report on its forty-seventh session—"with a wide measure of support" and "gave rise", at the same time, "to reservations".⁵

10. It should be noted, however, that support came not just from members in favour but, despite their "reservations", also from members opposed to draft article 19 of part one. No one contested, in other words, the fact that most modifications proposed in draft articles 15 to 18 for the purpose of adapting to crimes the provisions relating to delicts, should be embodied in the draft articles in any event in order to cover the consequences of the most serious among internationally wrongful acts, whatever their denomination.⁶

2. DRAFT ARTICLE 16 AS PROPOSED

11. Apart from the general objection to the real or assumed punitive connotation of some of the consequences envisaged in draft article 16—an objection obviously connected with the general conceptual and terminological issue that has been set aside (paras. 39 and 42–46 below)—a number of specific reservations were expressed.

12. One reservation related to the distinction between political independence (namely, independent international statehood) and political regime for the purposes of the mitigation of the obligation of restitution in kind.⁷ Concern was expressed that that mitigation should apply not only to the need for safeguarding that State's independent statehood but also to the safeguard of its political regime. In the Special Rapporteur's view, the extension of the mitigation to the political regime, for example, of an aggressor State or of a State in grave breach of obligations relating to human rights or self-determination, might practically amount to a condonement of the breach. A strong demand for a change of political regime might well prove to be an essential requirement not only as a matter of reparation but also as a guarantee of non-repetition. The Drafting Committee would be well advised to give further thought to the matter before rejecting the proposed distinction between independent statehood and political regime for the purposes of restitution in kind.

13. Remarks on draft article 16 were also addressed with regard to the issue of territorial integrity, the preservation of which was indicated in that draft article as a cause of mitigation of the wrongdoing State's obligation to provide restitution in kind.⁸

14. While most of the speakers agreed with the Special Rapporteur's suggested inclusion of the safeguard of territorial integrity (together with the preservation of independent statehood and the population's vital needs) among the mitigating factors, and while several members concurred in the doubt expressed in that respect by the Special Rapporteur as to whether any exceptions should be considered, some members questioned the Commission's competence "to ask that kind of question".⁹ Unaware of any limitation of the Commission's competence to discuss and express its views on any issue which may be of relevance for the proper performance of its role in the progressive development and codification of international law and the law of State responsibility in particular, the Special Rapporteur is of the view that the Drafting Committee should give some thought to the matter. No doubt, territorial integrity should in principle not be put in jeopardy by the implementation of the obligation to provide restitution in kind. Which exceptions, if any, should be envisaged and of what kind (the only point of doubt raised by the Special Rapporteur) should be the task of the Drafting Committee to explore to the best of its ability in 1996.

15. In 1995 during the debate, several members expressed reservations over the view that article 8 of part two on compensation did not call for any adaptation in its application to crimes. The Special Rapporteur is hardly able to understand that philosophy. To say that a mitigation of the compensation obligation would be imposed—as explained in the above-mentioned report of the Commission¹⁰—by the difficulty of implementing such an obligation in the case of "major disasters like the Second World War" seems to imply that States responsible for a disaster of such terrible gravity should be treated less severely than a State responsible for a minor breach of a commercial treaty! Of course there should be limits. But the only conceivable mitigation should be, in the Special Rapporteur's view, an express or implied extension of the provision safeguarding the vital (physical and moral) needs of the wrongdoing State's population to the duty to provide compensation for crime.

16. Considering guarantees of non-repetition, the Special Rapporteur is puzzled by the reservations expressed by some members relating to the proposed waiver of the mitigation of that obligation which is based (for the case of delicts) upon respect for the dignity of the wrongdoing State. While unnecessary wanton humiliations of the wrongdoing State would surely be inappropriate, the Special Rapporteur finds it difficult to see—for example—how a State guilty of a crime such as a deliberate armed attack and invasion, or deliberate, systematic, massive violations of human rights or self-determination, should not be required to offer guarantees that, while preserving its independent statehood and territorial integrity, could be viewed as incompatible with such a formal attribute of a State as its "dignity". The main consideration should be the effectiveness of the guarantees to be demanded, rather than a "dignity" which the law-breaker itself is offending in the first place.

⁵ *Ibid.*, p. 52, para. 284.

⁶ *Ibid.*, pp. 51–55, paras. 282–305. This conclusion emerges clearly.

⁷ See *Yearbook ... 1995*, vol. II (Part Two), p. 52, para. 289.

⁸ *Ibid.*, pp. 52–53, para. 291.

⁹ *Ibid.*

¹⁰ *Ibid.*, p. 53, para. 293.

17. Similar considerations apply to the preoccupations expressed by some members with regard to the protection of the sovereignty and liberty of the wrongdoing State. Again, all depends on the nature of the crime and the kinds of guarantees to be sought in order to avert repetition. For example, could a demand to hand over the responsible government officials for trial before a (lawfully established) international tribunal be resisted as contrary to the wrongdoing State's sovereignty and liberty?¹¹

3. DRAFT ARTICLE 17 AS PROPOSED

18. Doubts were expressed with regard to the admissibility of dealing with countermeasures in reaction to crimes. Such doubts were based on the consideration that such measures would legitimize "power play and coercive measures" and let the claimant State acquire "the status of a judge in its own cause" rather than "promoting the equity and justice essential for a new world order". The same speakers emphasized instead "the need for a careful structuring of the restraints in the interests of sovereign equality, territorial integrity, political independence and the regulation of international relations on the basis of international law, equity and justice".¹² These remarks are puzzling for two reasons. First, they seem to question, not only any attempt at regulation of the additional consequences of crimes or major breaches otherwise designated, but also any regulation whatsoever of the reaction to internationally wrongful acts of any kind.

19. Secondly, the above-mentioned remarks seem to overlook the fact that, in dealing with the instrumental consequences of crimes, draft article 17 expressly provides (as draft article 16 does for the substantive consequences) that the injured State's entitlement to resort to countermeasures "is subject to the condition set forth in paragraph 5 of [draft] article 19", as proposed. The envisaged condition is an ICJ decision that a crime has been or is being committed. Consequently, draft article 17, far from legitimizing "power play" or the acquisition by a claimant State of the "status of a judge in its own cause", does attempt, whatever the merits of the whole scheme proposed, to promote at least more "equity and justice essential for a new world order" than would be done by a system controlled exclusively by the States themselves (or some of them) or by a restricted and selective political body (paras. 31 and 39–41 below).

20. The Special Rapporteur finds equally hard to understand the gist of the paragraph with regard to draft article 17, paragraph 2, in the report of the Commission.¹³ What, if not resort to urgent, interim measures as are required to protect its rights etc., should an injured State do while waiting for any decision to come from some international body (possibly judicial)? How do the "difficulties inherent in that concept" (of interim measures) impose

the rejection of the proposed provision of draft article 17? Is it not obvious that, if anything serious has to be done by the Drafting Committee in 1996 concerning the consequences of the most grave internationally wrongful acts, it would be for that Committee to see, also in the light of the remarks on interim measures made further on in the present report, whether and in what terms the difficulties inherent in the concept of interim measures should be resolved? Does the fact that the exercise was not made in connection with delicts prevent the Commission from doing something on the subject?¹⁴

21. The remarks made with regard to draft article 17, paragraph 3, of the report of the Commission¹⁵ will be addressed further on.

4. DRAFT ARTICLE 18 AS PROPOSED

22. The first observation, in the report of the Commission to the General Assembly on the work of its forty-seventh session,¹⁶ that in some of the provisions of draft article 18 care should be taken to distinguish the rights of the State whose individual rights were violated from the rights of other States, seems justified. The 1996 Drafting Committee should be so advised.

23. On the other hand, the Special Rapporteur is puzzled by the second general remark, according to which "some of the wording [of draft article 18] had more to do with the rules on the maintenance of international peace and security than with the law of State responsibility". Considering the degree of gravity of crimes, the most serious of which is aggression, this statement is what the French call a *lapalissade* (truism).

24. The Commission's task is precisely to distinguish, despite any degree of interrelation, what belongs to the law of State responsibility from what belongs to the law of collective security. This is also true for delicts although it is more so for crimes. The Special Rapporteur pointed out this problem of distinction but little has been done in that respect during the debate at the forty-seventh session. The main contributions (although not the majority of them) made on the subject in the course of that debate were those of the members who, instead of trying to find a demarcation line, preferred simply to absorb the law of responsibility into the law of collective security by subjecting the former to the latter *in toto*. Almost no attention was paid to the questions raised since 1992 by the Special Rapporteur with regard to article 4 of part two as adopted on first reading or to a comparison between that article and draft article 20 as proposed in his seventh report¹⁷ (see paragraphs 42–46 below).

¹¹ It should not be overlooked that an excess of guarantees in favour of the wrongdoing State would jeopardize the attainment of the very purpose of the rule on guarantees of non-repetition. Moreover, this might encourage arbitrary action, including unlawful military action, by single Powers.

¹² *Yearbook ... 1995*, vol. II (Part Two), p. 53, para. 298.

¹³ *Ibid.*, para. 299.

¹⁴ The Special Rapporteur cannot but wonder how the preoccupation about the difficulty of defining urgent interim measures (in order, supposedly, to prevent abuse) logically coexists with the preoccupation, expressed with respect to other provisions, that the requirement of a prior ICJ decision would have an adverse effect on the effectiveness and promptness of the reaction.

¹⁵ *Yearbook ... 1995*, vol. II (Part Two), p. 54, para. 300.

¹⁶ *Ibid.*, para. 301.

¹⁷ See footnote 2 above.

C. The institutional aspects of the legal regime of crimes

25. The arguments against the institutional consequences scheme embodied in draft article 19 as proposed in the seventh report must be distinguished according to whether they consist of *de lege lata* or *de lege ferenda* objections.¹⁸

26. Although the distinction between *de lege lata* and *de lege ferenda* objections should not be understood or applied too strictly in the work of a body which, like the Commission, is entrusted with both progressive development and codification—the first task being inevitably preponderant in determining a possible legal regime for the consequences of crimes—the Special Rapporteur will try to deal with the above two sets of objections separately.

1. DE LEGE LATA OBJECTIONS

27. With regard to the objection based upon Article 12 of the Charter of the United Nations and the alleged “risk of conflicts” between the General Assembly and the Security Council, the task entrusted by the scheme to both organs does not seem to be of such a nature as to increase significantly the possibility of divergence between the two bodies.

28. First, it must be stressed again that Article 12 of the Charter has so frequently been ignored or otherwise circumvented by the General Assembly that many commentators believe that it has become obsolete. The only clear demarcation line is that which precludes the Assembly from interfering in the exercise of the Security Council’s functions under the Charter: and that line would not necessarily be crossed by the fact that, while the Council is dealing with a dispute, the Assembly adopts a recommendation acknowledging the existence of sufficient concern over a situation allegedly amounting to an international crime. Such a recommendation would operate as a condition triggering (under the future convention on State responsibility) the possibility for the allegation to be brought to ICJ either by injured States or by the alleged wrongdoer. As regards in particular the subsequent effect of the Assembly’s preliminary resolution—as well as that of a similar resolution by the Council—that effect would follow from the future convention on State responsibility and not from the Charter: there is nothing in the Charter preventing States from attributing certain effects, by treaty, to a resolution of the Assembly or of the Council, including an effect such as the jurisdiction of ICJ in certain cases.

29. The only hypothesis in which serious conflict could arise would be if the Security Council had made a finding under Article 39 of the Charter and acted accordingly under Chapter VII. However, apart from the fact that the proposed scheme does safeguard, by means of draft article 20, the Council’s functions relating to the maintenance of international peace and security—the latter functions prevail to the extent to which they do pertain to that area—it does not seem that, even in such a case, the possibility of General Assembly pronouncements about the

seriousness of an allegation of crime could significantly increase the risk of conflict. Considering that the scheme only provides for the consequences of crimes (as envisaged in the provisions of draft articles 15 to 18) and not for Council security measures and that the ICJ procedure could be triggered (by virtue of the future convention) by a resolution of *either* body, no increase in the risk of *conflicts de compétence* (overlapping jurisdictions) seems to be likely to arise from the scheme.

30. Assuming that the Security Council had made a finding of aggression under article 39 and were acting accordingly under Chapter VII of the Charter, it could either decide that there was serious ground for a crime allegation, or that there was no such ground. If the General Assembly, in its turn, also adopted a decision along the same lines, the crime procedure could be followed without interfering with the Council’s security measures thanks to the proviso contained in draft article 20 (paras. 44–46 below).

31. Conflict would be even less likely in the case of crimes other than those partly coinciding with the hypothesis involving Article 39 of the Charter. In areas such as human rights, self determination or environment violations, the competence of the General Assembly seems to the Special Rapporteur more probable—*de lege lata*—than that of the Security Council. It is difficult to see, therefore, with regard to the violations in such areas, why the attribution to the Assembly under the proposed scheme (as an alternative to the Council) of a role of preliminary finding should be inconsistent with Article 12 or otherwise increase the risk of conflict between the two bodies. The Special Rapporteur is assuming, of course, that both the Assembly and the Council would maintain their action within the limits of their respective spheres of competence.

32. It is of course quite possible that the risk of conflict is perhaps being unconsciously magnified, in the minds of some of the critics of the proposed scheme, by their view that all or most crimes qualify as situations under Article 39 of the Charter (especially as threats to the peace). Crimes should thus fall, in their opinion quite naturally, in the sphere of action of the Security Council. But that is *lex ferenda*, not *lex lata* of State responsibility.

33. A second objection *de lege lata*, seems to point to the fact that the Security Council could not legitimately proceed to the preliminary finding envisaged in the proposed scheme—i.e. the “*crimen fumus resolvet*”—because that body is only empowered, under the Charter of the United Nations (Arts. 34 and 39), to determine threats to the peace, breaches of the peace or acts of aggression. But it is easy to see that a number of international instruments, in a sense confer on the Security Council, *extra ordinem* or additional functions: such functions obviously pertain to the relations among the States participating in each instrument. Consequently, nothing more than that would be achieved by a future convention on State responsibility under the proposed scheme.

34. With regard to the third set of objections, a few remarks are necessary about the contested majority requirements set forth in draft article 19, paragraph 2. In the Special Rapporteur’s view, the fact that the General

¹⁸ *Yearbook ... 1995*, vol. II (Part Two), pp. 55–56, para. 307.

Assembly is empowered to determine, under Article 18 of the Charter, matters requiring a two-thirds majority would not constitute a legal obstacle in the case that a convention, conferring a certain function upon the Assembly (under the practice just evoked in the preceding paragraph), also indicated the majority required for the performance of that function. Were that majority not attained, it would simply have to be concluded that the preliminary finding condition had not materialized. In any event, the Special Rapporteur finds it hard to admit that the Assembly would have any difficulty in accepting the notion that a *crimen fumus resolvat*, so to speak, should be adopted by a two-thirds majority.

35. The question is of course less simple for the Security Council because it is complicated, to some extent, by the distinction between Chapters VI and VII of the Charter and between disputes and situations. On the first issue, a distinction must again be found, as already pointed out, between the role that the Council would perform under the proposed scheme and the role it performs anyway under Chapter VII. In the Special Rapporteur's view, the role envisaged in the scheme would fall under Chapter VI. In addition, and as in the case of the General Assembly, this function could be conferred on the Council by an international instrument—a convention on State responsibility—other than the Charter. No legal obstacle should exist to such an instrument—an instrument which develops and codifies the law of State responsibility and not the law of collective security—requiring, in addition to a certain majority, the abstention of “a party to a dispute”.

36. With regard to the second issue—the dispute/situation distinction—the answer to the objection is, first, that the situation in which a State is accused of a crime by other States surely qualifies more as a dispute than as a mere situation. Secondly, the obligation to abstain would constitute once more a question pertaining to the law of State responsibility as codified in an ad hoc convention and not a matter governed by the Charter. No legal obstacle can be found in the Charter to such an instrument attributing given legal consequences (such as the triggering of the legal possibility of resorting to ICJ) to a resolution adopted by the Security Council by a determined majority and an equally determined number of abstentions.

37. Another objection was that a decision according to which a State would be subjected to ICJ jurisdiction would “necessarily” fall under Chapter VII of the Charter of the United Nations and therefore be subject to the veto. The answer to that argument is, again, that ICJ jurisdiction would be imposed on States neither by the Security Council's nor by the General Assembly's *crimen fumus resolvat*. It would derive from the convention developing and codifying the law of State responsibility and not from the collective security law of the Charter with regard to which the convention on State responsibility does not and should not include any provisions.

38. The objection that a permanent member of the Security Council could not legitimately bind itself not to use the so-called “veto power” might not be groundless, to some extent, as a matter of Charter law. It might also be contended that the veto power is attributed to given member States not just in their interest but also in the interest of the other members. The objection would not be valid

in the crimes context, however, because it is based on the above-mentioned, unjustified confusion between the law of collective security as embodied in the Charter of the United Nations, on the one hand, and the law of State responsibility, on the other hand. The law of State responsibility could quite legitimately provide—and a convention on the subject would legitimately provide—for the waiver by given States, for the sake of justice and equality in the area of State responsibility, of their “veto power”. The Charter embodies, and is based upon, principles of justice and equality. The fact that a derogation from the equality of States was rightly considered to be necessary for the maintenance of international peace and security—namely for the purposes of the law of collective security—does not imply that States should be unequal in an area which is covered by the law of State responsibility.

2. DE LEGE FERENDA OBJECTIONS

39. As regards the allegedly “cumbersome” nature of the institutional scheme proposed, it is quite obvious that the conditions to be envisaged for the triggering of the consequences of crimes should be stricter than those envisaged for the consequences of delicts. One reason is the higher degree of severity of the substantive and procedural consequences to be attached to crimes as compared to those to be attached to delicts. It is natural that the former should be subject—except, of course, those urgent interim measures that the critics seem to ignore—to stricter “collective” or “community” control. The alleged “response paralysis” would not affect urgent measures anyway.

40. Considering the gravity of the breach alleged by the accuser(s) and the interest of all States—whether prospective victims or prospective accused—that the determination of existence/attribution of a crime be made by the most objective procedure available at the current stage of international “institutional law”, the possibility that States might accept ICJ compulsory jurisdiction for the purpose of such a determination does not appear to be so problematic as to justify a reluctance, on the part of the Commission, to include the requirement in question in draft articles intended for the progressive development and codification of the law of State responsibility.

41. As regards the undesirable “practical effects” for the injured States or the wrongdoing State (*scilicet*, allegedly injured and allegedly wrongdoing State(s)), the Special Rapporteur believes that the “practical effects” of the proposed scheme should be considered not in the absolute but in comparison with the alternative solution or solutions. Indeed, the alternative to the “cumbersome procedure” proposed by the Special Rapporteur in his seventh report is represented either by unilateral and possibly arbitrary action by single, allegedly injured, States or groups thereof, or by merely political decisions by a political body and the action it may authorize. In either case there is a high risk of arbitrariness and selectivity, whether individual or collective, on the part of the “strong” States. The “cumbersome procedure” proposed presents at least a higher degree of objective evaluation and *crimen fumus resolvat* by (a) extending the competence of political evaluation to a more representative—and by definition more objective—General Assembly; and (b) adding, more sig-

nificantly, a technical pronouncement such as the judicial decision of ICJ.

D. Conclusions: draft article 4 as adopted by the Commission and draft article 20 as proposed by the Special Rapporteur in his seventh report

42. As is explained in the seventh report,¹⁹ the Special Rapporteur believes that the legal consequences of international crimes of States, as well as the consequences of any internationally wrongful act, pertain to the law of State responsibility. Considering, however, that some of the wrongful acts qualified as crimes in article 19 of part one as adopted on first reading may coincide, to a certain extent, with one of the situations contemplated in Article 39 of the Charter of the United Nations, it is possible for problems of demarcation to arise. The Special Rapporteur is referring particularly, although not exclusively, to the demarcation line between any institutional procedures envisaged for the triggering of the consequences of crimes, on the one hand, and the Charter procedures relating to the maintenance of international peace and security (particularly, but not exclusively, those of Chapter VII of the Charter) on the other hand. The possibility of problems of this kind arising should not lead to the conclusion, however, that the law of State responsibility should, for instance, “give way” or be set aside, by subjecting any of the substantive or procedural consequences of a crime exclusively to the law of collective security.

43. The problem of the coexistence of the law of State responsibility with the law of collective security was not adequately discussed, although it was not ignored, during the debate on the consequences of crimes in 1995. All members, no doubt, perceived the existence of the problem. The members who addressed the matter explicitly did so, if the Special Rapporteur understood correctly, in two ways. A number of them indicated—and rightly so—that some of the provisions of the proposed draft articles (15 to 19) also touched upon matters relating to the maintenance of international peace and security. Some members stressed instead—quite drastically—that the whole matter of crimes should simply be left to the care of the Security Council acting under its powers relating to the maintenance of international peace and security. Considering that, in their view, most, if not all, crimes would constitute at least threats to the peace, no provision needed to be included for crimes in a convention on State responsibility. Despite the fact that most members of the Commission did not seem to share this view, the debate did not do justice, in the Special Rapporteur’s opinion, to the importance of the issue.

44. In conformity with his opinion that the legal consequences of crimes are part of the law of State responsibility and should be treated as such in the draft articles (*de lege ferenda* or *de lege lata*, according to the case),

the Special Rapporteur had proposed a draft article 20 in 1995.²⁰ That article was intended to ensure that neither the provisions of draft articles 15 to 18 nor those of draft article 19 would interfere unduly either with the measures decided upon by the Security Council in the exercise of its functions under the relevant provisions of the Charter of the United Nations or with the inherent right of self-defence as provided for in Article 51 of the Charter. It was also intended, at the same time, to make clear that, to the extent that the law of State responsibility would “be subject” to any decisions or measures of the Security Council (or, for that matter, the General Assembly), such decisions or measures would be maintained within the limits set by the relevant provisions of the Charter.

45. In the pursuit of the above-mentioned purpose—and in its formulation—draft article 20, as proposed, differs from article 4 of part two as adopted on first reading by the Commission on the basis of the proposal of the previous Special Rapporteur. That provision seems to proclaim in such terms a precedence of the law of collective security over the articles on State responsibility so as to open the way, for the purposes of the legal consequences of internationally wrongful acts (and apparently not just crimes) to a sort of subordination of the law of State responsibility to the action of political bodies.

46. Considering the great importance of the subject matter, the Special Rapporteur is confident that in 1996 the Drafting Committee shall look into it as thoroughly as it deserves. The Commission would be ill-advised, in his opinion, if it maintained draft article 4 as it stands. Regardless of the extent to which the Drafting Committee or the Commission itself will ultimately be disposed to accept the Special Rapporteur’s proposed draft articles 15 to 20, a provision such as the one embodied in the said article 4 would seriously affect the distinction between the law of collective security and the law of State responsibility and gravely undermine the impact of the latter.²¹ The preservation of the distinction is a vital element—*de lege lata* as well as *de lege ferenda*—of the existence, the effectiveness and the future development of the law of State responsibility. The Drafting Committee, to which draft articles 15 to 20 were referred in 1995, should not fail to address the matter to the extent and depth necessary to maintain and clarify the distinction. In the opinion of the Special Rapporteur, it would not be prudent for a body of lawyers like ICJ to suggest that the validity or application of the articles that they adopt would be subject to decisions or any other action of political bodies—be it the Security Council or the General Assembly—except to the extent strictly necessary for the maintenance of international peace and security. A provision such as draft article 4 of part two, as adopted, would not only undermine the effectiveness of the law of State responsibility as indicated above. It would also constitute

²⁰ *Ibid.*

²¹ The Special Rapporteur has been contesting the wording of draft article 4 since at least 1992 (*Yearbook ... 1992*, vol. I, 2277th meeting, p. 150; and *ibid.*, vol. II (Part Two), pp. 38–39, paras. 261–266). See also *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/469 and Add.1 and 2, pp. 21–22, paras. 95–99 (and footnote 51), and pp. 28–29, paras. 137–139.

¹⁹ See footnote 2 above.

a major factor encouraging political bodies to broaden the sphere of their functions and competence on the basis of questionable doctrines of evolutionary interpretation, implied powers and/or federal analogies in the Charter of the United Nations. Draft article 20, in the Special Rapporteur's view, is more prudently formulated in that respect: and the involvement of ICJ, which is provided for in the proposed

draft article 19, should help to ensure some judicial control of the respect of the demarcation between the law of international security and the law of State responsibility.²²

²² The opinion that more room should be made for the role of ICJ in the area of State responsibility (including particularly those areas which are close to that of the maintenance of peace and security) is being shared increasingly by international legal scholars.

CHAPTER II

Other issues to which the Special Rapporteur deems it necessary to call the attention of the Commission in view of the completion of the first reading of the draft articles

Introduction

47. The issues of parts two and three of the draft articles other than the regime of crimes, to which the Special Rapporteur believes that further thought should be given by the Commission (in plenary and/or in the Drafting Committee) are the following:

(a) The role of fault in the determination of the consequences of an internationally wrongful act ("delict" or "crime"), particularly with regard to satisfaction;

(b) The dispute settlement provisions of parts two and three; and

(c) The factors to be considered for the purpose of assessing proportionality of countermeasures (in connection with "crimes" as well as "delicts").

The said issues are dealt with in that order in the following sections.

A. The role of fault in general and in connection with satisfaction

48. In the opinion of the Special Rapporteur—as well as in the opinion of other scholars—the problem of fault has not been dealt with satisfactorily, if at all, in part one of the draft articles. It is therefore to be hoped that the matter will be taken up again, in part one, on second reading.

49. Be it as it may, however, regarding the question whether fault should or should not be dealt with in part one and in what terms, the Special Rapporteur believes that fault should be expressly recognized as a factor in the determination of various consequences of internationally wrongful acts, namely in part two of the draft articles. As indicated in the second report of the Special Rapporteur, although the literature is not very rich on the subject, significant doctrinal authority is available.²³

50. As regards the practice, while the impact of fault is only infrequently acknowledged with regard to compensation,²⁴ it emerges quite clearly—as is explained in the second report—with regard to satisfaction. That impact

is particularly significant regarding both (a) the role of satisfaction as a complement to pecuniary compensation or other forms of reparation; and (b) the kinds and number of forms of satisfaction claimed or obtained.²⁵

51. It will be recalled that an express reference to wilful intent or negligence was contained in the draft article on satisfaction proposed in the second report (para. 55 below).

52. The necessity to take account of the fault in the determination of the degree of the wrongdoing State's liability is enhanced by the fact that the *chapeau* provision on reparation (in general)—draft article 6 *bis*—as adopted by the Commission on first reading, does contemplate the consequences of the fault of the injured State or its national.²⁶

53. It is hardly necessary to stress that the relevance of fault is even higher with regard to the case of the internationally wrongful acts singled out as "crimes" in draft article 19 of part one as adopted on first reading. It would be difficult to contest that that particularly grave degree of fault which is generally known as wilful intent or *dolus* is an essential element of any one of the four kinds of crimes indicated in paragraph 3 of draft article 19 of part one, or any analogously grave acts, whatever their denomination.

54. In conclusion, draft articles which would not take due account of the impact of fault in the determination of the consequences of internationally wrongful acts—whether "delicts" or "crimes"—would simply overlook an important element of the *de lege lata* and *de lege ferenda* regime of State responsibility. The Special Rapporteur's position on the subject of fault—and the acknowledgment of the soundness of that position by a number of members—were well reflected in the Commission's report on its forty-second session.²⁷

²³ *Yearbook ... 1989*, vol. II (Part One), document A/CN.4/425 and Add.1, p. 49, footnote 407.

²⁴ *Ibid.*, p. 53, para. 182, and p. 50, footnotes 409–412.

²⁵ *Ibid.*, p. 31, footnote 252; p. 32, footnotes 257 and 261–262; p. 34, paras. 113 et seq.; and pp. 38–40, paras. 126–134.

²⁶ Considering that the *chapeau* provision of draft article 6 *bis* (on reparation in general) also covers satisfaction, the express mention of the injured State's (and its national's) fault inevitably aggravates the undesirable effect of the omission of any reference to fault in the provision of draft article 10 on satisfaction (para. 55 below).

²⁷ *Yearbook ... 1990*, vol. II (Part Two), pp. 81–82, paras. 408–412.

55. Partly interrelated with the relevance of fault in determining the consequences of internationally wrongful acts is the nature of the remedy—typical of inter-State relations—which goes under the name of satisfaction. In article 10 on satisfaction, as adopted in 1993, the Commission eliminated, together with the proposed reference to negligence and wilful intent contained in the Special Rapporteur's proposal on the subject,²⁸ the punitive connotation of that remedy which was also present in the proposed draft article 10.²⁹ The Special Rapporteur believes that the reality of international relations indicates that the legal consequences of internationally wrongful acts are neither purely reparatory nor purely punitive. The two functions are inherent in different degrees—although in forms not easily comparable to the functions of any similar remedies of national law—in the various forms of reparation. As regards satisfaction in particular, it seems to constitute—although in the *very relative* sense explained in the second report—the form of reparation in which the punitive element is relatively more pronounced.³⁰ The omission of any trace of that element obscures, in the Special Rapporteur's view, not only the fact that States seek and obtain satisfaction for purposes other than strict reparation, but also the very distinctive feature of satisfaction as opposed to restitution in kind and compensation. The availability of a more precisely defined remedy of satisfaction would help, in the view of the Special Rapporteur, to reduce the temptation of States, and especially of strong States, to resort to forms of punitive action frequently including, under the guise of self-defence, armed reprisals. Examples are too well known and need not be mentioned at the present stage.

B. The dispute settlement provisions of parts two and three of the draft articles³¹

1. GENERAL

56. The Special Rapporteur feels duty-bound to reiterate, at the present stage, his position with regard to the relationship between dispute settlement obligations, on the one hand, and the right of an allegedly injured State to resort to countermeasures against an allegedly wrongdoing State, on the other hand. As explained in his reports and in a number of oral statements, the generally recognized existence, in customary international law, of the right of the injured State to resort to countermeasures against the wrongdoing State is *per se* not sufficient to justify the inclusion of such a right in a codification convention on State responsibility without adequate guarantees against abuse. It is indisputable—as the relevant debates in the Commission and the General Assembly abundantly confirm—that the traditional, current regime of countermeasures leaves much to be desired because it lends itself to abuse.

57. The rules of proportionality and the rules prohibiting given kinds of countermeasures—rules frequently infringed—are not sufficient to ensure that allegedly injured States refrain from resorting abusively to reprisals against an allegedly wrongdoing State.³² It would therefore be improper for a body dedicated to the progressive development (more than just codification) of international law not to propose, in addition to the said rules, appropriate legal defences against any possible abuse. Such defences can only be found in adequate dispute settlement procedures.

58. It is unnecessary to reiterate here the distinction between pre-countermeasure and post-countermeasure dispute settlement obligations, and the Special Rapporteur's proposals relating to the former (draft art. 12 of part two) or to the latter (draft arts. 1 to 7 of part three).³³

59. With regard to both pre-countermeasure and post-countermeasure dispute settlement obligations, the Special Rapporteur believes that, in reviewing the matter of dispute settlement within the framework of the draft articles on State responsibility—a review that the 1996 session should do its best to accomplish—the Drafting Committee would be well advised if it re-examined article 12 and the relevant provisions of part three in close conjunction. It is the Special Rapporteur's view that the difficulties which have prevented the adoption of more satisfactory solutions in both areas are due in great part to the fact that draft article 12 was considered by the 1993 and 1994 Drafting Committees prior to, and separately from, the relevant draft articles of part three. It will be recalled that this opinion was repeatedly expressed, at the time, by Mr. Calero-Rodrigues and the Special Rapporteur.

60. In proceeding along the lines indicated in the preceding paragraph, in 1996 the Drafting Committee would be in a better position to review the formulation of both sets of dispute settlement obligations in the light of their interrelation. In so doing, the Drafting Committee would be enabled to adjust more adequately the provisions in question with a view to strengthening both the defences against abuse of countermeasures and the law of dispute settlement. The Commission should realize that the necessity of strengthening those defences within the context of draft articles codifying for the first time the unwritten law of unilateral enforcement of international obligations, offers a most appropriate—and, in a sense, unique—opportunity to take a few valuable steps forward in the inter-national law of dispute settlement, the development of which is characterized by an abundance of lip service which is inversely proportional to the number of really effective, “hard law” obligations assumed by States.

²⁸ Draft art. 10, para. 2 (see *Yearbook ... 1989*, vol. II (Part One), document A/CN.4/425 and Add.1, p. 56).

²⁹ *Ibid.*, para. 1.

³⁰ *Ibid.*, pp. 31–42, paras. 106–145, especially paras. 136–145. See, in particular, page 41, para. 143, footnote 347.

³¹ See footnote 1 above.

³² The use of prohibited armed reprisals under the pretence of self-defence is only one of the major examples of such infringements, particularly on the part of strong States.

³³ Following further consideration, the Special Rapporteur believes that the annexes to draft articles 1 to 7 (as proposed in 1992–1993) left much to be desired and should have been entirely reformulated (as the Drafting Committee has felicitously done). Their defective formulation was the result of inadvertence.

2. PRE-COUNTERMEASURE SETTLEMENT OBLIGATIONS:
ARTICLE 12 OF PART TWO

61. With regard to draft article 12 as adopted in 1993 and provisionally confirmed, *faute de mieux*, in 1994, the Special Rapporteur confines himself to listing, as briefly as possible, the main shortcomings of that formulation.

62. First, the formulation in question almost totally fails to counterbalance the legitimation of unilateral countermeasures by adequately strict obligations of prior recourse to amicable dispute settlement means. On the contrary, an allegedly injured State: (a) would remain free, under the future convention, to initiate countermeasures *prior* to recourse to any amicable settlement procedure; (b) would only be obliged to have recourse (at any time it may choose) to such procedures as are envisaged by a “relevant” treaty (see paragraph 66 below); (c) the obligation thus circumscribed would be further narrowed down if the future convention on State responsibility were to confine it to such means as third-party procedures or, worse, to binding third-party procedures; (d) the formulation in question completely ignores the problem of prior and timely communication, by the injured State, of its intention to resort to countermeasures.³⁴

63. Secondly—and not less importantly—by not condemning resort to countermeasures prior to recourse to dispute settlement means to which any participating States may be bound to have recourse under instruments other than the convention on State responsibility—the only function that the Special Rapporteur assigned to the requirement of prior recourse—the 1993 and 1994 Drafting Committee’s formulation might have a negative impact on the dispute settlement obligations deriving from those instruments. Although they would not be totally annulled, dispute settlement obligations could lose in credibility and effectiveness. Inevitably involved, in any event, in the mere fact of not imposing recourse to amicable means *prior* to countermeasures, the jeopardy of the said dispute settlement obligations would be further aggravated, first by the “relevant” treaties clause and secondly, by the exclusion, under the formulation, of some dispute settlement means.

64. The negative impact of the provision in question upon existing dispute settlement obligations seems to be more serious than it may appear. Of course, it can be argued that the fact that a convention on State responsibility did not impose prior recourse to dispute settlement means provided for by instruments in force between the parties—as would be the case under the Drafting Committee’s formulation of article 12, paragraph 1(a), adopted in 1993—would not affect the validity of the parties’ obligations under such instruments. It could be argued, for example, that since armed reprisals are prohibited—a rule that the convention could not fail to codify³⁵—the

countermeasures to which an injured State could lawfully resort would not contravene the general (and practically universal) obligation to settle disputes by peaceful means as embodied in Article 2, paragraph 3, of the Charter of the United Nations. Undoubtedly, lawful countermeasures are in principle bound to be “peaceful” by virtue of the prohibition of armed reprisals. The Special Rapporteur wonders, however, whether such a consideration dispels all doubts. Letting aside the question of the extent to which countermeasures would be compatible with that further requirement (of the same provision of Article 2, paragraph 3, of the Charter) that “international peace and security, and justice, are not endangered”,³⁶ the liberalization of countermeasures embodied in 1993 in the Drafting Committee’s formulation of article 12, paragraph 1 (a), would not be easy to reconcile with some of the existing dispute settlement obligations. The Special Rapporteur refers, for example, to such obligations as those spelled out in Article 33 of the Charter and those deriving, for any parties in a (real or alleged) responsibility relationship, from bilateral dispute settlement treaties or compromissory clauses. As regards the general Charter obligation, as spelled out in Article 2, paragraph 3, it is difficult to accept the notion that resort to a countermeasure *before* seeking a solution by one of the means listed in Article 33, paragraph 1, is compatible *de lege lata*, and should continue to be compatible *de lege ferenda* with that Charter provision.³⁷

65. The loss of credibility and effectiveness might affect even more seriously, in particular, treaties and compromissory clauses providing for the arbitration of legal disputes not settled by diplomacy (although one can hardly accept the notion that countermeasures qualify as part of diplomacy). A similarly negative effect would be created by the admissibility of prior recourse to countermeasures on the credibility and effectiveness of a jurisdictional link between the parties, deriving from their recognition “as compulsory *ipso facto* and without special agreement” of the “jurisdiction of the Court [ICJ] in all legal disputes concerning”: either “the existence of any fact which, if established, would constitute a breach of an international obligation”, or “the nature or extent of the reparation to be made for the breach of an international obligation”.³⁸

66. It should not be overlooked either that by referring to “relevant” treaties only, paragraph 1 (a) of the Drafting Committee’s draft article 12 of 1993 would put into question—if it ever became law—the credibility and effectiveness of more than just a part of the existing and future *conventional* instruments of amicable dispute settlement. It would also cast an “authoritative” doubt over any existing rules of *general* international law in the area. Assuming, for example, that paragraph 3 of Article 2 of the Charter had become a principle of customary international law, would the survival and further development

³⁴ This requirement was set forth in paragraph 1 (b) of the Special Rapporteur’s draft article 12 (see *Yearbook ... 1992*, vol. II (Part One), document A/CN.4/444 and Add.1–3, p. 22). According to the Drafting Committee’s formulation, the injured State would instead be relieved of any burden of prior notification of countermeasures (thus no chance of timely “repentance” being left for a law-breaker).

³⁵ See, for example, article 14 as proposed in 1992 and adopted by the Drafting Committee in 1993 (*Yearbook ... 1992*, vol. II (Part One), document A/CN.4/444 and Add.1–3, p. 35, and *Yearbook ... 1993*, vol. I, 2318th meeting, pp. 140–141).

³⁶ This point was covered in the Special Rapporteur’s draft article 12, paragraph 3 (see *Yearbook ... 1992*, vol. II (Part One), document A/CN.4/444 and Add.1–3, p. 22).

³⁷ No one could seriously argue that since Article 33, paragraph 1, refers to disputes “the continuance of which is likely to endanger the maintenance of international peace and security”, many disputes arising in the area of State responsibility would not be of such a nature as to fall under the general obligation in question.

³⁸ Art. 36, para. 2, of the ICJ Statute.

of such a principle not be affected by the provision of a codification convention authorizing any allegedly injured State to resort to countermeasures *ipso facto*, namely without any prior attempt at an amicable settlement? Does that principle have the merely negative function of condemning non-peaceful means? Does it not also contain—as the Special Rapporteur is inclined to believe—positive guidelines of a general scope with regard to the primacy of amicable means as well as “justice” and “international law”? Would an authorized disregard of available amicable means—means spelled out in the Charter itself—not affect the degree of justice of a solution? Assuming further that the survival of the general principle in question was not jeopardized, would paragraph 1 (a) of the text under review not jeopardize its further development?

67. The shortcomings of the “suspended” formulation of draft article 12 of part two are probably due, in addition to the great difficulty of the subject and the lack of available time, to the fact that that article was prepared prior to the consideration by the Drafting Committee of the proposals concerning the post-countermeasure dispute settlement provisions, namely, the provisions of part three of the draft articles. Debated in plenary at the same session of the Commission, the latter provisions were referred to the Committee rather late in that session, at a time when it was already debating draft article 12.

68. A further point that should not be overlooked in reviewing the subject matter at the forty-eighth session is the relationship between majority and minority views within the Drafting Committee. As clearly stated in 1993 in the report of the Chairman of the Committee, the majority of the Committee (as well as, the Special Rapporteur believes, the majority of the Commission) had pronounced itself in favour of the principle that prior recourse to dispute settlement means should be indicated in article 12 as a condition of lawful resort to countermeasures. It is to be wondered, therefore, how it happened that that majority’s position was not reflected in the formulation of the article. One explanation might be that the open-ended composition of the Committee, combined perhaps with the casual absence of some members, brought about a result in obvious contrast with the recognized majority view. The planning group should perhaps review, in the light of that experience, the drafting methods of the Commission.

3. POST-COUNTERMEASURE DISPUTE SETTLEMENT OBLIGATIONS (PART THREE)³⁹

69. With regard to post-countermeasure dispute settlement procedures, the Special Rapporteur finds somewhat satisfactory the provision of paragraph 2 of draft article 5 of part three as adopted on first reading at the forty-seventh session. By providing for a compulsory arbitration (on unilateral initiative) of any dispute arising following the adoption of countermeasures, that paragraph practically coincides with the second of the procedures that the Special Rapporteur had proposed in his draft of part three of the articles. The Special Rapporteur regrets, at the same time, that the same course was not adopted with

regard to the first of the procedures that he had proposed, namely conciliation.

70. The said “loss” from the Special Rapporteur’s point of view is not adequately compensated by articles 1–5, paragraph 1, of the adopted text of part three, to the extent that those provisions only envisage procedures which are neither really compulsory nor all-binding. Most of those provisions do nothing more than suggest to the parties to resort to settlement procedures that, in any event, they are perfectly free to use, regardless of any mention thereof in an international instrument such as a future convention on State responsibility.

71. The adopted system could be improved significantly in two ways.

72. One way would be to turn the conciliation procedure envisaged in article 4, as adopted, into a compulsory procedure to which the injured State should be bound to submit prior to adopting countermeasures. The Special Rapporteur suggests, *mutatis mutandis*, a system similar to that of the 1969 Vienna Convention⁴⁰ (arts. 65 and 66). The condition of prior resort to conciliation would not apply, of course, to urgent, provisional measures.

73. Another way would be to add to the article on conciliation, as adopted, a paragraph similar, *mutatis mutandis*, to paragraph 2 of article 5. In other words, where countermeasures had been resorted to by an allegedly injured State, the target State would be entitled to promote conciliation by unilateral initiative.

4. ISSUES OF INTERIM PROTECTIVE MEASURES

74. Something more needs to be said at this stage—mainly but not exclusively within the framework of the pre-countermeasure dispute settlement problem—on the role that may or should be played by urgent protective measures. One must distinguish, in this respect, between provisional measures indicated or ordered by a third-party body and provisional measures taken by the injured State unilaterally. The Special Rapporteur is concerned here with the latter.⁴¹

75. As regards unilateral interim protective measures, resort thereto by the injured State is contemplated in the Special Rapporteur’s 1992 draft article 12 as an exception to that State’s obligation of prior recourse to available dispute settlement means. The injured State’s right to adopt unilateral interim measures was restrictively qualified—under paragraph 2 (a) and (b) of the above-mentioned

⁴⁰ Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) (United Nations, *Treaty Series*, vol. 1155, p. 331).

⁴¹ As regards the former, the general rules on the subject are the well-known Article 41 of the ICJ Statute and Article 40 of the Charter of the United Nations, both provisions using the expression “provisional measures”. In the Special Rapporteur’s proposals, interim measures by a third-party procedure were envisaged mainly in part three, namely, within the framework of post-countermeasure dispute settlement obligations. Under the proposed draft articles of that part, the third party called to operate with regard to a post-countermeasure dispute should be empowered, by the future convention, to order provisional measures. This would apply to the conciliation commission as well as to the arbitral tribunal or ICJ. Third-party indications or orders of interim measures were also considered, together with unilateral interim measures, in the 1992 proposal for article 12, paragraphs 2 (a) and (b).

³⁹ See footnote 1 above.

article—by two conditions. One condition was that the object of the measures should be the protective purpose which is inherent in the concept of interim measures. This requirement would be met, for example, by a freezing—as distinguished from confiscation and disposal—of a part of the allegedly wrongdoing State’s assets; or by a partial suspension of the injured State’s obligations relating to customs duties or import quotas in favour of the allegedly law-breaking State. The second requirement was that the injured State’s right to adopt interim measures could only be exercised temporarily, namely “until the admissibility of such measures has been decided upon by an international body within the framework of a third-party settlement procedure”.⁴²

76. Considering that the concept of interim measures of protection might prove to be too broad and imprecise—as rightly (although inconsequentially) pointed out by some members of the Commission in 1992 in the course of the debate—for the injured State’s right not to be abused, some further precision could have been spelled out in the paragraph by the Drafting Committee. One of the main hypotheses—but not the only one—where the adoption of interim measures would be justified would be, of course, that of a continuing breach.

77. Much as the future convention on State responsibility may ultimately succeed in defining interim measures and the conditions under which they may be lawfully resorted to, a high degree of discretionary appreciation would inevitably remain with the injured State. Three factors, however, should help to ensure a reasonable measure of restraint on the part of the injured State’s authorities. One factor should be an accurate, bona fide appreciation, by the injured State, of the alleged wrongdoer’s response to its demand for cessation/reparation. This criterion was expressed more than once, with regard to any kind of countermeasures, in the Special Rapporteur’s 1992 proposals. It was inherent in the general concept of “adequate response” from the allegedly law-breaking State (in draft article 11); and it also appeared in draft article 12, paragraph 2 (a), in the condition of good faith (on the part of that same State) in the choice and implementation of available settlement procedures. A second factor could have been—always within the framework of the 1992 proposals—the condemnation, in draft article 12, paragraph 3, of any measure (including an interim measure) “not in conformity with the obligation to settle disputes in such a manner that international peace and security, and justice, are not endangered”.⁴³ The third and most important factor would have been represented, within the framework of the said 1992 proposals, by the post-countermeasure dispute settlement system of part three of the draft articles. Any third-party body called upon to deal with the dispute under that part three (conciliation commission, arbitral tribunal or ICJ) should of course be empowered not only to order interim measures but also to suspend any measures previously taken by the allegedly injured State.

78. The 1993 and 1994 formulation of draft article 12 does not take any account of urgent interim, provisional measures. The fact that interim measures were not taken into consideration is, in the Special Rapporteur’s view, to be regretted. In resuming the elaboration of the 1993–1994 formulation of article 12, the Drafting Committee should in 1996, in the Special Rapporteur’s view, take due account of the fact that if interim protective measures were exempted—as suggested—from the requirement of prior resort to dispute settlement means, that requirement would be far less restrictive of the prerogative of unilateral reaction than had been described by some participants in the debate on draft article 12 in the plenary, as well as in the Drafting Committee in 1992–1994. More considerate thought should be given, therefore, to the role of interim protective measures in the law of State responsibility. To dismiss the matter on the simple argument that interim measures are hard to define would not be appropriate, in the Special Rapporteur’s view.

79. There is much, in international law, which is vague or hard to define and can only be specified by the practice of States and international tribunals. In any case, the vagueness of the concept of urgent, interim protective measures was hardly a good argument against the prior resort to amicable means requirement that was being proposed. The vaguer the concept, the less severe would be the restriction of the allegedly injured States’ discretionary choice to resort to countermeasures. It is to be hoped that the matter will not be dropped again in 1996.

C. Proportionality

80. As indicated in his seventh report, the Special Rapporteur feels uneasy about the formulation of article 13 as adopted on first reading. While fully sharing responsibility for the presence, in that article, of a part of the reference to “the effects thereof on the injured State”,⁴⁴ the Special Rapporteur feels that the Commission should give more thought to that sentence and possibly cross it out.

81. As explained in the same report,⁴⁵ the degree of gravity of an internationally wrongful act—whether “delict” or “crime”—depends on a number of factors or elements to the variety of which the exclusive mention of the effects—and particularly of the effects upon the injured State—does anything but justice. Is it appropriate to limit oneself to the effects—and to the effects upon the injured State(s)—while leaving out such elements as: the importance of the breached rule; the possible presence of fault in any one of its various degrees (ranging from *culpa levissima* to wilful intent or *dolus*); and the effects upon the “protected object” such as human beings, groups, peoples or the environment? By singling out only the effects upon the injured State, does one not send to the interpreter (and States in the first place) a misleading message that may affect the proper evaluation of the degree of gravity for the purpose of verifying proportionality?

⁴² *Yearbook ... 1992*, vol. II (Part One), document A/CN.4/444 and Add.1–3, p. 22, para. 52.

⁴³ *Ibid.*

⁴⁴ *Yearbook ... 1995*, vol. II p. 13, (Part One), document A/CN.4/469 and Add.1–2, p. 13, para. 46.

⁴⁵ *Ibid.*, pp.13–14, paras. 47–54.

82. This preoccupation arises in particular with regard to *erga omnes* “delicts” and with regard to all “crimes”. In both areas there is far more than one injured State. Even more pointedly the problem arises in the case of “delicts” or “crimes” committed to the detriment of “protected objects” (human beings, groups, peoples or the environment) where an effect upon one or more injured State(s) may well be non-existent or very difficult to determine. The Special Rapporteur trusts that more thought will be given at some stage to the considerations developed in his seventh report.⁴⁶ The 1995 debate concentrated so much—and rightly so—on the crucial issue of the consequences of the internationally wrongful acts singled out as “crimes” in article 19 of part one that this important point on article 13 was not given all the consideration that, in the Special Rapporteur’s view, it deserves.

83. That the above-mentioned points had not been the object of sufficient consideration seems to be confirmed by the fact that the arguments against the proposed deletion of the clause “the effects ... on the injured State” were only those summed up in 1995 in the report of the Commission to the General Assembly.⁴⁷ After erroneously reducing the criticized deletion proposal to “the case of crimes”, that paragraph reads:

... It was emphasized that there were precedents which militated in favour of the retention of the clause in the case of delicts, such as the *case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*,⁴⁸ and that the lack of precedent in relation to “crimes”—a newly invented concept—in itself indicated a dearth of interest on the part of States.

84. Apart from the fact that the deletion was being proposed by the Special Rapporteur for both delicts and crimes, these arguments are beside the point. They seem to disregard completely: (a) the fact that the deletion was intended not to suppress the factor of gravity represented by the effect on the injured State but merely to avoid, by stressing that factor alone, neglecting a number of objective and subjective factors, the latter including *culpa* and *dolus* especially; (b) the fact that one of the main purposes of the proposed deletion was to take account particularly of *erga omnes* delicts as well as of all crimes, a hypothesis of which the *Air Service Agreement* case could hardly be considered as an example; (c) the fact that another major purpose of the proposed deletion was to deal with the case of delicts or crimes the victim of which was not—or not so much—the injured State(s) but some “protected object”, such as the law-breaking State’s own population or some common object or concern of all States.

⁴⁶ Ibid., paras. 50–54.

⁴⁷ Ibid., vol. II (Part Two), p. 54, para. 300.

⁴⁸ UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 417.

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

[Agenda item 3]

DOCUMENT ILC(XLVIII)/DC/CRD.3

Document on crimes against the environment, prepared by Mr. Christian Tomuschat, member of the Commission

[Original: English]
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Multilateral instruments cited in the present report

	<i>Source</i>
Convention respecting the Laws and Customs of War on Land (The Hague, 18 October 1907)	J. B. Scott, ed., <i>The Hague Conventions and Declarations of 1899 and 1907</i> , 3rd edition (New York, Oxford University Press, 1918), p. 100.
International Convention for the Regulation of Whaling (Washington, D.C., 2 December 1946)	United Nations, <i>Treaty Series</i> , vol. 161, p. 72.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	Ibid., vol. 75, pp. 31 et seq.
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	Ibid., p. 31.
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	Ibid., p. 85.
Geneva Convention relative to the Treatment of Prisoners of War	Ibid., p. 135.
Geneva Convention relative to the Protection of Civilian Persons in Time of War	Ibid., p. 287.
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977)	Ibid., vol. 1125, pp. 3 and 609.
International Convention for the Prevention of Pollution of the Sea by Oil (London, 12 May 1954)	Ibid., vol. 327, p. 3.
Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water (Moscow, 5 August 1963) (Partial Test Ban Treaty)	Ibid., vol. 480, p. 43.
Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, D.C., 3 March 1973)	Ibid., vol. 993, p. 243.
Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976)	Ibid., vol. 1108, p. 151.
Convention on Long-Range Transboundary Air Pollution (Geneva, 13 November 1979)	Ibid., vol. 1302, p. 217.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	Ibid., vol. 1833, p. 3.
Protocol to the Antarctic Treaty on Environmental Protection (Madrid, 4 October 1991)	<i>International Legal Materials</i> (Washington, D.C.), vol. XXX, No. 6 (November 1991), p. 1461.
United Nations Framework Convention on Climate Change (New York, 9 May 1992)	United Nations, <i>Treaty Series</i> , vol. 1771, p. 107.

Introduction

1. The Commission decided, in 1995, at its forty-seventh session, to establish a working group that would meet at the beginning of the forty-eighth session to examine the possibility of covering in the draft Code of Crimes against the Peace and Security of Mankind the issue of wilful and severe damage to the environment, while reaffirming the Commission's intention to complete the second reading

of the draft Code at that session in any event.¹ The present paper has been prepared to facilitate the task of the working group.

¹ See *Yearbook ... 1995*, vol. II (Part Two), p. 32, para. 141.

CHAPTER I

Historical review

2. The Commission intends to complete its work on the draft Code of Crimes against the Peace and Security of Mankind at its forty-eighth session in 1996. One of the issues that requires particular attention before the text can be finalized is whether causing damage to the environment should be included in the draft Code. Article 26 of the text adopted on first reading in 1991 provides:

An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced ...²

At the forty-seventh session in 1995, however, the Special Rapporteur, Mr. Doudou Thiam, expressed doubts as to whether it was advisable to go beyond the framework delineated at Nürnberg,³ which is now reflected in the provisions determining the jurisdiction 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 1991. He felt that the time was not yet ripe for a provision like article 26, given a definite lack of support by Governments for the proposal of the Commission.⁴ Before taking a decision on that issue, the Commission deemed it useful to hold a discussion in a small working group to be convened during the forty-eighth session.

A. The Nürnberg trial

3. At the Nürnberg trial against the major war criminals of Nazi Germany, no charges were brought against the accused on account of the damages which the natural environment had suffered during the Second World War. Indeed, the law regarding the conduct of hostilities, as it stood in the period between 1939 and 1945, did not contain any rules concerning the environment as such. Generally, the objective of humanitarian law was to protect the human person directly. Thus, the ban on “poison or poisoned weapons”, enunciated in article 23 of the Regulations concerning the Laws and Customs of War on Land annexed to the 1907 Convention respecting the Laws and Customs of War on Land, sought to prevent immediate threats resulting from the use of such weapons from military personnel engaged in fighting, but not to protect the soil or the air from dangerous long-term effects which, on their part, could at a later stage affect the health of human beings. The environment had not yet become a legal concept before the Second World War.

² For the text of the draft articles provisionally adopted by the Commission at its forty-third session, see *Yearbook ... 1991*, vol. II (Part Two), pp. 94–107.

³ Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European axis (United Nations, *Treaty Series*, vol. 82, p. 279).

⁴ See the thirteenth report of the Special Rapporteur, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/466, p. 35, para. 10.

B. The work done by the International Law Commission

4. It is not astonishing, therefore, that the Commission did not address the issue of environmental protection when it was asked by the General Assembly to draw the general lessons from the Nürnberg trial. The codification of the Nürnberg Principles⁵ reproduces faithfully the three categories of crimes over which the International Military Tribunal had jurisdiction, namely crimes against peace, war crimes and crimes against humanity. Likewise, the first draft Code of Offences against the Peace and Security of Mankind, adopted by the Commission in 1954,⁶ draws heavily on the Nürnberg precedent and does not attempt to explore new ground. This is all the more understandable since not even in the 1950s did there exist a general awareness of the necessity to take care of the natural environment. Nobody fully realized that such seemingly abundant goods as water, air and soil might be severely and perhaps even irreparably prejudiced by certain human activities.

5. A new stage was reached in 1986 when the Special Rapporteur suggested complementing the list of crimes against humanity with a provision making breaches of rules for the protection of the environment a punishable act. His proposed draft article 12 (Acts constituting crimes against humanity), in his fourth report,⁷ read as follows:

The following constitute crimes against humanity:

...

4. Any serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment.

In his commentary, the Special Rapporteur stressed that, within the framework of its project on State responsibility, the Commission had in the meantime included serious breaches of obligations regarding the safeguarding and preservation of the environment in the group of “international crimes”. Thus, it seemed to him obvious that the draft Code had to follow the example set by the Commission itself. In a brief comment, he stated:

It is not necessary to emphasize the growing importance of environmental problems today. The need to protect the environment would justify the inclusion of a specific provision in the draft code.⁸

6. In the ensuing discussion, broad support was manifested for such an enlargement of the traditional purview

⁵ Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (*Yearbook ... 1950*, vol. II, pp. 374–378, document A/1316, paras. 95–127). Text reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 12, para. 45.

⁶ The draft Code adopted by the Commission at its sixth session (*Yearbook ... 1954*, vol. II, pp. 150–152, document A/2693, para. 54) is reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18.

⁷ *Yearbook ... 1986*, vol. II (Part One), in particular pp. 85–86, document A/CN.4/398.

⁸ *Ibid.*, p. 61, para. 67.

of crimes against humanity.⁹ Only a few speakers cautioned against the new offence which, they felt, would not fit into a draft that was designed to address the most serious crimes threatening humankind.¹⁰ Some other members emphasized that there was a need for further clarification.¹¹ In particular, it was stated that the existence of a crime against humanity presupposed that a person causing damage to the environment had acted with intent.¹² Notwithstanding these reservations, the debate made clear that the great majority of the members of the Commission were in favour of setting forth a rule covering acts harmful to the environment.

7. Following the debate, the Commission requested the Special Rapporteur to submit, at the next session, revised draft articles recast in the light of the opinions expressed and the proposals made by members of the Commission and those expressed in the Sixth Committee of the General Assembly. The Special Rapporteur therefore submitted new proposals at the forty-first session of the Commission in 1989. Departing from the formulation he had previously used, he now suggested that in draft article 14 (Crimes against humanity), which appears in his seventh report,¹³ crimes affecting the environment should be couched in the following terms:

The following constitute crimes against humanity:

...

6. Any serious and intentional harm to a vital human asset, such as the human environment.

This time, fewer speakers commented on the draft provision. Mostly, the observation was made that, notwithstanding a considerable improvement in the drafting of the text, the formulations still lacked in rigour and needed to be phrased more precisely.¹⁴ Other members, however, fully approved of the proposals of the Special Rapporteur.¹⁵ At the end of the discussion, in any event, draft article 14 was sent to the Drafting Committee.

8. As is well known, the Commission adopted the draft Code of Crimes against the Peace and Security of Man-

⁹ See the debates on the topic in the Commission at its thirty-eighth session (*Yearbook ... 1986*, vol. I), in particular Mr. Flitan, 1958th meeting, para. 22; Mr. Francis, 1959th meeting, para. 8; Mr. Balanda, 1960th meeting, para. 38; Mr. Roukounas, 1961st meeting, para. 61; Mr. Jagota, 1962nd meeting, para. 79; Mr. Razafindralambo, 1963rd meeting, para. 29; Mr. El Rasheed, *ibid.*, para. 52; Mr. Díaz-González, *ibid.*, para. 66; and Mr. Barboza, 1967th meeting, para. 68.

¹⁰ See Sir Ian Sinclair, *Yearbook ... 1986*, vol. I, 1960th meeting, para. 17; and Mr. McCaffrey, *ibid.*, 1962nd meeting, para. 10.

¹¹ See Mr. Calero-Rodriguez, *Yearbook ... 1986*, vol. I, 1960th meeting, para. 24; Mr. Tomuschat, *ibid.*, 1961st meeting, para. 40; and Mr. Mahiou, *ibid.*, 1963rd meeting, para. 11.

¹² See Mr. Ogiso, *Yearbook ... 1986*, vol. I, 1961st meeting, para. 25; and Mr. Jacovides, *ibid.*, 1962nd meeting, para. 28.

¹³ *Yearbook ... 1989*, vol. II (Part One), document A/CN.4/419 and Add.1, p. 86.

¹⁴ See Mr. Tomuschat, *Yearbook ... 1989*, vol. I, 2096th meeting, para. 28; Mr. Mahiou, *ibid.*, 2097th meeting, para. 50; Mr. Sepúlveda Gutiérrez, *ibid.*, 2098th meeting, para. 22; Mr. Shi, *ibid.*, para. 36; and Mr. Calero-Rodriguez, *ibid.*, 2099th meeting, para. 47.

¹⁵ See Mr. Barsegov, *Yearbook ... 1989*, vol. I, 2097th meeting, para. 14; Mr. Solarí Tudela, *ibid.*, 2100th meeting, para. 16; Mr. Díaz González, *ibid.*, para. 26; Mr. Eiriksson, *ibid.*, 2101st meeting, para. 19; and Mr. Graefrath, *ibid.*, para. 33.

kind on first reading in 1991. Pursuant to an opinion that had emerged in the Drafting Committee, acts seriously prejudicing the environment were not listed as crimes against humanity, but were set apart to form a new, autonomous crime, whose wording has already been given (see paragraph 2 above). In the commentary to draft article 26 (Wilful and severe damage to the environment),¹⁶ it was clearly stated that the draft provision had borrowed most of its elements from article 55 of Additional Protocol I to the Geneva Conventions of 12 August 1949, but that its scope *ratione materiae* was larger in that it applied also in times of peace outside an armed conflict.

9. The following written comments on the draft articles as adopted by the Commission at its forty-third session in 1991¹⁷ were received from Governments:

Australia

50. The Commission's commentary refers to the possible inconsistency between the requirement in article 26 that the damage be caused or ordered to be caused wilfully and the possibility of a conviction under article 22, paragraph 2 (*d*), for employing methods not only intended but even likely or which "may be expected to cause" the damage. It was argued by some members of the Commission that the requisite *mens rea* in article 26 should be lowered so as to be consistent with article 22. This inconsistency could otherwise result in a deliberate violation of some regulations on protection of the environment for economic gain which caused widespread, long-term and severe damage, but did not cause that damage as the consequence of a will to do so, and did not therefore amount to criminal behaviour. Australia considers that this argument has merit and that if such violation may have been expected to cause the requisite degree of damage, then it should be treated as an international crime.

Austria

30. Since perpetrators of this crime are usually acting out of the motive to make commercial profit, intent should not be a condition for liability to punishment.

Belgium

26. Article 26 deals with wilful and severe damage to the environment. As noted in the relevant commentary, cases of damage by deliberate violation of regulations forbidding or restricting the use of certain substances or techniques if the express aim is not to cause damage to the environment are excluded from the scope of article 26. The commentary also indicates that article 26 conflicts with article 22, on war crimes, because under article 22 it is a crime to employ means of warfare that might be expected to cause damage, even if the purpose of employing such means is not to cause damage to the environment.

27. This difference between articles 26 and 22 does not seem to be justified. Article 26 should be amended to conform with the concept of damage to the environment used in article 22, since the concept of wilful damage is too restrictive.

Brazil

14. ... The crime of wilful and severe damage to the environment is also characterized without any reference to the international element.

¹⁶ *Yearbook ... 1991*, vol. II (Part Two), p. 107, para. (2) of the commentary to article 26.

¹⁷ See *Yearbook ... 1993*, vol. II (Part One), document A/CN.4/448 and Add.1, pp. 59 et seq.

Greece

3. With regard to draft articles 15 to 26, the Commission had identified 12 crimes which are of a particularly serious nature and which constitute an affront to mankind. The Government of Greece supports the inclusion of all these crimes in the draft Code. ...

Netherlands

71. The Government of the Netherlands is opposed to the inclusion of articles 23 to 26 in the draft Code, since none of them satisfies the criteria set out in part I of the commentary.

Nordic countries*

37. It is important to establish some form of international legal regime which deals with the question of liability in connection with transboundary environmental damage. From a substantive point of view, it is clear that the article does not have the degree of precision required for a penal provision. The matter should therefore be considered further.

* Reply submitted jointly by Denmark, Finland, Iceland, Norway and Sweden.

Paraguay

20. Given the current gravity of ecological problems, it was deemed appropriate that severe damage to the environment should be established as an offence under international criminal law.

Poland

43. It would be reasonable to supplement the expression “long-term” by adding the word “effects” at the end (“long-term effects”) because, as has been mentioned by the Commission, the expression “long-term” does not mean the period of time in which the damage occurs, but the long-term nature of its effects.

44. The observations made above in relation to the term used in article 25 (“on a large scale”) apply in the same manner to the expressions “widespread” and “severe”, which determine the character of damage to the environment in article 26.

45. Article 26 conflicts with article 22 on war crimes that also deals with protection of the environment (para. 2 (d)). Under the provisions of this article it is also a crime when an individual employs such methods or means of warfare that might “be expected to cause” damage, even if the purpose of using such methods has not been to cause damage in the environment, whereas article 26 is based on the concept of intention and will (“who wilfully causes”).

United Kingdom of Great Britain and Northern Ireland

31. The origin of this provision lies in article 19 of the Commission’s draft articles on State responsibility, where its inclusion proved controversial. It is no less so here, since there is certainly no general recognition of “widespread, long-term and severe damage to the natural environment” as being an international crime, much less a crime against the peace and security of mankind. Environmental damage may give rise to civil and criminal liability under municipal law but it would be extending international law too far to characterize such damage as a crime against the peace and security of mankind.

United States of America

24. This article, dealing with damage to the environment, is perhaps the vaguest of all the articles. The article fails to define its broad terms. There is no definition of “widespread, long-term and severe damage to the natural environment”. Similarly, the term “wilfully” is not defined, thereby creating considerable confusion concerning the precise volitional state needed for the imposition of criminal liability. The term “wilfully” could simply mean that the defendant performed an act voluntarily, i.e. without coercion, that had the unintended effect of causing

harm to the environment. “Wilfully” could also be construed to impose criminal liability only when the defendant acted for bad purpose, knowing and intending to cause serious harm to the environment. As presently drafted, the meaning of “wilfully” is subject to a variety of interpretations. This confusion is magnified by the draft Code’s failure throughout to specify the necessary mental and volitional states needed for the imposition of criminal liability.

25. Moreover, as with the other articles, this article fails to consider fully the existing and developing complex treaty framework concerning the protection of the environment.*

* See, for example: United Nations Framework Convention on Climate Change; Convention on Long-Range Transboundary Air Pollution (supplemented by various protocols); Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques; Convention on International Trade in Endangered Species of Wild Fauna and Flora; International Convention for the Prevention of Pollution of the Sea by Oil; International Convention for the Regulation of Whaling.

Uruguay

6. Despite this reservation, the Government of Uruguay deems it relevant, in connection with article 26, to put forward at this stage some comments and observations in accordance with what has been stated by its representatives in various international forums, and especially by the President of the Republic, Luis Alberto Lacalle, in the address delivered on 13 June 1992, at a plenary meeting of the United Nations Conference on Environment and Development.*

7. Uruguay believes that an effective defence of the environment is possible only within the framework of international cooperation, through joint action by all States and the conclusion of international instruments setting forth specific, legally binding obligations and conferring jurisdiction on national and international courts, as the case may be, making it possible to hold perpetrators of unlawful acts against the environment effectively accountable.

8. In this connection, the Government of Uruguay has summarized its views, at the national level, in the bill entitled “Prevention of environmental impact”, which has been submitted to the legislative authorities for consideration, and, at the international level, in the document entitled “Guidelines for a draft international environmental code”, which contains a chapter specifically devoted to civil and criminal liability, that was submitted to the General Assembly at its forty-seventh session.

9. With specific reference to article 26 as drafted by the Commission and the characterization of the offence envisaged in this provision, on the basis of the observations outlined above, the Government of Uruguay believes that, given the nature of the consequences of the conduct—“widespread, long-term and severe damage to the natural environment”—the requirement of wilfulness should be deleted and replaced by the principle of liability which, in the exceptional case of the environment, should encompass not only instances of wilfully caused damage (wilful wrongs), but also damage caused through negligence or lack of precaution (culpable wrongs), since the interest which it is proposed to protect is, in the final analysis, the survival of mankind.

10. The Government of Uruguay also believes that it would be appropriate, from the standpoint of rule-making techniques, to follow the methodological approach in several draft articles and to prepare a descriptive enumeration of the principal acts which make up the envisaged offence against the environment for which those responsible are to be punished, be they individuals, corporate managers or representatives of a State.

10. The recent proposal of the Special Rapporteur to delete article 26 was extensively discussed by the General Assembly during its fiftieth session in October 1995. A great majority of States argued in favour of keeping a provision dealing with crimes against the environ-

* Report of the United Nations Conference on the 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.93.1.8 and corrigenda), vol. III: Statements Made by Heads of State or Government at the Summit Segment of the Conference, pp. 227 et seq.

ment.¹⁸ Only a few delegations stated that article 26 was inappropriate as an element of the draft Code of Crimes against the Peace and Security of Mankind,¹⁹ while others expressed doubts²⁰ as to the wisdom of establishing such a crime under the draft Code or requested additional clarifications.²¹ There were also voices that supported the decision of the Commission to set up a working group mandated to look more closely into the matter.²² It should be additionally mentioned though, that some delegations praised the Commission in general terms for reducing the number of crimes from 12 to 6.

C. Work done by other United Nations bodies

11. The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana from 27 August to 7 September 1990, drew in general terms attention to the need to protect the environment not only with administrative measures and adequate rules on liability under civil law, but also with criminal sanctions. However, it did not specifically address the issue of making crimes of particular gravity punishable under international law regimes. Its focus was directed on penal sanctions under national criminal law, provided for in either domestic statutes or in international conventions. Consequently, the notion of international crimes governed in their entirety by international law was not mentioned as one of the possible avenues to be pursued.

12. The Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,²³ held in Cairo from 29 April to 8 May 1995, organized a two-day workshop on the topic “Environmental protection at the national and international levels: potentials and limits of criminal justice”. Again, the inclusion of crimes against the environment in the draft Code of Crimes against the Peace and Security of Mankind was not specifically inquired into. Yet, one of the conclusions set out in the final

report merits special attention. It was said that “A crime against the environment should be viewed as a crime against the security of the community”.²⁴

D. Work done by private bodies (learned societies)

13. In 1992 the International Association of Penal Law (AIDP) again took up the topic of crimes against the environment after having already dealt with the theme in 1978 and 1979. A preparatory colloquium to the XVth International Congress on Penal Law, devoted to such crimes, was held in Ottawa from 2 to 6 November 1992.²⁵ Following these recommendations to a large extent, the Congress itself, which was held in Rio de Janeiro, Brazil, from 4 to 10 September 1994, adopted a resolution which dealt extensively with crimes against the environment.²⁶ Although the main body of the resolution concerned criminal prosecution under national law, two of the paragraphs touched directly upon the issues discussed in this paper. Paragraph 23 read:

Core crimes against the environment affecting more than one national jurisdiction or affecting the global commons outside any national jurisdiction should be recognized as international crimes under multilateral conventions.

An additional note was added to this request in paragraph 28:

In order to facilitate the prosecution of international crimes, in particular crimes against the global commons, the jurisdiction of the international court proposed by the International Law Commission and currently being considered by the General Assembly of the United Nations should include crimes against the global commons.

¹⁸ Guatemala, Bulgaria, Croatia, Switzerland, Chile, Slovenia, Belarus, Trinidad and Tobago, Morocco, Egypt, Jamaica, Burkina Faso, Malaysia, Italy and Bangladesh (see *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, respectively, 13th meeting, para. 83 (A/C.6/50/SR.13); 14th meeting, para. 23 (A/C.6/50/SR.14); *ibid.*, para. 34; *ibid.*, para. 46; 16th meeting, paras. 11 and 21 (A/C.6/50/SR.16); 17th meeting, para. 53 (A/C.6/50/SR.17); 19th meeting, para. 1 (A/C.6/50/SR.19); *ibid.*, para. 28; 20th meeting, para. 55 (A/C.6/50/SR.20); 21st meeting, para. 29 (A/C.6/50/SR.21); 22nd meeting, paras. 10 and 23 (A/C.6/50/SR.22); *ibid.*, para. 48; 23rd meeting, para. 4 (A/C.6/50/SR.23); *ibid.*, para. 67; and 25th meeting, para. 4 (A/C.6/50/SR.25), and corrigendum).

¹⁹ France, Brazil and the Czech Republic (see *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, respectively, 13th meeting, para. 31 (A/C.6/50/SR.13); *ibid.*, para. 39; 15th meeting, para. 20 (A/C.6/50/SR.15), and corrigendum).

²⁰ United States of America and New Zealand (see *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, respectively, 13th meeting, para. 64 (A/C.6/50/SR.13) and 18th meeting, para. 15 (A/C.6/50/SR.18), and corrigendum).

²¹ Germany (see *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 15th meeting, para. 85 (A/C.6/50/SR.15), and corrigendum).

²² Hungary and Lebanon (see *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, respectively, 15th meeting, para. 95 (A/C.6/50/SR.15) and 25th meeting, para. 16 (A/C.6/50/SR.25), and corrigendum).

²³ *Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cairo, 29 April–8 May 1995* (United Nations publication, document A/CONF.169/16/Rev.1, paras. 355–369).

²⁴ *Ibid.*, para. 358.

²⁵ See Committee of experts on the protection of the environment through criminal law, *AIDP Preparatory Colloquium on the Application of the Criminal Law to “Crimes against the Environment”*, Recommendation (document PC-EN (92) 21, Council of Europe, 1992).

²⁶ Reproduced in *International Review of Penal Law*, vol. 66, Nos. 1/2 (Paris, 1995), pp. 52–53.

CHAPTER II

The constituent elements of a crime against the environment

A. General features of crimes against the peace and security of mankind

14. The first question to be posed and to be answered is whether causing harm to the environment meets the criteria that have been generally identified as characterizing crimes against the peace and security of mankind. In 1991, the Commission refrained from drawing up a draft article specifying the particular characteristics of such crimes. Nevertheless, in its commentary on article 1 it set forth its understanding of the essential features that a human act or activity must fulfil in order to come within the purview of the draft Code of Crimes against the Peace and Security of Mankind.²⁷ In the first place, the criterion of seriousness is mentioned. Seriousness, it is stated, can either be deduced from the nature of the act in question or from the extent, the magnitude of its effects. It would seem to stand to reason that, as such, seriousness is a relative notion. It must be measured within a specific context. Rightly, therefore, the Commission goes on to say that the protected object needs to be taken into account. It is, explains the commentary, the very foundations of human society which the draft Code seeks to shield from grave attacks. If this is the case, then the parallelism of article 19 of part one of the draft articles on State responsibility and the draft Code constitutes a logical inference from a common premise. Under the draft articles, States as juridical entities may incur responsibility if they breach fundamental rules of conduct securing a civilized state of affairs in international relations. Additionally, for the same acts, those who hold leadership positions in the governmental machinery of such States may be made accountable in their individual capacity,²⁸ without prejudice, of course, to the responsibility of other persons not occupying any official position. There is no denying the fact that rules imposing obligations upon States must be framed differently from rules that address individuals. Notwithstanding this technical difference, the substantive background is the same. In both instances, the foundations of the international community are at stake.

15. There can be no doubt that at least some types of injury to the environment are susceptible of meeting the criteria just recalled. The Gulf war has amply illustrated the dangers which should be borne in mind. After the Iraqi troops had ignited many of the Kuwaiti oil wells, it was feared that for months the country would have to live under a thick cloud of fumes and soot. Fortunately, these fears have proved to be unfounded; yet the damage actually sustained by the fauna and flora in the affected region is bad enough. The ozone layer is another good on whose continued existence the survival of mankind is

dependent. Should this protective belt of the atmosphere disappear, life on earth would become impossible. Lastly, reference may be made to nuclear pollution of the globe. Today, it has become clear what disastrous consequences contamination of a specific region or of the entire surface of the earth might entail for humankind.

16. Nobody can deny that the examples just provided illustrate the seriousness which may characterize damage to the environment in certain instances which, of course, require to be carefully defined. As far as the constituent elements of war crimes and crimes against humanity are concerned, in general, human life is the parameter against which gravity is measured. However, the 1907 Regulations concerning the Laws and Customs of War on Land already protected essential human assets such as enemy property in general (art. 23, para. (g)) and, specifically, undefended towns, villages, dwellings or buildings (art. 25). Other examples of war crimes whose direct target is not a human being can be found in article 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (“extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”), as well as in article 85 of Additional Protocol I to the Geneva Conventions of 1949 (paras. 3 (c)–(d) and 4 (d)). The essential thrust of these prohibitions is also reflected in the work of the Commission. The codification of the Nürnberg Principles,²⁹ adopted by the Commission at its second session in 1950, lists among the category of war crimes “plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity” (principle VI, para. (b)). Employing a different method, the 1954 draft Code of Offences against the Peace and Security of Mankind referred in general to “Acts in violation of the laws or customs of war”.³⁰ Although in 1991 the Commission took care not to follow automatically the Geneva humanitarian instruments in defining the specific category of war crimes constituting at the same time crimes against the peace and security of mankind, it did not confine its proposed rules to direct attacks on human life. In draft article 22, paragraph 2 (e)–(f), massive destruction of civilian assets as well as deliberate attacks on assets of exceptional religious, historical or cultural value are also characterized as war crimes under the draft Code.

17. Reference may also be made to the crime of aggression, the core element of the draft Code as it presently stands. Aggression does not as such entail loss of human life. War will mostly cause innumerable victims not only among combatants, but also among the civilian population. Aggression, however, can also be carried out through threats of employing force which leave the target State no choice but to surrender in view of the disparity of the military potential on both sides. In such cases, aggres-

²⁷ *Yearbook ... 1987*, vol. II (Part Two), p. 13, para. 66, para. (2) of the commentary to article 1.

²⁸ For a view to the contrary see V. P. Nanda, “Commentary on article 26”, *Commentaries on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind*, M. C. Bassiouni, ed. (Toulouse, Erès, 1993), p. 291.

²⁹ See footnote 5 above.

³⁰ See footnote 6 above.

sion essentially constitutes an infringement of the right of self-determination of the victimized people.

18. It can be concluded, therefore, that seriousness as the basic concept underlying the entire draft does not necessarily mean harmful to human life in a direct sense as an attack on bodily integrity. Rather, an act may be—and has indeed been—characterized as sufficiently grave for the purposes of the draft Code if its direct effect or its long-term repercussions undermine the substantive bases of life in conditions of good health and individual and collective dignity. Grave and heavy damage to the environment meets these criteria. Although such damage, by definition, does not immediately and directly destroy human life, its long-term effects may wreak havoc in the most diverse ways. Human beings may suffer genetic injury, entire regions may become uninhabitable or, in the worst of all imaginable scenarios, humankind may become threatened with extinction. In every instance of severe damage to the environment, therefore, a chain of events may be set in motion which is in addition likely to threaten international peace and security inasmuch as the affected populations will attempt to assert their right to life by all means at their disposal. To sum up, together with the criterion of seriousness the required disruptive effect on the foundations of human society is clearly present.

19. It might additionally be asked whether attacks on the environment have the necessary moral underpinnings to be elevated to the rank of crimes against the peace and security of mankind. That human life may not be taken away or that foreign States may not be attacked is nowadays deeply rooted in the conscience of mankind—although not generally respected and observed. As already stated earlier, the need to protect the environment was perceived only in the period following the “new international order” ushered in by the Charter of the United Nations, the first worldwide signal having been sent out by the United Nations Conference on the Human Environment, held in Stockholm from 5 to 16 June 1972. However, notwithstanding the relatively short time during which efforts have been undertaken at the universal level to preserve the environment, there can be no doubt nowadays that humankind has become fully aware of the precariousness of its bases of existence. Suffice it to refer to the resolutions of the United Nations Conference on Environment and Development, held at Rio de Janeiro, Brazil, from 3 to 14 June 1992, where universal consensus was reached on the necessity to protect the human environment so that the earth might remain a place where future generations can live under the same natural conditions as their ancestors. Any major attack on the environmental media is today strongly repudiated by the entire international community. Hence, the inclusion of acts damaging the environment in the draft Code of Crimes against the Peace and Security of Mankind would not lack the required moral and political support.

B. Need for inclusion in the draft Code of Crimes against the Peace and Security of Mankind

20. It is not enough to state that there exists a clearly identifiable need to proscribe attacks on the environment by making them acts punishable under criminal law. Additionally, it has to be asked whether environmental crimes

cannot be adequately dealt with by domestic jurisdictions or in accordance with the methods and procedures of international cooperation in criminal matters as provided for in a dense multilateral network of international treaties. These traditional methods and procedures have many advantages. First of all, they do already exist. No additional monies are required to establish new institutions or devise new mechanisms. Secondly, application of the provisions of national criminal codes may sometimes be more effective than treating an offence as a crime against the peace and security of mankind, given the fact that common rules of criminal law lack the political element which is inherent in the draft Code. Lastly, it might be argued that massive pollution of the environment invariably constitutes a consequence of armed conflict, not requiring any new treatment in view of the existence of article 55 of Additional Protocol I to the Geneva Conventions of 1949 and the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention). And yet, many situations can be conceived which cannot be dealt with in a satisfying manner within the framework of the existing substantive and procedural rules.

21. The draft Code of Crimes against the Peace and Security of Mankind is intended to strike at the worst crimes, those which affect the foundations of human society. While it is clear that under normal conditions of peaceful coexistence even phenomena of massive pollution or other degradation of the environment can easily be fitted into the available network of cooperation in criminal matters, this would not be the case any more if damaging the environment formed part of a general strategy on the part of a Government or a private group to exert terrorist pressure on the world community. It is precisely in such situations of a general breakdown of law and order and a sense of responsibility towards humankind that the draft Code is called into operation. The draft Code is certainly not necessary for states of normalcy, which should be taken care of pursuant to routine patterns that have long since stood the test of time. However, exceptional situations do require exceptional responses. To maintain that such situations should be tackled only after they have arisen would be short-sighted. What happened during the Gulf war has demonstrated what can become an atrocious reality within the context of an industrialized world.

22. There is no need specifically to emphasize the fact that article 55 of Additional Protocol I to the Geneva Conventions of 1949 applies solely to international armed conflict. Additional Protocol II, on the other hand, relating to the protection of victims of non-international armed conflicts, does not set forth a similar provision although widespread, long-term and severe damage to the environment may also be caused during armed conflict that does not reach an international dimension. Here, too, the probability that the authorities of the country concerned could impose adequate sanctions on the wrongdoers is extremely low. Lastly, the possibility of grave damage to the environment is not confined to armed conflict. Unfortunately, technological progress has not only increased the opportunities for exploiting more rationally and economically the resources provided by nature, but also for destroying the life supports upon which humankind is dependent. Private terrorist groups do not fall under the

Geneva rules. Nonetheless, it would be futile to believe that environmental terrorism could be tackled under the ordinary rules of criminal law.

23. To be sure, article I of the ENMOD Convention prohibits each State party from engaging not only in military, but also in “any other hostile use of environment modification techniques”. Additionally, States are required to suppress any activity in violation of this ban, occurring anywhere under their jurisdiction (art. IV). But the ENMOD Convention does not establish the deterrent of individual criminal responsibility. It is confined to providing for a useful mechanism of supervision and complaints to the Security Council (art. V). These institutional responses to allegations of non-fulfilment of the obligations undertaken should by no means be underrated. And yet they would prove largely inadequate in a case in which, unfortunately, a worst-case scenario had to be dealt with where all the preventive mechanisms of the Convention had failed.

C. The issue of protection: the environment

24. While the first proposals submitted by the Special Rapporteur had identified the “human environment” as the object to be protected by a provision regarding environmental crimes, article 26 of the draft Code as adopted in 1991 talks about the “natural environment”. This change alone makes clear that it is imperative precisely to determine the scope and meaning of the term “environment”, no matter how difficult such a definition may be. As it would appear at first glance, “human environment” is the more extensive notion. However, it should not be overlooked that the Special Rapporteur, when he first introduced a draft provision on crimes against the environment, was guided by article 19 of the Commission’s draft articles on State responsibility where indeed the concept of “human environment” is used (para. 3 (d)).³¹ Reading the commentary on that provision, one finds that the Commission had nothing else in mind than the natural environment that surrounds the human being and conditions its life. No example is given other than pollution of the atmosphere or the seas.³² It was obviously not the intention of the authors of draft article 19 to include elements of the cultural environment of humankind in the scope of the provision. Therefore, it can be concluded that “human” and “natural” environment are meant to have the same connotation. In order, however, to eschew any possible kind of confusion, the word “natural” should be preferred, as indeed chosen in 1991 when the draft Code was adopted on first reading. No one will deny that the cultural heritage of human societies is also in need of protection against arbitrary attacks. Yet, such attacks, if they are at all to be included in the draft Code, are more appropriately dealt with under other headings. The 1991 draft Code provides for the punishment of acts of destruction directed against property of exceptional religious, historical and cultural value in article 22, paragraph 2 (f). It does not appear that an extension of this legal umbrella to situations outside armed conflict is necessary.

³¹ *Yearbook ... 1976*, vol. II (Part Two), p. 96.

³² *Ibid.*, p. 121, paragraph (71) of the commentary to draft article 19.

25. The natural environment comprises manifold components. The environmental media like air, water and soil constitute one of these components. However, the living resources of the globe might be added. Many writers also understand by “environment” the fauna and flora in their entirety. Reference may be made to Bassiouni who, in one of his works, suggested setting forth a crime of environmental protection, defining the term “environment” in this connection as follows:

the term “environment” means the land, air, sea, the fauna and flora of the seas, rivers, and those species of animals deemed endangered of extinction.³³

The XVth International Congress of Penal Law, held in Rio de Janeiro, Brazil, in 1994, adopted this approach. In its resolution on crimes against the environment,³⁴ it stated under the heading “General principles” the following (sect. 1):

Environment means all components of the earth, both abiotic and biotic, and includes air and all layers of the atmosphere, water, land, including soil and mineral resources, flora and fauna, and all ecological inter-relations among these components.

26. Similarly, numerous legal instruments can be found which rest on a broad interpretation of the notion of environment. In a curious manner, the 1982 United Nations Convention on the Law of the Sea indicates its understanding of the environment by setting out, in the very first article labelled “Use of terms and scope”, what for the purposes of the Convention “pollution of the marine environment” should mean (para. 4):

“[P]ollution of the marine environment” means the introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries) which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

Thus, it is not primarily the waters of the seas that are protected; rather, the intention is to preserve the living resources of the oceans.

27. In other instances, the environment is understood as the physical framework within which life may develop. Thus, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana from 27 August to 7 September 1990, called upon Member States to enact and enforce national criminal laws designed to protect “nature and the environment”. In more recent instruments, care has been taken not just to juxtapose the two elements, but to highlight the link existing between them. Mention should be made, in the first place, of the Protocol to the Antarctic Treaty on Environmental Protection, which defines in article 2 the objectives of the Protocol as follows: “The Parties commit themselves to the comprehensive protection of the Antarctic environment.” Article 3 goes even further by including in the scope of protection Antarctica’s “wilderness and aesthetic values and its value as an area for the conduct of scientific research”. It goes without saying that

³³ *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (Dordrecht, Martinus Nijhoff, 1987), p. 170.

³⁴ Reproduced in *International Review of Penal Law* (footnote 26 above), p. 52, para. 21.

such an additional enlargement of the substantive field of application could not be justified within the context of the draft Code of Crimes against the Peace and Security of Mankind.

28. In article 20 of its draft articles on the law of the non-navigational uses of international watercourses,³⁵ the Commission, too, made it clear that the duty of protection and preservation has as its object essentially the ecosystems of international watercourses.

29. In trying to find an adequate formula, one should not lose sight of the fact that the Code of Crimes against the Peace and Security of Mankind, once in force, would have as its objective to furnish the international community with a legal instrument only for the worst occurrences with which national jurisdictions are unable to deal. Therefore, the ambition of the Commission, if it wishes to stick by the decision it took in 1991, cannot be to establish a comprehensive instrument, suitable to be applied in each and every instance of damage to the environment. The draft Code, to give a concrete example, is not suitable as a tool to protect individual species from extinction. Furthermore, although there is a modern tendency to distance oneself from an anthropocentric approach, attempting to preserve existing ecosystems as such, the draft Code remains committed to maintaining peace and security among human beings. The Commission, therefore, is fully justified in making deliberate choices, narrowing the area of application of a provision on crimes against the environment to those instances where indeed vital human interests are adversely affected. To be sure, and this should be repeated, protection of the environment is not tantamount to protection of human life in a direct sense. Protecting the environment, even through penal law as a defence of last resort, means securing the survival of humankind from a long-term perspective. The human being is the ultimate beneficiary of the efforts undertaken, but the disruptive effect of damage to the environment does not necessarily need to be measured in terms of injury to human life and physical integrity.

30. To sum up, the conclusion seems to be warranted that by "environment" the Commission, for the purposes of the draft Code, should understand the supports that bear human life as well as fauna and flora, namely water, air—including the atmosphere with its different layers—and soil, together with the dependent and associated ecosystems. Generally, for environmental harm to become relevant under the draft Code, the condition should be that it not only damage the three media in an abstract fashion, but also and at the same time the ecosystems related thereto.

D. Harm

31. There is no need for harm to be capable of being assessed in economic terms. It may best be described as a disturbance of the natural patterns or rhythms of life. Even if an uninhabited region is contaminated by nuclear fallout, the situation thereby produced does qualify as harm. Crimes against the environment are crimes that adversely

affect the long-term prospects of human survival. They are not designed to secure commercial profits.

E. The characterization of harm: international concern

32. The next question that arises is whether environmental harm should be taken into account as such or whether it should be qualified by an international element. Three different categories may be distinguished. The classical configuration comprises those instances where transboundary damage has been caused. Secondly, an international element is present per se if and when the commons of humankind have been affected. Things are more difficult if the short-term consequences of the act concerned are confined to the territory of one specific State. As far as water and air are concerned, such a territorial departmentalization is unthinkable. Water and air move freely around the globe, with some minor exceptions for confined groundwater reserves. However, an issue may arise with regard to soil or to living resources linked to soil, in particular forests. Major destruction of forests can in the first place be equated with self-mutilation or even self-destruction of the national community concerned. In the long run, however, the harmful effects of such actions will inevitably spread beyond national boundaries. Moreover, as the development of the human rights idea has shown, matters may grow to dimensions of international concern even if the relevant events take place in national territory. Proceeding from this philosophy, the international community should not turn away from occurrences which may threaten the bases of existence of entire populations, solely on the ground that the immediate and direct effects do not transcend the territory of a given State. This proposition is not intended to brush aside national sovereignty. It remains beyond doubt that the draft Code should not interfere with routine matters, nor even with grave situations that can be dealt with in traditional ways of inter-State cooperation. It would come into operation solely in extreme circumstances with which a nation would be unable to cope on the strength of its own forces.

F. The characterization of harm: the requirement of seriousness

33. It does not appear that any voice has questioned the wisdom of qualifying damage to the environment by criteria that clearly indicate that only harm of exceptional dimensions shall be taken into account. The wording of the 1991 draft article, which has followed the precedent of article 55 of Additional Protocol I to the Geneva Conventions of 1949, fully meets this requirement. The three attributes concerned—namely widespread, long-term and severe—emphasize unequivocally the necessary gravity of the actions which may come within the purview of the draft Code. Hence, there is no need to revise the former text in this respect.

³⁵ *Yearbook ... 1994*, vol. II (Part Two), pp. 89 et seq., para. 222.

G. The crime against the environment: an autonomous crime

34. Clarification needs to be sought on whether crimes against the environment require a violation of applicable legal standards or whether criminal sanctions might be imposed in the absence of any such standard. From the outset, it should be clear that individual criminal responsibility under the draft Code cannot be dependent on the domestic law of any individual country. Since Nürnberg, it is the guiding idea of such responsibility that it is brought into being directly by virtue of international law, independently of any rules set forth by national law-making bodies. This basic principle was also expressed by the Commission in article 2 of the 1991 draft Code. National law can under no circumstances justify inflicting grave damage on the environment.

35. It is a different question altogether whether criminal responsibility under the draft Code presupposes the violation of applicable international standards as embodied in treaties or resolutions adopted by competent international organizations. It may be recalled that the United Nations Convention on the Law of the Sea refers in many of its articles to such international standards. However, the draft Code is not meant to enforce international environmental legislation either agreed upon by contracting parties or enacted by treaty bodies duly authorized for that purpose. Draft article 26, as adopted by the Commission on first reading, rests on the premise that certain actions, inasmuch as they target the foundations of human society, must be deemed to be unlawful *per se*, without having to be prohibited by specific norms. Indeed, international environmental law does not yet constitute a comprehensive edifice dealing with all possible acts that threaten or destroy environmental goods or interests. Making responsibility under the draft Code dependent on the existence of specific environmental norms would therefore create the risk of leaving widely gaping lacunae in the intended scope of draft article 26.

36. This conclusion is buttressed by the results of the XVth Congress of International Penal Law held in Rio de Janeiro, Brazil, from 4 to 10 September 1994. In paragraph 21 of the concluding resolution, the International Association of Penal Law recommends that so-called “core crimes”, those of the utmost gravity, should not be made dependent on a breach of other rules than the relevant provisions of criminal codes. This statement has its origin in a report drawn up by a group of experts which the Association had convened for a meeting to prepare the XVth Congress. According to this report, there was a need to specify core crimes, i.e. crimes which are *sui generis* and do not depend for their content on other laws.³⁶ If this holds true for crimes under domestic statutes, it is all the more persuasive for crimes under the draft Code of Crimes against the Peace and Security of Mankind, whose gravity is such that everyone must be aware of their incompatibility with the basic tenets of human society. For this reason also, some of the critical observations formulated by the United States of America vis-à-vis draft article 26 adopted by the Commission in 1991, do not seem to be well founded. The United States complained of the

failure by the Commission “to consider fully the existing and developing complex treaty framework concerning the protection of the environment”.³⁷ The Commission has never overlooked this emerging trend. However, all the treaties which were mentioned in that connection rely for their punishment on national legislation. This is not satisfactory with regard to the instances under review here.

H. *Mens rea*

37. A more difficult problem is posed by the mental element to be required. The Commission has not yet adopted a specific provision dealing with this issue. It may be assumed, however, that hitherto a tacit understanding had prevailed to the effect that generally crimes against the peace and security of mankind can be committed only intentionally, not by negligence. This was said explicitly for crimes against the environment in the text of draft article 26 as adopted in 1991, where the term “wilfully” was used. To be sure, a requirement of having to prove intent may more often than not impose a heavy burden on prosecutors. And yet, with regard to crimes to be included in the draft Code no other solution seems to be possible. The objective of the draft Code is not to strike at crimes that are—unfortunately—perpetrated almost every day for gainful purposes. It is meant to deal with situations that cannot be handled in the traditional ways by the existing machinery for the prosecution of criminal acts. In such instances, intent will generally be present.

38. In its comments on article 26 of the draft Code as adopted in 1991, the United States of America criticized the term “wilfully” as utterly imprecise. In fact, it cannot be denied that “wilfully” is susceptible of a variety of interpretations. Three different stages may be discerned.

39. As a minimum, “wilful” signifies that the person concerned must have acted voluntarily, without, however, necessarily knowing what the consequences of his or her conduct would be so that any harm caused could be an unintended result. Here, the threshold would be much too low. Without ignoring the fact that it may be a convenient defence for an accused in trials concerning environmental crimes to argue that he or she was unaware of the disastrous consequences of the actions underlying the charges, it should be repeated once again that the philosophy of the draft Code is not an expansive one. “Wilful” in this elementary sense, therefore, cannot be relied upon as an acceptable interpretation.

40. Another clear situation arises when a person not only knows that he or she is committing a dangerous act, but foresees all the injurious consequences that would be entailed by the act and approves of these consequences, being motivated by a definite will to cause serious harm to the environment. There can be no doubt that under such circumstances a person can be held criminally accountable.

41. Somewhat more difficult to evaluate is a middle group of cases where a person acts in full knowledge of the consequences of his or her actions, without having the intention, however, of causing harm to the environment,

³⁶ *International Review of Penal Law* (footnote 26 above), p. 52, para. 21.

³⁷ See footnote 17 above.

which then occurs as an inevitable consequence of those actions whose direct purpose is a different one. Here, the draft Code would be too lenient if it abstained from providing for responsibility. In particular, terrorists could argue that their true aim was a political one and that, unfortunately, in order to further a paramount objective of justice they had to employ methods which they would also have found unacceptable in other circumstances. On this issue, the draft Code should be placed under the general philosophy of humanitarian law, which forms a constituent element of the draft Code. There are certain acts which cannot be allowed under any circumstances and for which international law, therefore, cannot grant a licence, no matter how noble the cause to be furthered. Thus, humanitarian law imposes restrictions not only on the aggressor, but also on the victim of aggression, whose choice of methods of warfare is not unlimited. Likewise, as far as terrorist acts are concerned, the international community repudiates indiscriminate murder in any form whatsoever, no regard being paid to the political background of such strategies of killing. It is, therefore, perfectly in keeping with the basic blueprint of the draft Code to demand categorically that the environment must not be made to suffer from activities which entail widespread, long-lasting and severe damage. No valid grounds can be adduced to justify such harm. This position would be significantly weakened and perhaps even reduced to irrelevance if a requirement were established to the effect that the person under scrutiny must have acted "for bad purpose".

42. In order to respond constructively to the problems of interpretation expounded above, it may be preferable to replace the word "wilfully" by "knowingly", which would seem to reflect precisely the meaning it would be intended to carry.

I. Scope of application *ratione personae*

43. With regard to persons capable of falling under a provision designed to combat crimes against the environment, the openness of the general part of the draft Code constitutes a great advantage. No specific links to any kind of societal organization are required. Although the draft Code is intended, in the first place, to provide the legal basis enabling the international community to make accountable members of a criminal governmental machinery, it is not confined to public officials or other holders of governmental functions. In some instances at least, private citizens can also incur responsibility under the draft Code, the forefront example being provided by the crime of genocide. Concerning crimes against the environment, it stands to reason that their scope *ratione personae* should be adapted to the general line pursued by the draft Code. Everyone qualifies as a potential author of such crimes.

J. Examples

44. In order to make the conclusions reached more understandable, a couple of examples shall be given in the following paragraphs. Some of these examples illustrate the limits of the draft Code, others make clear in what situations the draft Code would be called into operation.

45. The burning of fossil fuels, which inevitably produces carbon dioxide and to some extent also sulphur dioxide, has led to extensive environmental harm in many countries and still continues to do so. After having been first emitted into the atmosphere, the two gases—and other noxious components—return some day to the surface of the earth, causing a massive acidification of soils and water there. In particular, many lakes have reached such a high degree of acidity that they have lost their quality as life bearers for plants and animals. Everybody who lives in modern industrialized societies contributes his or her share to the process which, in the long run, may threaten the existence of fauna and flora and, consequently, that of humans as well, since benefiting from the comforts of modern technology is inevitably tied to the use of energy, the biggest part of which is precisely produced by burning fossil fuels. In the last analysis, furthermore, nobody can evade the necessities of life and survival. Even persons living far away from centres of modern life are simply compelled to rely on fire to satisfy their basic needs. From the very outset, it would appear to be clear beyond any reasonable doubt that this general phenomenon does not fall within the scope *ratione materiae* of the draft Code. The draft Code cannot possibly deal with harm to the environment by accumulation, where an infinite multitude of separate actions cause damage not individually, but conjunctively in their combination. It would be absurd to postulate that humankind constitutes nothing more than a society of criminals. It may well be that it is on a dangerous path. However, criminal law can hardly be used as an instrument to call into question the generally accepted order. Through other methods, a resolute effort has been made to eliminate air pollution.³⁸ The application of penal sanctions would greatly disturb this process. Draft article 26 of the draft Code, adopted in 1991, makes clear by its wording that an identifiable act (or omission) by an individual is required which brings about damage of the specified kind *hic et nunc* and not just through a long-term process conditioned by a vast array of other factors. To sum up, "normal" activities by human societies, practised all over the globe, no matter how deleterious their long-term effects may be, do not fall under the draft Code.

46. The diversion of international rivers or the reduction of the quantities of water carried by them may bring about dangerous tensions between the States concerned. Through its draft articles on the law of non-navigational uses of international watercourses the Commission has sought to make a substantial contribution to the solution of such problems. Nonetheless, the question may be asked whether in extreme situations, rules under the draft Code might have a complementary role to play, acting in particular as a deterrent. Here, the answer should also be a negative one. Matters of distribution of natural resources have characteristics which are different from instances where such resources have been damaged. Many international rules apply to disputes about the apportionment of water between competing interests. The paramount rule provides that all watercourse States concerned are entitled to an equitable share of the available uses (see, in particular, article 5 of the draft articles adopted by the Commission on the law of the non-navigational uses of

³⁸ Convention on Long-Range Transboundary Air Pollution.

international watercourses).³⁹ Additionally, Article 2, paragraphs 3–4, of the Charter of the United Nations may be mentioned in this connection. However, the diversion of waters as such does not meet the criteria of a crime against the environment.

47. Massive interference with hazardous processes forming part of the production patterns of industrialized societies would constitute the core substance of a provision governing crimes against the environment. The igniting of a vast number of Kuwaiti oilfields by Iraqi troops has already been mentioned. Such a strategy of scorched earth could also be resorted to by terrorists outside an armed conflict. A similar example comes readily to mind, namely the sinking of fully loaded oil tankers with its well-known consequences for the marine environment. To date, the disasters that have occurred—suffice it to mention the *Exxon Valdez* or more recently the *Sea Empress*—have resulted from human negligence. If, however, a leakage were produced deliberately, the international community would have to judge such an act as an attack on its collective interests, justifying in the last resort sanctions by community agencies, in particular criminal prosecution.

48. The same degree of gravity would be displayed by any use of nuclear devices for criminal purposes by private gangs or other factions, in particular terrorist groups. Again, in such instances the interests of the entire international community would be gravely affected.

49. Leaving aside issues arising during warfare, which are not the subject matter of this paper and on which very soon an ICJ advisory opinion will shed more light, a last question to be raised is whether atmospheric testing of nuclear bombs or grenades would—today!—come within the scope of the draft Code of Crimes against the Peace and Security of Mankind. It is well known that during the 1950s and early 1960s all the States that today possess nuclear weapons and are recognized as doing so conducted atmospheric tests in order to ascertain the actual effects of their newly developed atomic arsenals. Only progressively was it discovered and acknowledged that

the ensuing contamination of the soils and waters carried enormous health risks not only for human beings, but for the entire fauna. It is for this reason that the Partial Test Ban Treaty was concluded in 1963, which provides for a complete end to atmospheric testing. Originally, the Partial Test Ban Treaty, like any other international treaty, engendered binding effects only for the States parties. China and France, in particular, were not willing to assume the commitments deriving from the nuclear ban as agreed upon by a majority of States. It is a matter of common knowledge that Australia and New Zealand seized ICJ when France continued a series of experiments in the Pacific, and it is also well known that the Court refrained from pronouncing itself on the merits of the case in view of the undertaking publicly given thereafter by the Government of France that it would abstain from further atmospheric tests.⁴⁰

50. All this now belongs to the past. The Chernobyl accident has provided ample corroborating evidence for the health hazards posed by nuclear materials transported by air across national boundaries. It may therefore be safely concluded that the ban on atmospheric testing has by now crystallized as customary law. Additionally, there are, in 1996, good reasons to assume that such tests would fall within the scope of crimes against the environment, provided, of course, that all the other requirements listed in the relevant provision are met. No Government—and hence no individual linked to a governmental machinery—could still today plead its ignorance of the fatal consequences of nuclear contamination. As outlined above, the fact that such pollution was not intended as such, but that the only objective was to prepare his or her country's self-defence against potential attacks could not exempt anyone from responsibility. Underground testing belongs to a different category. It certainly may be undesirable. Yet, there exists no scientific evidence that it entails widespread, long-term and severe damage. Thus, it could hardly be contended that it puts in jeopardy the natural environment in the same way as atmospheric testing does.

³⁹ See footnote 35 above.

⁴⁰ *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253, and *Nuclear Tests (New Zealand v. France)*, ibid., p. 457.

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

[Agenda item 4]

DOCUMENT A/CN.4/475 and Add.1*

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

[Original: Spanish]
[13 May 1996]

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* Incorporating documents A/CN.4/475/Corr.1 and Add.1/Corr.1.

CHAPTER I

Prevention

1. It will be recalled that, given the Commission's reluctance to accept the idea of prevention *ex post*, which refers to measures adopted after an incident has occurred, the Special Rapporteur included in his tenth report a section¹ explaining, as clearly as possible, his belief that that type of prevention existed in international practice.² It contained comments³ on two proposed texts,⁴ the first of which would be inserted as paragraph (e) of article 2 (Use of terms) and would define what are referred to therein as "response measures", which are nothing other than measures for prevention *ex post*.

2. The text read as follows:

"Response measures" means any reasonable measures taken by any person in relation to a particular incident to prevent or minimize transboundary harm.

The harm referred to in subparagraph ... includes the cost of preventive measures wherever taken, as well as any further harm that such measures may have caused."

¹ *Yearbook ... 1994*, vol. II (Part One), document A/CN.4/459, chap. I, in particular p. 133, paras. 7–18.

² The Special Rapporteur argued that prevention always took place "prior" to the incident and that prevention *ex post* was a contradiction in terms. This type of prevention is intended to avoid incidents, but there is another type of prevention intended to keep the *effects of an incident* from reaching their maximum potential; in other words, measures to minimize the effects of an incident. Measures of this type have been unanimously considered to be preventive, both in theory and in all conventions dealing with liability for acts not prohibited by law.

³ *Yearbook ... 1994*, vol. II (Part One), document A/CN.4/459, chap. I, p. 133, paras. 19–21.

⁴ *Ibid.*, para. 22.

3. This method was used to avoid an impasse in case the Commission continued to oppose the use of the term "prevention" for *ex post* measures. However, the Special Rapporteur pointed out that calling them "response measures" would mean using a term that differed from the term used in all the relevant conventions—namely, "preventive measures"—and would pose serious problems.

4. It would seem that the Commission was receptive to the arguments put forward and that it now accepts the idea of prevention *ex post*. If this is the case, the Special Rapporteur suggests that the Commission consider that text at its current session and that it agree on a formulation that covers both measures to prevent incidents (prevention *ex ante*) and measures to prevent further harm once an incident has occurred (prevention *ex post*), such as:

"(e) 'Preventive measures' means:

"(i) Measures to prevent or minimize the risk of incidents;

"(ii) Measures taken in relation to an incident which has already occurred to prevent or minimize the transboundary harm it may cause."

Then, a subparagraph could be inserted under letter (g) of the same article, after the definition of harm, stating that:

"(g) *The harm referred to in the preceding paragraph includes the cost of preventive measures under paragraph (e) (ii), as well as any further harm that such measures may have caused.*"

CHAPTER II

Principles

5. At its preceding session, the Commission adopted the principles set forth in articles A to D⁵ (6 to 9 of the num-

⁵ For the text of the draft articles provisionally adopted by the Commission, see *Yearbook ... 1995*, vol. II (Part Two), pp. 89 et seq.

bering to be proposed below, chap. IV), but was unable to consider the principle of non-discrimination because the latter had not yet been examined by the Drafting Committee. It would be useful if the Committee could take a decision on that principle at the current session so that the relevant chapter may be provisionally completed.

CHAPTER III

Liability

6. Two complete reports of the Special Rapporteur have yet to be considered: the tenth report,⁶ which proposes a liability regime for cases of transboundary harm, and the eleventh,⁷ which concerns harm to the environment. The Commission expressed preliminary views on both reports, but decided to use the time it would have spent considering them to enable the Drafting Committee to examine some of the articles on the subject appearing on its agenda; the Committee ultimately adopted those articles.

7. Thus, in the Special Rapporteur's view, it is time to deal with the crux of the matter; namely, liability. Although it is true that harm to the environment is an interesting item, it is also true that, basically, the Commission need only determine what this category comprises, since it has already agreed in principle that the concept of harm should include harm to the environment.

8. Having exhausted the issue of prevention, at least for the moment, the Commission should abide by its decision made at its forty-fourth session, in 1992, to the effect that:

... the topic should be understood as comprising both issues of prevention and of remedial measures. However, prevention should be considered first; only after having completed its work on that first part of the topic would the Commission proceed to the question of remedial measures. Remedial measures in this context may include those designed for mitigation of harm, restoration of what was harmed and compensation for harm caused.⁸

9. The Commission cannot postpone this unavoidable task, at the risk of showing negligence with respect to the General Assembly's mandate, particularly since the Commission itself recognized, at its forty-seventh session, that the vital task of identifying the activities to be included in the draft articles would "depend on the provisions on prevention which have been adopted by the Commission and the nature of the obligations on liability which the Commission will be developing".⁹

10. What the Commission must determine at its current session are *the main features of the regime it wishes to apply to liability for acts not prohibited by international law*. In the present report there is an explanation of the regime set out in the schematic outline of the previous Special Rapporteur, Mr. Quentin-Baxter, which was annexed to his fourth report,¹⁰ and of the regimes proposed in the sixth¹¹ and tenth reports of the current Special Rapporteur. These are the three options which have been

proposed thus far and on which the Commission has yet to take a decision. What the Special Rapporteur suggests for this session is that the Commission simply look at the main points of these liability regimes. To this end, he has indicated, for each regime, the articles and paragraphs of the relevant reports which contain essential information. Members of the Commission could also read the rest of the proposed articles in each report on liability to have an idea of how each of the regimes under consideration could operate.

11. It is suggested, then, that the Commission focus on the annex to the fourth report of the previous Special Rapporteur (which could be supplemented, if desired, by a perusal of the entire report); chapters IV and V of the sixth report of the current Special Rapporteur, particularly articles 21, 23 and 28 to 31, which define the regime, and the tenth report, in particular the careful consideration of the whole of chapter II and of sections A, B and C of chapter III, and of the articles included therein.

12. In the following analysis, the Special Rapporteur will discuss only basic concepts in the body of the text; clarifications and complementary concepts will be found in the footnotes.

A. The schematic outline

13. The regime set forth in the schematic outline is only a rough sketch, but the Commission will find in it the information it needs in order to take a decision and in order to develop it further, if it so desires. Some of the articles of the sixth report might also be helpful in order to have an idea of how this part of the schematic outline could be developed.

14. The regime applies to activities carried out in the territory or under the control of one State which *give or may give rise* to loss or injury to persons or things within the territory or in places under the control of another State. In other words, the activities of article 1, proposed by the current Special Rapporteur, would be covered by the outline and the article's provisions would apply to them.

1. PREVENTION

15. *Breach of obligations regarding prevention does not entail any sanction* according to section 2, paragraph 8. In other words, there is no liability for wrongful act in that draft.

2. LIABILITY

16. If transboundary harm arises and there is no prior agreement between the States concerned regarding their rights and obligations, these rights and obligations shall be determined in accordance with the schematic outline. There is an obligation to negotiate such rights and obligations in good faith.

⁶ *Yearbook ... 1994*, vol. II (Part One), p. 133, document A/CN.4/459.

⁷ *Yearbook ... 1995*, vol. II (Part One), p. 51, document A/CN.4/468.

⁸ See *Yearbook ... 1992*, vol. II (Part Two), p. 51, para. 345.

⁹ See *Yearbook ... 1995*, vol. II (Part Two), chap. V, p. 89, para. 408 *in fine*.

¹⁰ *Yearbook ... 1983*, vol. II (Part One), pp. 201 et seq., document A/CN.4/373.

¹¹ *Yearbook ... 1990*, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1.

17. Section 4 establishes in paragraph 2 that the acting State—that is to say the State of origin—shall make reparation to the affected State.¹² The amount of the reparation due is determined by a number of factors.¹³

18. The general ideas of the outline are, therefore, as follows:

(a) Recommendations to States regarding the prevention of incidents due to activities “which give or may give rise to” transboundary harm. In particular, that they should draw up a legal regime between the States concerned which would apply to the activity;

(b) State liability for transboundary harm caused by dangerous activities;¹⁴

- (i) Nature of the liability. *Sine delicto*, since the acts are not prohibited by international law;
- (ii) Attenuation of liability: although, in principle, the innocent victim should not bear the injury, the nature and amount of the reparation must be negotiated in good faith between the parties, taking into consideration a series of factors which may lessen the amount.

B. The regime of the sixth report

19. The draft articles proposed by the Special Rapporteur in the sixth report¹¹ constitute an almost complete draft of the topic.

1. PREVENTION¹⁵

20. Draft article 18 strips the obligations regarding prevention of their “hard” nature, since it does not give the affected State the right to institute proceedings.¹⁶ Although more detailed, the draft articles set forth in the sixth report

¹² This obligation, however, is subject to a condition that did not find any support in the Commission: that the reparation for injury of that kind or character should be in accordance with the *shared expectations* of the States concerned. For the concept and effect of such expectations, see section 4, paras. 2–4, of the schematic outline.

¹³ These include the so-called “shared expectations”, the principles spelled out in section 5 of the schematic outline—*inter alia*, that insofar as may be consistent with these articles, an innocent victim should not be left to bear his loss or injury—the reasonableness of the conduct of the parties and the preventive measures of the State of origin. The factors outlined in section 6 (some of which were adopted in draft outline 20 proposed by the current Special Rapporteur) also play a role as do the matters referred to in section 7, which remained open for consideration by the Commission; however, they are very vague, given the preliminary nature of the schematic outline.

¹⁴ Although the scheme (sect. 7, para. II.1) leaves open the possibility that by a decision of the parties to the negotiation there may be another decision as to where primary and residual liability should lie, and whether the liability of some actors should be channelled through others.

¹⁵ The provisions regarding notification of affected States, the provision of information concerning the dangerous activity and consultations with them regarding a regime, further develop and refine the concepts set forth in the schematic outline.

¹⁶ Unless, of course, such action is provided for in another agreement between the same parties. In any event, there would be a form of sanction for failure to comply. If, at some point subsequent to such failure to comply, there were to be appreciable transboundary harm, the sanction would be that in such a case, the State which did not comply could not invoke the provisions of draft article 23 which enable it to obtain favourable adjustments of the compensation.

do not depart in any significant way from the schematic outline as far as prevention is concerned.

2. LIABILITY

21. There is State liability *sine delicto* for transboundary harm which translates, here again, into a simple obligation to negotiate the determination of the legal consequences of the harm with the affected State or States. The States concerned must take into account that, in principle, the harm must be *compensated in full*, even though the State of origin may, in certain cases, seek a reduction of the compensation payable by it (draft art. 23).¹⁷

22. Thus far, the draft articles do not depart from the general lines of the schematic outline. The Special Rapporteur thought, however, that there seemed to be an undeniable trend in international practice towards introducing into specific activities civil liability for transboundary harm and that he should, therefore, present that possibility to the Commission.¹⁸

23. For that reason, in addition to State liability which is exercised through the diplomatic channel, the draft articles provide for what is called the domestic channel, that is to say, remedy for victims through the domestic courts of law.¹⁹ The aim was merely to establish a *minimum regulation* of the domestic channel.²⁰

24. To summarize, the general thrust of the regime proposed in the sixth report is as follows:

¹⁷ For example, if the State of origin took precautionary measures solely for the purpose of preventing transboundary harm, it could ask for a reduction of the compensation. In order to illustrate the above, take the example of an industry located on the border, upstream on a successive international river, which discharges waste into the water and, consequently, affects only the territory downstream but not the course of the river situated in its own territory.

¹⁸ In the international practice considered, such civil liability *could coexist with State liability only insofar as the latter was residual*, in other words when neither the operator nor his insurance could cover the full amount of the compensation fixed. In such cases, the State would intervene (nuclear conventions, see the tenth report of the Special Rapporteur (footnote 6 above), chap. II, sect. B, paras. 24–29 inclusive). Subsequently, in draft articles such as the ones relating to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (United Nations, *Treaty Series*, vol. 1673, p. 57), the obligation of the State to complete the compensation was made contingent on the condition that the harm would not have been caused had the State not failed to comply (indirect causality).

¹⁹ In order for the domestic channel to coexist with the diplomatic channel, two provisions are needed: (a) one to permit the affected State to initiate the diplomatic claim without having to exhaust all internal remedies of the State of origin (draft art. 28, para. 1), because otherwise the domestic channel would be compulsory and it would be appropriate to use the diplomatic channel only in the cases provided for under general international law, for example where there had been a denial of justice; and (b) one to prevent the State of origin from claiming immunity from jurisdiction (draft art. 28, para. 2) because if it were to do so, the domestic channel would lead nowhere. A claim of immunity from jurisdiction may only be made in respect of enforcement of a judgement.

²⁰ As explained in the sixth report of the Special Rapporteur (footnote 11 above), pp. 98–99, paras. 62–63. For example, it did not establish that the liability had to be *sine delicto* (causal, strict) but referred, as far as the basic rules are concerned, to the applicable national law, that is to say, that of the court that ultimately had jurisdiction. It was suggested that States parties should, through their national legislation, give their courts jurisdiction to deal with claims of the type permitted under draft article 28, paragraph 2, that they should give affected States or individuals or legal entities access to their courts (draft art. 29, para. 1) and that they should provide in their legal systems for remedies which permit prompt and adequate compensation (draft art. 29, para. 2).

1. Recommendations to States regarding the prevention of incidents and above all the drawing up of a legal regime between States to govern the activity;
2. State liability for transboundary harm caused by dangerous activities:
 - 2.1 Nature of the liability: *sine delicto* (strict, causal) where the acts giving rise to liability are not prohibited by international law;
 - 2.2 Attenuation of liability: although, in principle, an innocent victim should not have to bear the injury caused, the nature and amount of the reparation must be negotiated in good faith between the parties, taking into consideration a series of factors which may diminish the amount;
3. In addition to the diplomatic channel where one State deals with another State, provision is made for a domestic channel available to individuals or private entities and to the affected State:
 - 3.1 Once a channel has been selected for a specific claim, the other channel may not be used for the same claim;
 - 3.2 Character of the liability: to be established by the domestic legislation of the State of the court having jurisdiction.

25. As the preventive measures are not compulsory, failure to take such measures does not give rise to liability and therefore there is no State liability for a wrongful act. Consequently, there cannot be both responsibility for a wrongful act and at the same time responsibility *sine delicto* in respect of any single incident.

26. The Special Rapporteur points out two features of the system proposed in his sixth report. The first is that if the affected State knows that its subjects may use the domestic channel it may be very reluctant to use the diplomatic channel. The second is that the determination of the type of liability is left to domestic law. This latter feature can easily be changed by including in the draft articles a provision for liability *sine delicto* of the person in charge.

C. The regime of the tenth report

27. It should be recalled that:

(a) As the Special Rapporteur said before, the Commission categorically rejected the suggestion that the obligations concerning prevention should be “soft”. Accordingly, violation of such obligations gives rise to State liability for a wrongful act;

(b) This makes these draft articles extremely unusual and creates many difficulties, since State liability for violation of its obligations in respect of prevention must necessarily coexist with liability *sine delicto* for payment of compensation for injury caused.

28. If compensation for an injury caused followed only from a wrongful act, that is to say as a result of failure by the State to comply with its obligations concerning prevention, *nothing in the draft articles would relate to the*

liability for acts not prohibited by international law. Innocent victims would then be compelled to bear the *onus probandi* and would be left without any remedy when the injury was caused by an act that was not prohibited as a consequence of a dangerous (but lawful) activity. The liability regime, which is becoming increasingly widespread in the world in respect of such activities: that of liability *sine delicto*, would not be applied to compensation for injury caused by dangerous activities. Thus, the area which prompted the inclusion of the item on the Commission’s agenda, namely, that of liability for injurious consequences arising out of acts not prohibited by international law, would be totally unprotected.

29. There is no doubt whatsoever that compensation for transboundary harm arising out of acts not prohibited must be subjected to some form of liability *sine delicto*. In the previous Special Rapporteur’s schematic plan this type of liability is assigned to the State although it is considerably diminished because it is subject to negotiations between the States concerned and to possible readjustments. The sixth report of the current Special Rapporteur follows the same solution and also adds the possibility that the injured may resort to domestic channels.²¹

30. To summarize, the system proposed in the tenth report is as follows:

1. Obligations to prevent incidents are the responsibility of the State. There is State liability for failure to comply with these obligations;
2. Nature of State liability: for wrongful act, with the characteristics and consequences of international law (art. X);
3. Payment of compensation for transboundary harm caused is the responsibility of the operator. Nature of such liability: *sine delicto*.²²

D. The options available to the Commission

31. (a) The decisions already taken by the Commission regarding prevention leave no other alternative than State liability for wrongful acts;

(b) As to some form (whether attenuated or not) of liability *sine delicto*, the Commission has no choice but to introduce it into the draft articles, unless it wishes to renounce the mandate given to it by the General Assembly (international liability for the injurious consequences of acts not prohibited by international law). It can assign liability to the State (schematic outline of the previous Special Rapporteur), to the operator (tenth report of the current Special Rapporteur) or, depending on what the

²¹ See in particular chapter II of the tenth report (footnote 6 above), pp. 134 et seq.

²² Thus, the State is responsible for all the consequences of the wrongful act (cessation, satisfaction, guarantee of non-repetition (see tenth report of the Special Rapporteur (footnote 6 above), pp. 136 et seq., paras. 31–41), but not for compensation which is always the responsibility of private operators, even if they coexist with the failure of the State to comply with its obligations regarding prevention. The operator’s liability is *sine delicto*, since it arises from acts not prohibited by international law and redresses the material harm caused by the dangerous activity under draft article 1.

actor chooses, to the State or operator (sixth report) with some possible changes of detail;

(c) The residual liability of the State can be resolved once the two previous issues have been settled.

CHAPTER IV

Order of the draft articles

32. The Commission observed that the draft articles were not presented in order and that the various partial numberings of the articles adopted by the Drafting Committee, together with the proposed articles (designated by letters) for the chapter on liability, could give rise to confusion.

33. At its forty-eighth session (1988) and at its forty-ninth session (1989), the Commission sent to the Drafting Committee the first ten draft articles, which included two different versions of chapters I (General provisions) and II (Principles): one is that of the fourth report of the Special Rapporteur,²³ and the other is that of his fifth report.²⁴ This set of articles does not present a problem in terms of renumbering, because the draft articles deal with the same content in both versions, although their wording differs.

34. The draft articles which may be adopted in relation to liability may be numbered consecutively (beginning with article 21) following the last article adopted thus far by the Commission.

²³ *Yearbook ... 1988*, vol. II (Part One), pp. 251 et seq., document A/CN.4/413.

²⁴ *Yearbook ... 1989*, vol. II (Part One), pp. 131 et seq., document A/CN.4/423.

Draft articles^{*,5}

CHAPTER I

GENERAL PROVISIONS

Article 1. Scope of the present articles

The present articles apply to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which involve a risk of causing significant transboundary harm through their physical consequences.

Article 2. Use of terms

For the purposes of the present articles:

(a) “Risk of causing significant transboundary harm” encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

(b) “Transboundary harm” means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin,

*The articles adopted so far by the Commission are reproduced below without square brackets.

whether or not the States concerned share a common border;

(c) “State of origin” means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out;

[(d) Definition of “affected State” (fourth and fifth reports);]²⁵

[(e) Definition of “preventive measures” (tenth⁶ or eleventh report,⁷ depending on the Commission’s decision);]

[(f) Definition of “harm” (eighth report²⁶), including environmental harm (eleventh report);]

[(g) Inclusion of the cost of ex-post preventive measures as part of reparation for harm.]

*[Article 3. Attribution (fourth report)/
Assignment of obligations (fifth report)]*

[Conditions for the assignment of the obligations imposed by the present articles (fourth and fifth reports).]²⁷

*[Article 4. Relationship between the present articles and other international agreements]**

[Relationship between the present articles and other international agreements to which the States parties to the present articles are also parties concerning the

²⁵ In the fourth report, the proposed text of article 2 (e) is as follows:

“‘Affected State’ means the State under whose jurisdiction persons or objects, or the use or enjoyment of areas, are or may be affected.”

In the fifth report, the text is as follows:

“‘Affected State’ means the State in whose territory or under whose jurisdiction persons or objects, the use or enjoyment of areas, or the environment, are or may be appreciably affected.”

²⁶ *Yearbook ... 1992*, vol. II (Part One), pp. 59 et seq., document A/CN.4/443, appendix, sect. C.

²⁷ In the fourth report, article 3 (Attribution), reads as follows:

“The source State shall have the obligations imposed on it by the present articles, provided that it knew or had means of knowing that an activity involving risk was being, or was about to be, carried out in areas under its jurisdiction or control.”

In the fifth report, article 3 (Assignment of obligations) reads as follows:

“1. The State of origin shall have the obligations established by the present articles, provided that it knew or had means of knowing that an activity referred to in article 1 was being, or was about to be, carried out in its territory or in other places under its jurisdiction or control.

“2. Unless there is evidence to the contrary, it shall be presumed that the State of origin has the knowledge or the means of knowing referred to in the preceding paragraph.”

activities referred to in article 1 (fourth and fifth reports).]²⁸

*[Article 5. Absence of effect upon other rules of international law]**

[Application of other rules of international law to transboundary injury arising from wrongful acts or omissions of the State of origin not specified in the present articles (fourth and fifth reports).]²⁹

CHAPTER II

PRINCIPLES**

Article 6. [A] Freedom of action and the limits thereto

The freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited. It is subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm, as well as any specific obligations owed to other States in that regard.

Article 7. [B] Prevention

States shall take all appropriate measures to prevent or minimize the risk of significant transboundary harm.

Article 8. [C] Liability and reparation

In accordance with the present articles, liability arises from significant transboundary harm caused by an activity referred to in article 1 and shall give rise to reparation.

Article 9. [D] Cooperation

States concerned shall cooperate in good faith and as necessary seek the assistance of any international organization in preventing or minimizing the risk of significant transboundary harm and, if such harm has occurred, in minimizing its effects both in affected States and in States of origin.

* The Commission may decide not to include these two articles, bearing in mind that it does not normally include final provisions in the draft articles it produces.

²⁸ In the fourth report, article 4 (Relationship between the present articles and other international agreements) reads as follows:

“Where States parties to the present articles are also parties to another international agreement concerning activities or situations within the scope of the present articles, in relations between such States the present articles shall apply, subject to that other international agreement.”

In the fifth report, the same article reads as follows:

“Where States parties to the present articles are also parties to another international agreement concerning activities referred to in article 1, in relations between such States the present articles shall apply, subject to that other international agreement.”

²⁹ The text proposed by the Special Rapporteur reads as follows:

“The fact that the present articles do not specify circumstances in which the occurrence of transboundary harm arises from a wrongful act or omission of the State of origin shall be without prejudice to the operation of any other rule of international law.”

[Article 10. Non-discrimination]

[States parties shall treat the effects of an activity that arise in the territory or under the jurisdiction or control of another State in the same way as effects arising in their own territory. In particular, they shall apply the provisions of these articles and of their national laws without discrimination on grounds of the nationality, domicile or residence of persons injured by the activities referred to in article 1.]

Article 11. Prior authorization

States shall ensure that activities referred to in article 1 are not carried out in their territory or otherwise under their jurisdiction or control without their prior authorization. Such authorization shall also be required in case a major change is planned which may transform an activity into one referred to in article 1.

Article 12. Risk assessment

Before taking a decision to authorize an activity referred to in article 1, a State shall ensure that an assessment is undertaken of the risk of such activity. Such an assessment shall include an evaluation of the possible impact of that activity on persons or property as well as in the environment of other States.

Article 13. Pre-existing activities

If a State, having assumed the obligations contained in these articles, ascertains that an activity involving a risk of causing significant transboundary harm is already being carried out in its territory or otherwise under its jurisdiction or control without the authorization as required by article 11, it shall direct those responsible for carrying out the activity that they must obtain the necessary authorization. Pending authorization, the State may permit the continuation of the activity in question at its own risk.

Article 14. Measures to prevent or minimize the risk

States shall take legislative, administrative or other actions to ensure that all appropriate measures are adopted to prevent or minimize the risk of transboundary harm of activities referred to in article 1.

*Article 14 bis. Non-transference of risk**

In taking measures to prevent or minimize a risk of causing significant transboundary harm, States shall ensure that the risk is not simply transferred, directly or indirectly, from one area to another or transformed from one type of risk into another.

Article 15. Notification and information

1. If the assessment referred to in article 12 indicates a risk of causing significant transboundary

** In articles 6–9 the letters in square brackets correspond to the numbering of the draft articles as provisionally adopted by the Commission in 1995.

* It would be preferable to place this article with those dealing with principles.

harm, the State of origin shall notify without delay the States likely to be affected and shall transmit to them the available technical and other relevant information on which the assessment is based and an indication of a reasonable time within which a response is required.

2. Where it subsequently comes to the knowledge of the State of origin that there are other States likely to be affected, it shall notify them without delay.

Article 16. Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all information relevant to preventing or minimizing the risk of causing significant transboundary harm.

Article 16 bis. Information to the public

States shall, whenever possible and by such means as are appropriate, provide their own public likely to be affected by an activity referred to in article 1 with information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Article 17. National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

Article 18. Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them and without delay, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of causing significant transboundary harm, and cooperate in the implementation of these measures.**

2. States shall seek solutions based on an equitable balance of interests in the light of article 20.

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution the State of origin shall nevertheless take into account the interests of States likely to be affected and may proceed with the activity at its own risk, without prejudice to the right of any State withholding its agreement to pur-

sue such rights as it may have under these articles or otherwise.

Article 19. Rights of the State likely to be affected

1. When no notification has been given of an activity conducted in the territory or otherwise under the jurisdiction or control of a State, any other State which has serious reason to believe that the activity has created a risk of causing it significant harm may require consultations under article 18.

2. The State requiring consultations shall provide a technical assessment setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1, the State requiring consultations may claim an equitable share of the cost of the assessment from the State of origin.

Article 20. Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 18, the States concerned shall take into account all relevant factors and circumstances, including:

(a) The degree of risk of significant transboundary harm and the availability of means of preventing or minimizing such risk or of repairing the harm;

(b) The importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;

(c) The risk of significant harm to the environment and the availability of means of preventing or minimizing such risk or restoring the environment;

(d) The economic viability of the activity in relation to the costs of prevention demanded by the States likely to be affected and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(e) The degree to which the States likely to be affected are prepared to contribute to the costs of prevention;

(f) The standards of protection which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

** If the Commission adopts a regime of liability for acts not prohibited, it will have to change the wording of this paragraph to include remedial measures.

THE LAW AND PRACTICE RELATING TO RESERVATIONS TO TREATIES

[Agenda item 5]

DOCUMENT A/CN.4/477 and Add.1*

Second report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur

[Original: French]
[10 May and 13 June 1996]

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Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	Ibid., vol. 213, p. 221.
Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions (Strasbourg, 6 May 1963)	Ibid., vol. 1496, p. 245.
Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (Strasbourg, 28 April 1983)	Ibid., p. 281.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	Ibid., vol. 189, p. 137.
Protocol relating to the Status of Refugees (New York, 31 January 1967)	Ibid., vol. 606, p. 267.
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International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome, 26 October 1961)	Ibid., vol. 496, p. 43.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	Ibid., vol. 660, p. 195.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid., vol. 999, p. 171.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	Ibid., vol. 1155, p. 331.
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Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	Ibid., vol. 1249, p. 13.

	<i>Source</i>
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CHAPTER I

Overview of the study

A. First report on reservations to treaties and the outcome

1. In accordance with the wishes of the General Assembly,¹ the Special Rapporteur presented to the forty-seventh session of the Commission a preliminary report on the law and practice relating to reservations to treaties.² In three chapters, this report:

(a) Gave a brief description of the Commission’s previous work on reservations and the outcome;

(b) Provided a brief inventory of the problems of the topic; and

(c) Put forward a number of suggestions as to the scope and form of the Commission’s future work.

2. In accordance with the Commission’s consideration of the topic, the Special Rapporteur summarized as follows the conclusions he had drawn from these debates:

(a) The Commission considers that the title of the topic should be amended to read “Reservations to treaties”;

(b) The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission’s statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;

(c) The above arrangements shall be interpreted with flexibility and, if the Commission feels that it must depart from them substantially, it would submit new proposals to the General Assembly on the form the results of its work might take;

(d) There is a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.³

3. In the Commission’s view, these conclusions constituted “the result of the preliminary study requested by General Assembly resolutions 48/31 and 49/51. The Commission understood that the model clauses on reservations, to be inserted in multilateral treaties, would be designed to minimize disputes in the future”.⁴

4. Following the Sixth Committee’s discussions of the report of the Commission, the General Assembly, in its resolution 50/45 of 11 December 1995, noted the beginning of the work of the Commission on this topic and invited it “to continue its work on [this topic] along the lines indicated in the report”.⁵

5. Moreover, at its 2416th meeting on 13 July 1995, the Commission “authorized the Special Rapporteur to prepare a detailed questionnaire, as regards reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which are depositaries of multilateral conventions”.⁶ In its above-mentioned resolution 50/45, the General Assembly had invited “States and international organizations, particularly those which are depositaries, to answer promptly the questionnaire prepared by the Special Rapporteur on the topic concerning reservations to treaties”.⁷

6. In accordance with these provisions, the Special Rapporteur prepared a detailed questionnaire, the text of which was sent by the Secretariat to States Members of the United Nations or of a specialized agency, or parties to the ICJ Statute and will be distributed at the forty-eighth

¹ General Assembly resolution 48/31 of 9 December 1993, para. 7.

² *Yearbook ... 1995*, vol. II (Part One), p. 121, document A/CN.4/470.

³ *Ibid.*, vol. II (Part Two), p. 108, para. 487.

⁴ *Ibid.*, para. 488.

⁵ General Assembly resolution 50/45, para. 4.

⁶ *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 489.

⁷ Paras. 4–5 of the resolution.

session of the Commission.⁸ Thus far, twelve States⁹ have replied to the questionnaire. With the exception of San Marino, these States have answered only the questions to which the Special Rapporteur particularly drew attention and which most closely concern the matters dealt with in this report;¹⁰ several of them have included with their replies a large amount of very interesting documentation on their practice with regard to reservations.

7. Furthermore, the Special Rapporteur has prepared a similar type of questionnaire that will soon be sent to international organizations that are depositories of multilateral treaties, the text of which is reproduced as annex III to this report.

8. In addition, as the Special Rapporteur promised in 1995,¹¹ a non-exhaustive bibliography on the question of reservations to treaties has been distributed and is reproduced as annex I to this report.

B. The future work of the Commission on the topic of reservations to treaties

1. AREA COVERED BY THE STUDY

9. In his preliminary report, the Special Rapporteur endeavoured to draw up a “brief inventory of the problems of the topic”,¹² noting that it was far from exhaustive, and without placing the topics in order of their importance or of their logical relationship to each other.

10. Although establishing a “general problem” had not been central to the Commission’s discussions on this topic at its forty-seventh session, these had allowed some useful clarifications to be made in this respect.¹³ Five main substantial issues were fully debated during the discussion of the preliminary report:¹⁴

(a) The definition of reservations, the distinction between these and interpretative declarations and the differences of legal regime which characterize the two institutions;¹⁵

⁸ Reproduced as annex II to this report.

⁹ Canada, Chile, Denmark, Ecuador, Estonia, Finland, San Marino, Slovenia, Spain, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America. The Special Rapporteur wishes to express his profound gratitude to these States. He hopes it will be possible for them to complete their replies and that other States will reply to the questionnaire in the near future.

¹⁰ See paragraph 6 of the covering note of the questionnaire (annex III to the present report).

¹¹ *Yearbook ... 1995*, vol. I, 2400th meeting, p. 148, para. 7.

¹² *Ibid.*, vol. II (Part One), document A/CN.4/470, chap. II, pp. 141–150; see in particular paragraphs 124, 148 and 149, in which the Special Rapporteur had enumerated the main problems which, according to him, are connected with the ambiguities and gaps in the provisions relating to reservations in the 1969, 1978 and 1986 Vienna Conventions.

¹³ *Ibid.*, vol. II (Part Two), pp. 104–106, paras. 442–466.

¹⁴ *Ibid.*, p. 107, paras. 473–478, and vol. I, 2412th meeting, pp. 220–227.

¹⁵ *Ibid.*, vol. I, 2401st meeting, statement by Mr. Tomuschat, pp. 154–155; 2402nd meeting, statements by Mr. Robinson, pp. 157–159, Mr. Lukashuk, pp. 159–161, and Mr. He, pp. 161–162, 2404th meeting, statements by Mr. Pambou-Tchivounda, pp. 167–169, Mr. Elaraby, pp. 170–171, and Mr. Sreenivasa Rao, pp. 171–172; 2407th meeting, statements by Mr. Yamada, pp. 190–192, and Mr. Eiriksson, pp. 192–193; and 2412th meeting, statement by Mr. Al-Baharna, pp. 220–222.

(b) The doctrinal quarrel (which has, however, important practical consequences) between the permissibility and opposability schools,¹⁶ which will have a bearing, eventually, on what may probably be considered *prima facie* as the main problem raised by the subject: conditions for the permissibility and opposability of reservations;¹⁷

(c) The settlement of disputes;¹⁸

(d) The effects of the succession of States on reservations and objections to reservations;¹⁹ and

(e) The question of the unity or diversity of the legal regime applicable to reservations based on the subject of the treaty to which they are made.²⁰

11. Accordingly, the members of the Commission have given the Special Rapporteur useful information, if not on the order in which problems should be dealt with,²¹ then at least on the matters to which special attention should be paid.

12. Likewise, the discussions of the Sixth Committee during the fiftieth session of the General Assembly make it possible to have a more precise idea of the points which preoccupy States in this regard.²² It should be noted in particular that their representatives stressed two essential, basic problems:

(a) The question of reservations and human rights treaties;²³ and

¹⁶ Briefly, the “permissibilists” may be thought of as considering that a reservation incompatible with the object and purpose of the treaty is invalid *ab initio*, while the “opposabilists” think that the sole criterion for the validity of a reservation is the position taken by the other contracting States. For further (but preliminary) details on this point, see *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 142–143, paras. 100–107.

¹⁷ See *Yearbook ... 1995*, vol. I, 2401st meeting, statements by Mr. Tomuschat, p. 155, and Mr. Bowett, p. 155; 2404th meeting, statement by Mr. Elaraby, pp. 170–171; 2407th meeting, statements by Mr. Kabatsi, p. 190; and Mr. Yamada, pp. 190–192.

¹⁸ *Ibid.*, 2402nd meeting, statement by Mr. Robinson, pp. 157–159; and 2403rd meeting, statement by Mr. Villagrán Kramer, pp. 163–164.

¹⁹ *Ibid.*, 2406th meeting, statement by Mr. Mikulka, p. 186; and 2407th meeting, statement by Mr. Eiriksson, pp. 192–193.

²⁰ *Ibid.*, 2402nd meeting, statement by Mr. Robinson, pp. 157–159; 2403rd meeting, statement by Mr. Villagrán Kramer, pp. 163–164; 2404th meeting, statements by Mr. de Saram, pp. 165–167, and Mr. Sreenivasa Rao (Chairman), pp. 171–172; 2407th meeting, statements by Mr. Idris, pp. 189–190; and Mr. Yamada, pp. 190–192.

²¹ Some members of the Commission, however, have expressed useful opinions in this respect. It is worth noting in particular that several members remarked that “the problems related to State succession in matters of reservations and objections to treaties should have a low degree of priority in the future work of the Commission” (*Yearbook ... 1995*, vol. II (Part Two), p. 106, para. 461).

²² See the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session (A/CN.4/472/Add.1), paras. 143–174.

²³ *Ibid.*, paras. 155–161; see also *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 13th meeting (A/C.6/50/SR.13), view of the United States, paras. 50–53; 18th meeting (A/C.6/50/SR.18), view of Pakistan, para. 62; 22nd meeting (A/C.6/50/SR.22), view of Spain, para. 44; 24th meeting (A/C.6/50/SR.24), view of Sri Lanka, para. 82; and 25th meeting (A/C.6/50/SR.25), view of Lebanon, para. 20.

(b) The distinction between interpretative declarations and reservations.²⁴

Moreover, some representatives called upon the Commission to clarify the following points: the effects of non-permissible reservations; the regime of objections to reservations; and both the precise difference between reservations and interpretative declarations and the exact definition of the legal effect of the latter.²⁵

13. It is interesting and, in many respects, comforting, to see such a striking unanimity of views between the positions adopted by the members of the Commission on the one hand²⁶ and the representatives of States on the other, regarding the “hierarchy” of problems posed—or left unresolved—by the current legal regime governing reservations to treaties.

14. It therefore seems legitimate to consider, since “the Sixth Committee as a body of government representatives and the International Law Commission as a body of independent legal experts”²⁷ agree on the special importance of certain topics, that those topics should be studied particularly carefully. Without a doubt, that is the case with:

- (a) The question of the very definition of reservations;
- (b) The legal regime governing interpretative declarations;
- (c) The effect of reservations which clash with the purpose and object of the treaty;
- (d) Objections to reservations;
- (e) The rules applicable, if need be, to reservations to certain categories of treaties and, in particular, to human rights treaties.

15. This list of particularly important questions does not, however, limit the Commission’s field of study regarding reservations to treaties. Both the Commission itself in raising this topic²⁸ and the General Assembly in approving its proposal²⁹ alluded in the general sense to the “law and practice relating to reservations to treaties” without specifying or circumscribing the questions which should be the subject of such a study. Moreover, it seems difficult to make a serious study of the questions listed above³⁰ and to usefully elaborate draft articles in respect of them without placing them in the wider context of the law relating to reservations to treaties. In addition, it would be hard to envisage drawing up a “guide to practice” that would only contain controversial points; if such a guide is to be used by States and international organizations, its “users” should be able to find in it the answers to all their questions on the topic.

²⁴ A/CN.4/472/Add.1, paras. 162–167; see also *Official Records of the General Assembly, Fiftieth Session, Sixth Committee, 24th meeting (A/C.6/50/SR.24)*, views of Venezuela, para. 56, and of the Republic of Korea, para. 93.

²⁵ A/CN.4/472/Add.1, para. 148.

²⁶ See paragraph 10 above.

²⁷ General Assembly resolution 50/45.

²⁸ See *Yearbook ... 1993*, vol. II (Part Two), p. 96, para. 427.

²⁹ General Assembly resolution 48/31, para. 7.

³⁰ See paragraph 14 above.

16. It therefore seems logical to take account of the broader picture in considering questions relating to reservations which are imperfectly addressed or not addressed at all by existing conventions on codification,³¹ while at the same time devoting particular and primary attention to questions which the Commission and the Sixth Committee both consider to be of special importance, and recalling the applicable rules as codified by existing conventions or resulting from practical application.

17. Moreover, as the preliminary report on the topic states, the relatively long list of questions partially or not covered by the 1969, 1978 and 1986 Vienna Conventions should be supplemented by other questions 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; selective acceptance of certain provisions, etc.).³² There is no doubt that, considered in themselves, such approaches are not part of the field of study, in that they are not reservations. However, to the extent that they have similar aims and comparable consequences, it would seem useful to take account of them when necessary, if only to draw the attention of States to the options which they offer in certain cases; after all, they can prove useful alternatives to the employment of reservations when recourse to the latter meets objections of a legal or political nature. Moreover, reservations to these instruments themselves raise specific problems which cannot be ignored.³³

2. FORM OF THE STUDY (REVIEW)

18. As mentioned above,³⁴ the Commission decided in principle during its forty-seventh session to draw up a “guide to practice in respect of reservations” and took the view that there were insufficient grounds for amending the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions, it being understood that the draft would, if necessary, be accompanied by “model clauses”. These conclusions, which were endorsed by the majority of the members of the Sixth Committee,³⁵ were approved by the General Assembly.³⁶

(a) *Preserving what has been achieved*

19. The decision to preserve what has been achieved by the Vienna Conventions with regard to reservations provides a firm basis for the Commission’s future work.³⁷ Specifically, it follows from this that the starting point for the present study should necessarily comprise:

³¹ See footnote 13 above and the questionnaires sent to States and international organizations (annexes II and III to the present report).

³² See *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, p. 150, para. 149.

³³ *Ibid.*, paras. 145–147; the brief examples listed relate to additional protocols on the one hand and the bilateralization approach—employed frequently in conventions relating to private international law—on the other.

³⁴ Paras. 2–3 above.

³⁵ See A/CN.4/472/Add.1, para. 147.

³⁶ General Assembly resolution 50/45, para. 4.

³⁷ See on this topic *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 151–154, paras. 153–169.

(a) Articles 2, paragraph 1 (d), and 19–23 of the 1969 Vienna Convention;

(b) Articles 2, paragraph 1 (j), and 20 of the 1978 Vienna Convention; and

(c) Articles 2, paragraph 1 (d), and 19–23 of the 1986 Vienna Convention.³⁸

20. This decision is also a constraint in that the Commission must ensure that the draft articles which it will eventually adopt conform in every respect to these provisions, with regard to which it should simply clarify any ambiguities and fill in any gaps.³⁹

21. The Special Rapporteur therefore undertook in subsequent reports to repeat systematically the relevant provisions of existing conventions in respect of each point he took up in order to indicate their connection with the draft articles whose adoption he was proposing and to establish their conformity with the letter and spirit of those provisions.

22. Moreover, it would probably be advisable to quote the actual text of the existing provisions at the beginning of each chapter of the draft guide to practice in respect of reservations.

(b) *Draft articles accompanied by commentaries ...*

23. These provisions should in each case be followed by a statement of additional or “clarificatory” regulations which would comprise the actual body of the study and, as the Commission indicated during its forty-seventh session,⁴⁰ the guide would be presented in accordance with its usual practice, in “the form of draft articles whose provisions, together with commentaries, would be guidelines”.

(c) *... and model clauses*

24. In addition, the draft articles themselves would, if necessary, be followed by model clauses which, pursuant to the instructions of the Commission, would be worded in such a way as “to minimize disputes in the future”.⁴¹

25. The function of these model clauses should be clearly understood.

26. The “guide to practice” which the Commission intends to draw up is intended to indicate to States and international organizations “guidelines for [their] practice

in respect of reservations”.⁴² It will therefore consist of general rules designed to be applied to all treaties, whatever their scope,⁴³ in cases where the treaty provisions are silent. However, like the actual rules of the Vienna Conventions⁴⁴ and the customary norms which they enshrine,⁴⁵ these rules will be purely residual where the parties concerned have no stated position; they cannot be considered binding and the contracting parties will naturally always be free to disregard them. All the negotiators need to do is incorporate the specific clauses relating to the reservations into the treaty.

27. The interest shown in the idea of incorporating clauses relating to reservations into multilateral treaties has frequently been commented on.⁴⁶ Thus, in its advisory opinion of 28 May 1951 regarding Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ noted the disadvantages that could result from the profound divergence of views of States regarding the effects of reservations and objections and asserted that “an article concerning the making of reservations could have obviated [such disadvantages]”.⁴⁷ Moreover, the Commission stated in its 1951 report to the General Assembly that:

It is always within the power of negotiating States to provide in the text of the convention itself for the limits within which, if at all, reservations are to be admissible and for the effect that is to be given to objections taken to them, and it is usually when a convention contains no such provisions that difficulties arise. It is much to be desired, therefore, that the problem of reservations to multilateral conventions should be squarely faced by the draftsmen of a convention text at the time it is being drawn up; in the view of the Commission, this is likely to produce the greatest satisfaction in the long run.⁴⁸

And in its resolution 598 (VI) of 12 January 1952, the General Assembly recommended:

that organs of the United Nations, specialized agencies and States should, in the course of preparing multilateral conventions, consider the insertion therein of provisions relating to the admissibility or non-admissibility of reservations and to the effect to be attributed to them.

⁴² *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487 (b).

⁴³ See chapter II below.

⁴⁴ See, *inter alia*, Maresca, *Il diritto dei trattati: la Convenzione codificatrice di Vienna del 23 Maggio 1969*, pp. 289 and 304; Imbert, *Les réserves aux traités multilatéraux: évolution du droit et de la pratique depuis l'avis consultative donné par la Cour internationale de Justice le 28 mai 1951*, pp. 160–161 and 223–230; Ruda, “Reservations to treaties”, *Collected Courses ... 1975–III*, p. 180; and Reuter, *Introduction to the Law of Treaties*, pp. 80–82; this was also the position of ICJ (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports, 1951*, p. 15, para. 27, cited below) and of the authors of the joint dissenting opinion (“... States negotiating a convention are free to modify both the rule [the customary rule which they believe to exist] and the practice by making the necessary express provision in the convention and frequently do so”, *ibid.*, p. 30).

⁴⁵ See *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 151–152, paras. 154–157.

⁴⁶ Even if no panacea has been identified; see in this regard Imbert, *op. cit.*, who says that reservation clauses are not an ideal solution in every case, but are always preferable to silence in the treaty (p. 214); see also the chapter devoted to the reduced role of treaty clauses in the law on the admission of reservations (pp. 202–230).

⁴⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15.

⁴⁸ *Yearbook ... 1951*, vol. II, document A/1858, p. 129, para. 27.

³⁸ *Ibid.*, paras. 60, 70 and 89. These provisions are reproduced *in extenso*.

³⁹ Of course, the Commission also considered that the arrangements which it had adopted, including the steps to preserve what had been achieved, should “be interpreted with flexibility” and that, if it felt “that it must depart from them substantially, it would submit new proposals to the General Assembly on the form the results of its work might take” (*ibid.*, vol. II (Part Two), p. 108, para. 487 (c)), which implies that if there is a pressing need, it could suggest that some of the rules articulated in the 1969, 1978 and 1986 Vienna Conventions should be reconsidered.

⁴⁰ See paragraphs 2–3 above.

⁴¹ See paragraph 3 above.

28. These clauses may have a triple function:

(a) They may refer to the rules articulated in the 1969 and 1986 Vienna Conventions explicitly⁴⁹ or implicitly by reproducing the wording of some of their provisions;⁵⁰

(b) They may fill in any gaps and clarify any ambiguities by amplifying obscure points or points that were not addressed in the Vienna Conventions;

(c) They may derogate from the Vienna rules by stipulating a special regime in respect of reservations which contracting parties would consider more suitable for the purposes of the particular treaty they had concluded.

29. The model clauses which the Commission intends to suggest as part of the study on reservations to treaties cannot be patterned after the first of these examples: although such clauses would indubitably ensure the uniform application of a reservations regime, whether the parties to the treaty have ratified the Vienna Conventions or not, they would leave intact all the gaps and ambiguities in the relevant provisions of those conventions. Moreover, it will not be the function of the model clauses to fill in those gaps or clarify those ambiguities: that is, precisely, the purpose of the “guide to practice” which the Commission is to prepare. On the other hand, it might be useful if in future contracting States and international organizations were to incorporate reservations clauses reproducing the draft articles to be included in the future guide to practice so as to ensure that those articles become crystallized into customary norms.

30. However, the model clauses to be appended to the draft articles proper will have a different function. The sole aim will be to encourage States to incorporate in certain specific treaties the model clauses concerning reservations, which derogate from general law and are better adapted to the special nature of these treaties or the circumstances in which they are concluded. This would have the advantage of adapting the legal regime concerning reservations to the special requirements of these treaties or circumstances, thus preserving the flexibility to which both the Commission and the representatives of States are rightly attached, without calling in question the unity of the general law applicable to reservations to treaties.

31. Of course, this technique can only be used for treaties that are concluded in the future. In the case of treaties already in force there are only two options, either to amend them or to adopt an additional protocol on reservations, a course which would certainly raise difficult problems.

⁴⁹ See article 75 of the American Convention on Human Rights: “This Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969.”

⁵⁰ See, for example, article 28, paragraph 2, of the Convention on the Elimination of All Forms of Discrimination against Women (which, moreover, repeats the wording of article 20, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination and hence predates the adoption of the 1969 Vienna Convention), which states that: “A reservation incompatible with the object and purpose of the present Convention shall not be permitted”; see also article 51, paragraph 2, of the Convention on the Rights of the Child, or article 91, paragraph 2, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

(d) *Final form of the guide to practice*

32. The guide to practice in respect of reservations which the Commission intends to prepare in accordance with the General Assembly’s invitation should be divided into chapters.⁵¹ Each of these chapters should take the following form:

(a) Review of the relevant provisions of the 1969, 1978 or 1986 Vienna Conventions;

– Commentary on those provisions, bringing out their meaning, their scope and the ambiguities and gaps therein;⁵²

(b) Draft articles aimed at filling the gaps or clarifying the ambiguities;

– Commentary to the draft articles;

(c) Model clauses which could be incorporated, as appropriate in specific treaties and derogating from the draft articles;

– Commentary to the model clauses.

3. GENERAL OUTLINE OF THE STUDY

(a) *Characteristics of the proposed outline*

33. In accordance with General Assembly resolution 48/31, the preliminary study which the Assembly requested the Commission to prepare concerned the final form to be given to the Commission’s work on reservations to treaties, rather than the content of the study to be undertaken. Although it is probably unnecessary to establish at the outset a complete and rigid plan for the study, it would nevertheless seem useful to think about a general outline on which the Commission could base its future work on the topic.

34. The Special Rapporteur considers that such an outline should meet the following requirements:

(a) It should make it possible to cover the entire topic of “reservations to treaties”, so that States and international organizations can find in the guide to practice that will be the outcome of the Commission’s work all the elements that are useful in this regard;

(b) It should also highlight the problems to which no satisfactory solution has yet been found and about which States and international organizations are rightly concerned;

(c) It should, moreover, be sufficiently clear and simple to enable the members of the Commission and the representatives of States in the General Assembly to follow the progress of the work without too much difficulty;

(d) It should result in a guide to practice that is really *utilizable* by States and international organizations;

⁵¹ See paragraphs 164–252 below.

⁵² This should consist essentially of a brief review, based on the relevant passages of the Special Rapporteur’s first report on the law and practice relating to reservations to treaties (see footnote 2 above).

although the study can certainly not ignore theoretical considerations completely—if only because they have substantial practical consequences—such considerations should not dictate the general approach to the topic, which according to the Special Rapporteur should be pragmatic rather than theoretical; and

(e) It should provide a general framework that can be adapted and supplemented as required as the Commission proceeds with its work.

35. The Special Rapporteur based the outline which follows (see paragraph 37 below) on the following elements:

(a) The relevant provisions of the 1969, 1978 and 1986 Vienna Conventions, which in the Special Rapporteur's view seem to be the essential starting point for any thinking about the content of the study, since it has been agreed that the latter must "preserve what has been achieved";⁵³

(b) The non-exhaustive summary of the problems posed by the topic which the Special Rapporteur attempted to provide in his first report;⁵⁴ although this list was drawn up on the basis of a cursory study of the *travaux préparatoires* for the three Vienna Conventions and of doctrine, no fundamental objections were raised to it during the discussion of that report;

(c) The discussions in the Commission and subsequently in the Sixth Committee of the General Assembly on the topic of reservations to treaties, which made it possible to gain a more complete and more accurate idea of the problems posed by the topic and to "hierarchize" them in the light of the concerns expressed by the members of the Commission and the representatives of States;⁵⁵

(d) The replies of States to the questionnaire drawn up by the Special Rapporteur⁵⁶ and the documents received from international organizations.⁵⁷

36. Moreover, this outline is entirely provisional and is intended to give the members of the Commission an overall view of the Special Rapporteur's current intentions; he would welcome their reactions and suggestions in that connection.

(b) *Provisional general outline of the study*

37. PROVISIONAL PLAN OF THE STUDY⁵⁸

I. UNITY OR DIVERSITY OF THE LEGAL REGIME FOR RESERVATIONS TO MULTILATERAL TREATIES (RESERVATIONS TO HUMAN RIGHTS TREATIES)

A. **Unity of rules applicable to general multilateral treaties (para. 148 (k))**

1. The legal regime for reservations is generally applicable;
2. The legal regime for reservations is generally applied.

⁵³ See paragraphs 19–22 above.

⁵⁴ See paragraph 9 above and the references given in footnote 13.

⁵⁵ See paragraphs 1 and 9–17 above.

⁵⁶ See paragraph 6 above.

⁵⁷ See *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, p. 141, para. 92, footnote 127.

⁵⁸ The relevant articles of the 1969, 1978 and 1986 Vienna Conventions (where no number is noted, the problem is not dealt with in these conventions) and references to the questions formulated in paragraphs 124, 148 and 149 of the Special Rapporteur's first report (footnote 2 above) are noted in parentheses following each heading.

B. **Control mechanisms (paras. 124 (g), 148 (m) and (n))**

1. Use of control mechanisms to evaluate the permissibility of reservations;
2. Consequences of the determination of a non-permissible reservation.

II. DEFINITION OF RESERVATIONS

1. Positive definition (1969 and 1986, art. 2.1 (d); 1978, art. 1 (j));
2. Distinction between reservations and other procedures aimed at modifying the application of treaties (para. 149);
3. Distinction between reservations and interpretative declarations (para. 148 (c));
4. The legal regime of interpretative declarations (para. 148 (d), (e) and (f));
5. Reservations to bilateral treaties (para. 148 (a)–(b)).

III. FORMULATION AND WITHDRAWAL OF RESERVATIONS, ACCEPTANCES AND OBJECTIONS⁵⁹

A. **Formulation and withdrawal of reservations**

1. Acceptable times for the formulation of a reservation (1969 and 1986, art. 19, *chapeau*);
2. Procedure regarding formulation of a reservation (1969 and 1986, art. 23, paras. 1 and 4);
3. Withdrawal (1969 and 1986, arts. 22, paras. 1 and 3 (a), and 23, para. 4).

B. **Formulation of acceptances of reservations**

1. Procedure regarding formulation of an acceptance (1969 and 1986, art. 23, paras. 1 and 3);
2. Implicit acceptance (1969 and 1986, art. 20, paras. 1 and 5);
3. Obligations and express acceptance (1969 and 1986, art. 20, paras. 1–3) (paras. 124 (b), 148 (l)).

C. **Formulation and withdrawal of objections to reservations**

1. Procedure regarding formulation of an objection (1969 and 1986, art. 23, paras. 1 and 3);
2. Withdrawal of an objection (1969 and 1986, arts. 22, paras. 2 and 3 (b), and 23, para. 4).

IV. EFFECTS OF RESERVATIONS, ACCEPTANCES AND OBJECTIONS

Permissibility or opposability? Statement of the problem

A. **Prohibition of certain reservations**

1. Difficulties relating to the application of reservation clauses (1969 and 1986, art. 19 (a)–(b));
2. Difficulties relating to the determination of the object and purpose of the treaty (1969 and 1986, art. 19 (c));

⁵⁹ To the extent that the role of depositories seems, in the predominant system, to have been exclusively "mechanical", this chapter will probably be the logical—although probably not exclusive—place to discuss that topic.

3. Difficulties relating to the customary nature of the rule to which the reservation applies (para. 148 (o)–(q));

B. The effects of reservations, acceptances and objections in the case of a reservation that complies with the provisions of article 19 of the 1969 and 1986 Vienna Conventions

1. On the relations of the reserving State or international organization with a party that has accepted the reservation (1969 and 1986, arts. 20, para. 4 (a) and (c), and 21, para. 1) (para. 124 (o));
2. On the relations of the reserving State or international organization with an objecting party⁶⁰ (1969 and 1986, arts. 20, para. 4 (b), and 21, para. 3) (para. 124 (h)–(j) and (l–n)).

C. The effects of reservations, acceptances and objections in the case of a reservation that does not comply with the provisions of article 19 of the 1969 and 1986 Vienna Conventions

1. On the relations of the reserving State or international organization with a party that has accepted the reservation⁶¹ (1969 and 1986, arts. 20, para. 4 (a) and (c), and 21, para. 1) (para. 124 (e)–(f));
2. On the relations of the reserving State or international organization with an objecting party⁶² (1969 and 1986, arts. 20, para. 4 (b), and 21, para. 3) (para. 124 (k)–(l));
3. Should a reservation that does not comply with the provisions of article 19 be considered null independently of any objection? (para. 124 (c)–(d)).

D. The effects of reservations on relations with other contracting parties

1. On the entry into force of the treaty (para. 148 (g));
2. On relations with other parties inter se (1969 and 1986, art. 21, para. 2).

V. STATUS OF RESERVATIONS, ACCEPTANCES AND OBJECTIONS IN THE CASE OF SUCCESSION OF STATES

Significance of article 20 of the 1978 Vienna Convention dealing with newly independent States

A. In the case of newly independent States

1. Selective maintenance of reservations (1978, art. 20, para. 1);
2. Status of acceptances of reservations by the predecessor State in the case of a maintenance of a reservation (para. 148 (i));
3. Status of objections to the reservations of the predecessor State in the case of a maintenance of a reservation (para. 148 (j));
4. Possibility of a newly independent State formulating new reservations, and their consequences (1978, arts. 20, paras. 2–3) (para. 148 (i));
5. Status of objections and acceptances by the predecessor State with regard to reservations formulated by third States.

⁶⁰ Including the question of the permissibility of an objection on this assumption.

⁶¹ Including the question of the permissibility of an acceptance on this assumption.

⁶² Including the question of the need for an objection on this assumption.

B. Other possibilities with regard to the succession of States (para. 148 (i)–(j))

1. In cases where part of a State's territory is concerned;
2. In the case of the unification or division of States (para. 148 (h));
3. In the case of the dissolution of States.

VI. THE SETTLEMENT OF DISPUTES LINKED TO THE REGIME FOR RESERVATIONS

1. The silence of the Vienna Conventions and its negative consequences (para. 124 (g));
2. Appropriateness of mechanisms for the settlement of disputes—standard clauses or an additional protocol.

(c) *Brief commentary on the proposed outline*

(i) *Unity or diversity of the legal regime for reservations to treaties*

38. It is a question here of determining whether the legal regime for reservations, as established under the 1969 Vienna Convention, is applicable to all treaties, regardless of their object. The question could have been posed on a case-by-case basis with regard to each of the rules. Nevertheless, there are three reasons for conducting a separate and preliminary study:

(a) First, the terms of the problem are, at least partially, the same, regardless of the provisions in question;

(b) Secondly, its consideration may be an opportunity for inquiring into some basic general aspects of the regime for reservations, which is preferably done *in limine*;

(c) Lastly, this question is at the heart of very topical discussions relating above all to reservations to human rights treaties, which justifies placing the emphasis on the consideration of the specific problems that concern them.

This also involves one of the main difficulties which were stressed by both the members of the Commission at its forty-seventh session as well as the representatives of States in the Sixth Committee at the fiftieth session of the General Assembly.⁶³

(ii) *Definition of reservations*

39. The same holds true with regard to the definition of reservations, a question that was constantly linked during the discussions to the difference between reservations and interpretative declarations and to the legal regime for the latter.⁶⁴ It also seems useful to link the consideration of this question to that of other procedures, which, while not constituting reservations, are, like them, designed to and do, enable States to modify obligations under treaties to which they are parties; this is a question of alternatives to reservations, and recourse to such procedures may likely make it possible, in specific cases, to overcome some problems linked to reservations.

40. For reasons of convenience, the Special Rapporteur also plans to deal with reservations to bilateral treaties in

⁶³ See paragraphs 10–16 and footnotes 21 and 24 above.

⁶⁴ *Ibid.* and footnotes 16 and 25.

connection with the definition itself of reservations: the initial question posed by reservations to bilateral treaties is that of determining whether they are genuine reservations, the precise definition of which is therefore a necessary condition for its consideration. Furthermore, although consideration of the question regarding the unity or diversity of the legal regime for reservations could have been envisaged, it appears at first glance that that question relates to a different problem.

(iii) *Formulation and withdrawal of reservations, acceptances and objections*

41. Except for some problems linked to the application of paragraphs 2 and 3 of article 20 of the 1969 and 1986 Vienna Conventions,⁶⁵ this chapter does not appear, *prima facie*, to involve questions giving rise to serious difficulties. It is nevertheless necessary to include it in the study: this is a matter of practical questions which arise constantly, and one could hardly conceive of a “guide to practice” which would not include developments in this regard.⁶⁶

(iv) *Effects of reservations, acceptances and objections*

42. This is, without any doubt, the most difficult aspect of the study, and the Commission members and the representatives of States in the Sixth Committee agreed on this point.⁶⁷ This is also the aspect with regard to which apparently irreconcilable doctrinal trends were most clearly in opposition.⁶⁸

43. No one denies that some reservations are prohibited; and this is, furthermore, most clearly evident from the provisions of article 19 of the 1969 and 1986 Vienna Conventions. Nevertheless, their implementation will not be problem-free. These difficulties will have to be dealt with under section IV.A (see paragraph 37 above).

44. Disagreement arises really with regard to the effects of reservations, their acceptance and objections that are made to them, as well as the circumstances in which acceptances or objections are either permissible (or impermissible), or necessary (or superfluous). This is at the heart of the opposition between the schools of “admissibility” or “permissibility” on the one hand, and “opposability” on the other.⁶⁹ In the opinion of the Special Rapporteur, it is certainly premature to take a position at this stage and it is not out of the question that the Commission may propose specific guidelines providing useful guidance for the practice of States and international organizations without having to decide between these opposing doctrinal positions. It is also possible that the Commission will be persuaded to borrow from both of them in order to arrive at satisfactory and balanced practical solutions.

⁶⁵ An exact definition of limited multilateral treaties and gaps in the regime applicable to reservations to the constituent instruments of international organizations, in particular.

⁶⁶ See paragraph 15 above.

⁶⁷ See paragraphs 10–16 and footnote 18 above.

⁶⁸ See *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 142–143, paras. 97–108, and pp. 144–146, paras. 115–123.

⁶⁹ *Ibid.*

45. This is the reason why the general outline reproduced above⁷⁰ does not take any position, even implicitly, on the theoretical questions that divide doctrine.⁷¹ Assuming that there are, without any doubt, permissible and impermissible reservations,⁷² the Special Rapporteur felt that the most “neutral” and objective method was to deal separately with the effects of reservations, acceptances and objections when the reservation is permissible on the one hand (para. 37, sect. IV.B) and when it is non-permissible on the other (para. 37, sect. IV.C), since it is necessary to consider separately two specific problems which, *prima facie*, are defined in the same terms as a reservation, whether permissible or not, and which concern the effect of a reservation on the relations of the other parties among themselves (para 37, sect. IV.D).

(v) *Status of reservations, acceptances and objections in the case of succession of States*

46. As is evident from the Special Rapporteur’s first report⁷³ and some statements made during the discussions in the Commission in 1995,⁷⁴ the 1978 Vienna Convention left numerous gaps and questions with regard to this problem, which article 20 of the Convention deals with only as concerns the case of newly independent States and without addressing the question of the status of the acceptances of the predecessor State’s reservations and objections that had been made to them or acceptances and objections formulated by the predecessor State to reservations made by third States to a treaty to which the successor State establishes its status as a party.

(vi) *The settlement of disputes linked to the regime for reservations*

47. The Commission is not in the habit of providing the draft articles that it elaborates with clauses relating to the settlement of disputes.⁷⁵ The Special Rapporteur considers that there is no reason *a priori* to depart from this practice in most cases: in his opinion, the discussion of a regime for the settlement of disputes diverts attention from the topic under consideration strictly speaking, gives rise to useless debates and is detrimental to efforts to complete the work of the Commission within a reasonable period. It seems to him that, if States deem it necessary, the Commission would be better advised to draw up draft articles which are general in scope and could be incorporated, in the form of an optional protocol, for example, in the body of codification conventions.

⁷⁰ Para. 37, sect. IV.

⁷¹ It should be pointed out again, however, that these questions, “theoretical” as they may be, have very important practical implications.

⁷² See paragraphs 37, sect. IV.A of the general outline, and 43 above.

⁷³ *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 136–137, paras. 62–71.

⁷⁴ *Ibid.*, vol. II (Part Two), paras. 458–460.

⁷⁵ The draft articles on the responsibility of States are the exception: in 1975, it was anticipated that the Commission might decide to add to them a third part on the question of the settlement of disputes and the implementation of responsibility (*Yearbook ... 1975*, vol. II, document A/10010/Rev.1, pp. 55–59, paras. 38–51); since 1985 “the Commission assumed that a part three on the settlement of disputes and the implementation of international responsibility would be included in the draft articles” (*Yearbook ... 1995*, vol. II (Part Two), p. 43, para. 233); it adopted the text of that part three in its first reading in 1995 (*ibid.*, p. 64, para. 364).

48. Nevertheless, the problem arises perhaps in a somewhat particular manner with regard to the subject of reservations to treaties.

49. As some members of the Commission pointed out during the debate on the subject at the forty-seventh session, although there are, admittedly, mechanisms for the peaceful settlement of disputes, to date they have been scarcely or not at all utilized in order to resolve differences of opinions among States with regard to reservations, particularly concerning their compatibility with the object and purpose of a treaty.⁷⁶ Moreover, when such mechanisms exist, as is frequently the case with regard to human rights treaties, it is particularly important to determine the extent and limits of their powers with respect to reservations.⁷⁷

50. Under these conditions, it may be useful to consider the establishment of mechanisms for the settlement of disputes in this specific area since, in the view of the Special Rapporteur, these mechanisms could be provided for, either in standard clauses that States could insert in future treaties to be concluded by them, or in an additional optional protocol that could be added to the 1969 Vienna Convention.

Conclusion

51. It is very clear that the provisional outline of the study proposed above could not be immutable: it must be able to be adapted, supplemented and revised in the course of further work which, quite obviously, will uncover new difficulties or, on the contrary, will reveal the artificial nature of some of the problems anticipated.

⁷⁶ *Yearbook ... 1995*, vol. II (Part Two), p. 105, para. 455.

⁷⁷ As a result, the position that the existence of provisions establishing a mechanism for the settlement of disputes obviates the need to insert a clause on reservations is at least debatable; see in this regard Imbert, *op. cit.*, which gives the example of the statement by the representative of Greece, Mr. Eustathiadès, at the United Nations Conference on the Representation of States in Their Relations with International Organizations, and according to which the adoption of a protocol on the settlement of disputes would have an advantage in that "the delicate problem of reservations would be avoided" (United Nations Conference on the Representation of States in Their Relations with International Organizations (United Nations publication, Sales No. E.75.V.11), p. 327, para. 50).

52. It also stands to reason that the study is a mere proposal by the Special Rapporteur, who will gratefully welcome any suggestion that can make it clearer or more complete. Nevertheless, he urges the members of the Commission to bear in mind, in making criticisms and suggestions, the requirements which such an outline must meet in order to carry out its functions fully.⁷⁸

53. The study should, in particular, enable the members of the Commission and the representatives of States in the Sixth Committee, on the one hand, to ascertain that the concerns which they expressed during the "preliminary phase" have indeed been taken into account and, on the other hand, to gain in future a rather precise idea of the degree of progress made in the work as it progresses. The outline is designed to be, as it were, a "compass" enabling the Special Rapporteur to make progress, under the supervision of the Commission, in the difficult mission entrusted to him. It should also constitute the framework for the guide to practice, which the Commission has undertaken the task of elaborating.

54. The Special Rapporteur feels that, subject to unforeseen difficulties, the task can and should be carried out within four years. If the above-mentioned outline is followed, and taking into account the fact that chapter II of this report deals with the question of the unity or diversity of the legal regime for reservations (chap. I of the provisional outline of the study):

(a) Chapters II (Definition of reservations) and III (Formulation and withdrawal of reservations, acceptances and objections) could be submitted to the Commission at its forty-ninth session;

(b) The very important and difficult chapter IV (Effects of reservations, acceptances and objections) could be dealt with the following year; and

(c) The first reading of the guide to practice in respect of reservations to treaties could be completed in 1999 with the consideration of chapters V (Status of reservations, acceptances and objections in the case of succession of States) and VI (The settlement of disputes linked to the regime for reservations), it being clearly understood that, like the general outline itself, these indications are only and can be only of a purely contingent nature.

⁷⁸ See paragraph 34 above.

CHAPTER II

Unity or diversity of the legal regime for reservations to treaties (reservations to human rights treaties)

55. This chapter relates to item I of the general outline proposed on a provisional basis in chapter I above.⁷⁹ Its object is to determine if the rules applicable to reservations to treaties, whether codified in articles 19 to 23 of the 1969 and 1986 Vienna Conventions, or customary, are applicable to all treaties, whatever their object, and in particular to human rights treaties.

1. NECESSITY AND URGENCY OF CONSIDERATION OF THE QUESTION BY THE COMMISSION

56. As recalled above, the question was raised with some insistence both in the Commission at its forty-seventh session and in the Sixth Committee of the General Assembly at its fiftieth session.⁸⁰ It is easy to understand these concerns.

57. Their origin doubtless lies in initiatives in respect of reservations taken recently by certain monitoring bodies established by human rights treaties, which in recent years have considered themselves entitled to assess the permissibility of reservations formulated by States to the instruments under which they are established, and, where appropriate, to draw far-reaching conclusions from such observations.

58. The origins of this development may be found in the practice of the Commission and of the European Court of Human Rights, which, in several significant decisions, have noted that a reservation (or an “interpretative declaration” which, on analysis, proves to be a reservation) was impermissible or did not have the scope attributed to it by the respondent State, and have drawn the conclusions both that the State concerned could not invoke the impermissible reservation before them and that the State was no less bound by its ratification of the European Convention on Human Rights.⁸¹ The Inter-American Court of Human Rights has taken a similar position.⁸²

⁷⁹ See paragraph 37 above.

⁸⁰ See paragraphs 10 and 12, and footnotes 19 and 22 above.

⁸¹ See the cases of *Temelhasch v. Switzerland* (Council of Europe, European Commission of Human Rights, *Decisions and Reports*, Application No. 9116/80, vol. 31 (Strasbourg, April 1983), p. 120); *Belilos v. Switzerland* (European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 132, *judgment of 29 April 1988*, Registry of the Court, Council of Europe, Strasbourg, 1988, paras. 50–60); *Chrysostomos et al. v. Turkey* (Council of Europe, European Commission of Human Rights, *Decisions and Reports*, Application Nos. 15299/89, 15300/89 and 15318/89, vol. 68 (Strasbourg, 1993), pp. 216–253; *F. and M. L. v. Austria* (Council of Europe, *Yearbook of the European Convention on Human Rights*, Application No. 17588/90, vol. 37 (The Hague/London/Boston, Kluwer Law International, 1994); *Gradinger v. Austria* (European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 328, *judgment of 23 October 1995* (Registry of the Court, Council of Europe, Strasbourg, 1996)); *Loizidou v. Turkey (Preliminary Objections)* (ibid., vol. 310, *judgment of 23 March 1995*), (Registry of the Court, Council of Europe, Strasbourg, 1995); and *Fischer v. Austria* (ibid., vol. 312, *judgment of 26 April 1995*). These decisions are analysed in more detail in section C of this chapter.

⁸² Inter-American Court of Human Rights, *The effect of reservations on the entry into force of the American Convention (arts. 74 and 75)*, Advisory Opinion OC–2/82 of 24 September 1982, Series A, No. 2; and *Restrictions to the death penalty (arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC–3/83 of 8 September 1983, Series A, No. 3.

59. The monitoring bodies established by human rights treaties concluded under United Nations auspices, traditionally cautious in this regard,⁸³ have thereby been encouraged to be somewhat bolder:

(a) The persons chairing the human rights treaty bodies have twice expressed their concern at the situation arising from reservations to treaties under their scrutiny and recommended that those bodies should draw the attention of States to the incompatibility of some of those reservations with the applicable law,⁸⁴

(b) The Committee on the Elimination of Discrimination against Women amended its guidelines on the preparation of initial and periodic reports by the inclusion of a section indicating the form in which States parties making reservations were to report them,⁸⁵ and

welcomed the request of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, in its resolution 1992/3 on contemporary forms of slavery, to the Secretary-General:

To seek the views of the Committee on the Elimination of Discrimination against Women and the Commission on the Status of Women on the desirability of obtaining an advisory opinion on the validity and legal effect of reservations to the Convention on the Elimination of All Forms of Discrimination against Women ...

[and] ... decided that it should support steps taken in common with other human rights treaty bodies to seek an advisory opinion from the International Court of Justice that would clarify the issue of reservations to the human rights treaties and thereby assist States parties in their ratification and implementation of those international instruments. Such an opinion would also help the Committee in its task of considering the progress made in the implementation of the Convention.⁸⁶

(c) Above all, perhaps, the Human Rights Committee, on 2 November 1994, adopted its general comment No. 24 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, in which it took a clear position in favour of a broad view of its own powers to examine the compatibility of such reservations and declarations with the purpose and object of the Covenant.⁸⁷

60. These positions have provoked some disquiet among States and drawn strong criticism from some of them,⁸⁸ probably linked to the review of the question of reserva-

⁸³ See paragraphs 165–176 below.

⁸⁴ See the reports of the fourth and fifth meetings of persons chairing the human rights treaty bodies (A/47/628, annex, paras. 36 and 60–65, and A/49/537, annex, para. 30).

⁸⁵ See fifteenth session, 15 January–2 February 1996, “Guidelines regarding the form and content of initial reports of States parties” (CEDAW/C/7/Rev.2), para. 9.

⁸⁶ Report of the Committee on the Elimination of Discrimination against Women, *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 38* (A/48/38), chap. I, paras. 3 and 5.

⁸⁷ Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), vol. I, annex V.

⁸⁸ See, in particular, the extremely critical remarks on general comment No. 24 by the United States, the United Kingdom (ibid., annex

tions to treaties being undertaken in various forums, in particular, the Council of Europe.⁸⁹

61. It is thus certainly not redundant for the Commission to take a position on these questions at an early date. The position of the Special Rapporteur, which induced him to amend somewhat the order in which he proposed to take up the questions raised in connection with the matter entrusted to him, does not spring from any desire to follow a trend.

62. While it is obviously fundamental for human rights bodies to state their views on the question, the Commission must also make heard the voice of international law⁹⁰ in this important domain, and it would be unfortunate for it not to take part in a discussion which is of concern to the Commission above all: on the one hand, the questions raised by States and human rights bodies relate to the applicability of the rules on reservations codified by the 1969 Vienna Convention, in the drafting of which the Commission played such an influential role; on the other hand, under its statute, the Commission “shall have for its object the promotion of the progressive development of international law and its codification”,⁹¹ meaning “the more precise formulation and systematization of rules of international law in fields where there has already been extensive State practice, precedent and doctrine”.⁹² These two aspects are at the centre of the debate, one of the prerequisites being to determine whether the problem arises in terms of codification or of progressive development.

63. Given the opposing views which have emerged, the Special Rapporteur considers that the Commission might usefully seek to clarify the terms of the problem as it arises with respect to general public international law and adopt a resolution on the question which could be brought to the attention of States and human rights bodies by the General Assembly. A draft resolution along these lines is included in the conclusion to this chapter (para. 260).

2. OBJECT AND PLAN OF THE CHAPTER

64. However, since the function of the Commission is to contribute to the codification and progressive de-

velopment of international law as a whole, and as the question of “reservations to treaties” covers treaties as a whole, it seems appropriate to re-situate the specific problems raised by reservations to human rights treaties in a broader context and to consider the more general question of the unity or diversity of the legal regime or regimes applicable to reservations.

65. A first element of diversity could stem in this respect from the opposition between treaty norms laid down in articles 19 and 23 of the 1969 and 1986 Vienna Conventions⁹³ and customary rules in this area. There is, however, no reason to make such a distinction: while it can doubtless be maintained that at the time of their adoption the Vienna rules stemmed, at least in part, from the progressive development of international law rather than its codification in the strict sense, that is certainly no longer true today; relying on the provisions of the 1969 Vienna Convention, confirmed in 1986, practice has been consolidated in customary norms.⁹⁴ In any event, notwithstanding the nuances which may be ascribed to such an opinion,⁹⁵ the concern expressed by Commission members as well as within the Sixth Committee of the General Assembly to preserve what has been achieved under the existing Vienna Conventions⁹⁶ renders the question somewhat moot: it must be placed in the context of the norms set out in these conventions.

66. This artificial problem being set aside, the question of the unity or diversity of the legal regime governing reservations may be stated thus: do, or should, certain treaties escape application of the Vienna regime by virtue of their object? Should the answer be yes, to what specific regime or regimes are, or should, these treaties be subject with respect to reservations?⁹⁷ If the treaties which are recognized by the 1969 and 1986 Vienna Conventions themselves as having a specific status are set apart, the problem has essentially been posed with respect to the “normative” treaties, of which it has been affirmed that they would be antinomical with the very idea of reservations (sect. A).

67. In this view (but with the specific problem of human rights treaties still in the background), it has been

VI) and France (*ibid.*, *Fifty-first Session, Supplement No. 40 (A/51/40)*, vol. I, annex VI).

⁸⁹ See in particular, Council of Europe, *Texts Adopted*, recommendation 1223 (1993) on reservations made by member States to Council of Europe conventions, adopted by the Parliamentary Assembly on 1 October 1993 (Strasbourg, 1993), and *ibid.*, *Documents*, adopted by the Committee of Ministers on the same question on 17 February 1994, and the work of CAHDI at its meeting of 21–22 March 1995 (document CAHDI(95)5 and corrigendum, paras. 23–34); at the conclusion of the meeting it was decided that “[t]he Secretariat will submit this document [CAHDI(95)7, working paper presented by the delegation of Austria], together with a copy of the meeting report, to the Special Rapporteur of the ILC, indicating at the same time that the CAHDI takes a keen interest in this issue and was willing to contribute to the study. This item will be kept on the agenda for the Spring 1996 meeting of the CAHDI when first indications will have been received on how the ILC study was progressing”.

⁹⁰ In its formulation of General Comment No. 24, the Human Rights Committee did not focus its attention on the general rules of international law on reservations but on the International Covenant on Civil and Political Rights itself; see the comment by Mrs. Higgins who criticized the initial draft for making excessive reference to the 1969 Vienna Convention in comparison with the Covenant, which should be the central concern of the Committee (1366th meeting of the Committee (CCPR/C/SR.1366), para. 58).

⁹¹ Art. 1, para. 1.

⁹² Art. 15.

⁹³ It would appear prudent to leave to one side, at this stage, the problems raised by article 20 of the 1978 Vienna Convention; besides the fact that a consensus seems to have emerged within the Commission that it is not a priority problem (see footnote 21 above), it arises in quite specific terms. Suffice to say that the question of succession to reservations (and to acceptances and objections) appears *prima facie* only as ancillary to the more general question of succession to the treaty itself. This being so, the Commission, when it considers the problems of succession to reservations, will perhaps need to reflect, at least incidentally, on the question of determining whether the object of a treaty plays a role in the modalities for succession to treaties. It is possible that, in the meantime, the judgement to be delivered by ICJ on preliminary objections raised by Yugoslavia in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* will offer new elements in this regard.

⁹⁴ See the first report of the Special Rapporteur (footnote 2 above), pp. 151–152, paras. 153–157.

⁹⁵ *Ibid.*, paras. 158–162.

⁹⁶ See paragraphs 2–4 and 18–20 above.

⁹⁷ The problem has been put in more or less exactly these terms with regard to reservations to human rights treaties: “The basic question concerning treaties on human rights is whether or not they are to be considered as a category separate from other multilateral treaties and in particular, whether the rules on reservations ... apply to them with equal force” (Coccia, “Reservations to multilateral treaties on human rights”, p. 16).

remarked that the general question leads to another, more specific: “There are in effect two separate but related issues: should reservations to normative treaties be permitted, and should the validity of such reservations be assessed by a system other than that pertaining to treaties in general?”⁹⁸ If the problem is put thus, “the reality is that we are speaking of *two sorts* of rules—substantive and procedural”.⁹⁹

68. These two categories of rules may be linked, and here again it may be imagined that the monitoring bodies established by certain multilateral treaties have specific powers with regard to reservations by virtue of the object of the treaty. But it may also be considered that the problem of the extent of these powers arises in many forms, independently of the object of the treaty, in all cases where a treaty instrument creates a body responsible for monitoring its implementation; in such a case, the specificity of the reservations regime would stem from the existence of the body and not from the specific characteristics of the treaty—unless it is considered that treaties establishing monitoring bodies constitute a separate category ...

69. It thus appears methodologically sound to distinguish the problem of principle—substantive—of the unity or diversity of the rules applicable to reservations (sect. B) from that—procedural—of the application of such rules and, in particular, of the powers of monitoring bodies where they exist (sect. C).

A. Diversity of treaties and the legal regime for reservations

1. LIMITATION OF THE STUDY TO NORMATIVE TREATIES

70. Two conflicting considerations may lead to expansion or, conversely, to limitation of the scope of this chapter: on the one hand, the question of the unity or diversity of the legal regime of reservations arises with some acuteness and urgency only with regard to human rights treaties; but, on the other hand, it is the case that other categories of treaties present particular problems with regard to the nature of the applicable rules or the modalities of their application; this is very certainly true of:

- (a) Limited treaties;
- (b) Constituent instruments of international organizations; and
- (c) Bilateral treaties.

71. It would seem wise, however, to exclude these various categories of treaties from consideration at this stage, for both theoretical and practical reasons. While the “universality or diversity” problem is partially common to all treaties, it is also, as a logical necessity, specific to each category; after all, it is in the light of the particular features of each category that the question arises of whether common rules are applicable to all treaties or whether, on

the contrary, they should be ruled out. Put differently, the problem of unity is one thing by definition, but, by the same token, the problem of diversity is many things.¹⁰⁰ In other words, it may be necessary to consider each individual category separately, and there is no disadvantage in giving such consideration to certain types of treaties and not to others for the time being, since they pose different problems, at least in part.

72. Moreover, in the 1969 and 1986 Vienna Conventions themselves, limited treaties and constituent instruments of international organizations are given separate treatment which is reflected in specific rules.¹⁰¹ Reservations to bilateral treaties, meanwhile, pose very specific problems relating to the very definition of the concept of reservations,¹⁰² and it would probably be advantageous to address them in the chapter devoted to that definition.¹⁰³

73. Codification treaties raise more difficult questions. The belief has occasionally been expressed that reservations to such treaties pose specific problems.¹⁰⁴ However widespread,¹⁰⁵ this notion is not devoid of ambiguity; the boundary between the codification of international law on the one hand and its progressive development on the other is, to say the least, unclear (assuming that it exists);¹⁰⁶ many treaties contain “codification clauses”, in other words, *provisions* which reproduce customary norms, without constituting “codification treaties” as such, since these provisions are set forth alongside others that are not of the same nature (this, incidentally, is the problem posed by numerous human rights treaties).¹⁰⁷ It is quite unlikely, then, that the category of codification treaties would, in and of itself, be “operational” for the purposes of this chapter.¹⁰⁸

74. Unquestionably, however, there is a need to determine whether a reservation to a customary norm repeated in a treaty provision is permissible.¹⁰⁹ In keeping with the “provisional plan of the study” in paragraph 37 above,¹¹⁰

¹⁰⁰ See the similar comments made by Mr. de Saram in the debate on the first report of the Special Rapporteur, *Yearbook ... 1995*, vol. I, 2404th meeting, pp. 165–167.

¹⁰¹ See article 20, paras. 2–3.

¹⁰² See the doubts expressed during the forty-seventh session of the Commission by Mr. Idris (*Yearbook ... 1995*, vol. I, 2407th meeting, pp. 189–190), Mr. Kabatsi (*ibid.*, p. 190) and Mr. Yamada (*ibid.*, pp. 190–192) concerning the appropriateness of the topic itself.

¹⁰³ See paragraph 37, Provisional plan of the study, sect. II.5, and paragraph 40 above.

¹⁰⁴ See, for example, Téboul, “Remarques sur les réserves aux conventions de codification”, and the literature cited on page 684, footnotes 9–10.

¹⁰⁵ See, for example, Imbert, *op. cit.*, pp. 239–249, and Téboul, *loc. cit.*

¹⁰⁶ See *The Work of the International Law Commission*, 4th ed. (United Nations publication, Sales No. E.88.V.1), pp. 14–15.

¹⁰⁷ See paragraphs 85–86 below.

¹⁰⁸ It is chiefly for similar reasons, moreover, that the once important distinction between “law-making treaties” and “contractual treaties” has now fallen into disfavour: “... most treaties certainly have no homogeneous content, and rules of all kinds can be cast into the same treaty as into a mould ... If material legal distinctions were to be applied to treaties, all their provisions would in any case have to be examined separately: a superficial overview would not be enough (Reuter, *op. cit.*, p. 27).

¹⁰⁹ See the first report of the Special Rapporteur (footnote 2 above), p. 149, paras. 143–144, and the statement made by Mr. Lukashuk during the debate on that report (*Yearbook ... 1995*, vol. I, 2402nd meeting, pp. 159–161).

¹¹⁰ See paragraph 37 above, sect. IV.A.3.

⁹⁸ Redgwell, “Universality or integrity? Some reflections on reservations to general multilateral treaties”, p. 279.

⁹⁹ Higgins, “Introduction”, *Human Rights as General Norms and a State’s Right to Opt Out: Reservations and Objections to Human Rights Conventions*, p. xx.

the Special Rapporteur promises to deal more fully with this complex problem at a later stage in the study. This decision seems to him justified by the fact that what is at issue is not the *subject* but the dual nature (both contractual and customary) of the provision to which the reservation relates.

75. Nevertheless, the problem is clearly not wholly unrelated to the one with which this chapter deals. In the view of the Special Rapporteur, a practical approach is called for in this regard. Some of the questions being addressed at this stage are unavoidably of a “vertical” nature and relate to the entire topic under consideration; they cannot be ignored altogether, as the Commission must feel completely free to make subsequent improvements in the provisional and partial conclusions reached at the 1996 session.

76. Conversely, it is the conviction of the Special Rapporteur that consideration of the “vertical” problem addressed in this chapter, which runs through the whole topic of reservations to treaties, can be very beneficial for the rest of the study, by providing it with useful reference points and analysing it from a particular angle.

2. NORMATIVE TREATIES AND PROVISIONS

77. “Normative” treaties pose special problems. It is in discussing them that academic writers have not only dwelt most heavily on the unsuitability of the general legal regime governing reservations, but have even gone so far as to assert that such instruments, by their nature, do not permit reservations. Before considering these questions, however (which are, to a large extent, separate),¹¹¹ it is necessary to inquire into the substance and the very existence of this category of treaty.

78. According to some writers,

Multilateral conventions have become one of the most common means of establishing rules of conduct for all States, not only in their relations with other States, but also in their relations with individuals. States thus tend to make their contributions to the formation of international law through such instruments, by articulating a general requirement of the international community.¹¹²

It is this peculiarity of “normative” Conventions, namely, that they operate in, so to speak, the absolute, and not relatively to the other parties—*i.e.*, they operate for each party *per se*, and not *between* the parties *inter se*—coupled with the further peculiarity that they involve mainly the assumption of duties and obligations, and do not confer direct rights or benefits on the parties *qua* States, that gives these Conventions their special juridical character.¹¹³

79. Treaties of this type are found in widely differing fields, such as the legal (“conventions on codification”¹¹⁴ of public and private international law, including uniform law conventions), economic, technical, social, humanitarian, and other fields. General conventions on environmental protection usually have this character, and disarmament conventions frequently do so as well.

80. It is in the human rights field, however, that these peculiarities have most frequently come to light,¹¹⁵ the term “human rights” being understood here in the broad sense. For the purposes of this chapter, there are no grounds for distinguishing between humanitarian law on the one hand and human rights, strictly speaking, on the other; considerations which apply to one term apply just as well to the other.¹¹⁶

81. Nevertheless, even from a broad standpoint, the categorization of a treaty as a human rights (or disarmament or environmental protection) treaty is not always problem-free;¹¹⁷ a family law or civil status convention may contain some provisions which relate to human rights and others which do not. Moreover, assuming that this problem can be solved, two other difficulties arise.

82. First, the category of “human rights treaties” is, by all indications, far from homogeneous.

The United Nations Covenants and the European Convention [on Human Rights], which govern very nearly all aspects of life in society, cannot be considered on the same footing as the Genocide Convention or the Convention on racial discrimination which are concerned only to safeguard a single right.¹¹⁸

These two subcategories of “human rights treaties” pose quite different problems as regards the definition of their object and purpose, which plays such a central role in evaluating the permissibility of reservations.¹¹⁹

83. Secondly, within a single treaty, clauses that vary greatly in their “importance” (which, legally speaking, can be reflected in whether they are binding or non-binding and whether they may or may not be derogated from),¹²⁰ their nature (customary or non-customary)¹²¹ or their substance (“normative” or contractual) can be set forth side by side. While all these factors have a bearing on the question under consideration,¹²² it is clearly this last factor, the “normative” character attributed to human rights treaties, which has the greatest impact.

84. According to a widely held view, the main peculiarity of such treaties is that their object is not to strike a balance between the rights and advantages which the States parties mutually grant to one another, but to establish common international rules, reflecting shared values, that all parties undertake to observe, each in its own sphere. As ICJ stated forcefully, with regard to the Convention on the Prevention and Punishment of the Crime of Genocide:

¹¹⁵ See paragraphs 84 and 148–152 below.

¹¹⁶ For an outline and a justification of the distinction, see Vasak, “Le droit international des droits de l’homme”, *Collected Courses ... 1974-IV*, pp. 350 et seq.

¹¹⁷ See, in this regard, Redgwell, *loc. cit.*, p. 280.

¹¹⁸ Imbert, “Reservations and human rights conventions”, p. 28.

¹¹⁹ See, in this regard, McBride, “Reservations and the capacity to implement human rights treaties”, to be published in *Human Rights as General Norms ...* (footnote 99 above), and Schabas, “Reservations to human rights treaties: time for innovation and reform”, p. 48.

¹²⁰ See, on this point, the moderate position taken by the Human Rights Committee in its general comment No. 24 (A/50/40), para. 10 (footnote 87 above), and the commentary by McBride, *loc. cit.*, pp. 163–164; see also Imbert, “Reservations and human rights conventions”, pp. 31–32.

¹²¹ See paragraphs 73–74 above.

¹²² See paragraphs 90–98 below.

¹¹¹ See paragraph 83 below.

¹¹² Imbert, *op. cit.*, pp. 435–436; see also the extensive bibliography cited by this author, particularly footnotes 92 and 95.

¹¹³ Fitzmaurice, “Reservations to multilateral conventions”, p. 15.

¹¹⁴ See paragraph 73 above.

In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.¹²³

85. It is, however, necessary to beware of taking an overly straightforward and simplistic view of things. While, as a rule, provisions that protect human rights have a marked normative character, human rights treaties also include typically contractual clauses. Awkward as this may be, the “Hague law” applicable to the conduct of warring parties in armed conflicts remains fundamentally contractual, and the 1899 and 1907 Conventions for the Pacific Settlement of International Disputes are still applied on a reciprocal basis (despite the lapsing of the celebrated *si omnes* clause),¹²⁴ similarly, the inter-State application machinery established by article 24 of the European Convention on Human Rights¹²⁵ and article 45 of the American Convention on Human Rights are based on reciprocity, and it has even been possible, in speaking of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, to state that it

contains stipulations of a normative character and stipulations of a contractual character. However, as is clear from its text and from the whole history of United Nations dealing with the problem of genocide, the intention of its framers was equally to codify, at least in part, substantive international law, and to establish international obligations to facilitate international co-operation in the prevention and punishment of the crime. Consequently, the Convention cannot be regarded as a single indivisible whole, and its normative stipulations are divisible from its contractual stipulations.¹²⁶

86. Here again, the problem does not seem to have been posed in the proper terms. While this has been done with respect to “human rights treaties”, all that is involved is “human rights clauses” of a normative character, or, more broadly, “normative clauses”, regardless of the subject of the treaty in which they are articulated.

87. Indeed, while it is clear that human rights treaties display these characteristics in a particularly striking way, it must also be recognized that they are not unique in doing so. The same is true of most environmental protection or disarmament treaties and, in a broader sense, all “normative” treaties by which the parties enact uniform rules which they undertake to apply.

88. Naturally, this observation does not obviate the need to inquire whether there are subcategories within this category—if it does in fact have legal status—which

pose specific problems with regard to reservations and, in particular, whether human rights treaties pose such problems. Nevertheless, thinking must start from more general premises, unless conclusions are to be posited at the outset of the process. Hence, while human rights treaties will be emphasized for the reasons outlined above,¹²⁷ the body of law-making multilateral treaties will form the broader focus of this chapter.

B. Unity of the main rules applicable to reservations

89. The adaptation to normative multilateral treaties of the “Vienna rules” relating to reservations cannot be evaluated in the abstract. It must be viewed in the light of the functions assigned to reservations regimes and the intentions of their authors.

1. FUNCTIONS OF THE LEGAL REGIME OF RESERVATIONS

90. Two opposing interests are at stake. The first interest is the extension of the convention. It is desirable for this convention to be ratified by the largest possible number of States; consequently, adjustments which make it possible to obtain the consent of a State will be accepted. The other concern relates to the integrity of the Convention: the same rules must apply to all parties; there is no point in having a treaty regime that has loopholes or exceptions, in which the rules vary according to the States concerned.¹²⁸

The function of the rules applicable to reservations is to strike a balance between these opposing requirements: on the one hand, the search for the broadest possible participation; on the other hand, the preservation of the *ratio contrahendi* (ground of covenant), which is the treaty’s reason for being. It is this conflict between universality and integrity which gives rise to all reservations regimes,¹²⁹ be they general (applicable to all treaties which do not provide for a specific regime) or particular (established by express clauses incorporated into the treaty).

91. As far as human rights treaties are concerned, Mrs. Higgins has expressed the problem in the following terms:

The matter is extremely complex. At the heart of it is the balance to be struck between the legitimate role of States to protect their sovereign interests and the legitimate role of the treaty bodies to promote the effective guarantee of human rights.¹³⁰

92. The first of these requirements, universality, militates in favour of widely expanding the right of States to formulate reservations, which clearly facilitates universal

¹²³ Advisory opinion cited above (footnote 47), p. 23; see also paragraphs 148–152 below.

¹²⁴ See, on this point, Imbert, *op. cit.*, pp. 256–257.

¹²⁵ See Imbert, “Reservations and human rights conventions”, p. 36.

¹²⁶ Statement made by Mr. Shabtai Rosenne on behalf of the Government of Israel during consideration of the request by the General Assembly for an advisory opinion concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Pleadings, Oral Arguments, Documents, Advisory Opinion of 28 May 1951*, pp. 356–357; see also Scovazzi, *Esercitazioni di diritto internazionale*, pp. 69–71. Likewise, in a Memorandum by the Director of ILO on the Admissibility of Reservations to General Conventions (League of Nations, *Official Journal*, 8th year, No. 7, July 1927, annex 967a, p. 882), it was noted that international labour conventions “appear to be legal instruments partaking of the nature both of a law and of a contract”.

¹²⁷ See paragraphs 56–63 above.

¹²⁸ Bastid, *Les traités dans la vie internationale: conclusions et effets*, pp. 71–72.

¹²⁹ See, in this regard, Halajczuk, “Les Conventions multilatérales entre l’universalité et l’intégrité”, pp. 38–50 and 147–158; Ruda, *loc. cit.*, p. 212; Gamble Jr., “Reservations to multilateral treaties: a macroscopic view of State practice”, pp. 372–373; Piper, “Reservations to multilateral treaties: the goal of universality”, pp. 297, 305 and 317; Cook, “Reservations to the Convention on the Elimination of All Forms of Discrimination against Women”, pp. 683–684 and 686; Blay and Tsamenyi, “Reservations and declarations under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees”, p. 557; and Nguyen Quoc, Daillier and Pellet, *Droit international public*.

¹³⁰ Higgins, “Introduction”, p. xv.

participation in “normative” treaties. And the same applies with respect to human rights:

... the possibility of formulating reservations may well be seen as a strength rather than a weakness of the treaty approach, insofar as it allows a more universal participation in human rights treaties.¹³¹

93. Nevertheless, such freedom on the part of States to formulate reservations cannot be unlimited. It clashes with another, equally pressing requirement—preserving the very essence of the treaty. For instance, it is absurd to believe that a State could become a party to the Convention on the Prevention and Punishment of the Crime of Genocide while objecting to the application of articles I–III, i.e. the only substantial clauses of the Convention.

94. The problem can also be posed in terms of consent.¹³²

95. By its very definition, the law of treaties is consensual. “Treaties are binding by virtue of the will of States to be bound by them. They are juristic acts, involving the operation of human will.”¹³³ States are bound by treaties *because* they have undertaken—*because* they have consented—so to be bound. They are free to make this commitment or not, and they are bound only by obligations which they have accepted freely, with full knowledge of the consequences.¹³⁴ “No State can be bound by contractual obligations it does not consider suitable.”¹³⁵

96. The same applies to reservations: “The fundamental basis remains, that no state is bound in international law without its consent to the treaty. This is the starting-point for the law of treaties, and likewise for our international law rules dealing with reservations.”¹³⁶ As ICJ has stated: “It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto.”¹³⁷ Likewise, in the arbitration

¹³¹ Coccia, *loc. cit.*, p. 3. The author refers to Schachter, Nawaz and Fried, *Toward Wider Acceptance of UN Treaties*, p. 148, and adds: “This UNITAR study shows statistically that ‘the treaties ... which permit reservations, or do not prohibit reservations, have received proportionally larger acceptances than treaties which either do not permit reservations to a part or whole of the treaty, or which contain only one substantial clause, making reservations unlikely.’”

¹³² See the first report on the law of treaties by Sir Hersch Lauterpacht, in which he explains that the problem of consent “is a question closely, though indirectly, connected with that of the intrinsic justification of reservations” (*Yearbook ... 1953*, vol. II, document A/CN.4/63, p. 125).

¹³³ Reuter, *op. cit.*, p. 23.

¹³⁴ Unless they are otherwise bound, but this is a different problem. See also, in this regard, the statement made by the United States representative in the Sixth Committee during the fiftieth session of the General Assembly (*Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 13th meeting (A/C.6/50/SR.13), para. 53).

¹³⁵ Tomuschat, “Admissibility and legal effects of reservations to multilateral treaties: comments on arts. 16, 17”, p. 466. See, for example, in this regard, the case of the *S.S. “Wimbledon”*, *Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 25, and *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 139.

¹³⁶ Bishop Jr., “Reservations to treaties”, *Recueil des cours ... 1961–II*, p. 255.

¹³⁷ ICJ opinion cited above (footnote 47), p. 21. The authors of the dissenting opinion express this idea still more strongly: “The consent of the parties is the basis of treaty obligations. The law governing reservations is only a particular application of this fundamental principle, whether the consent of the parties to a reservation is given in advance

of the dispute between France and the United Kingdom of Great Britain and Northern Ireland with regard to the *English Channel* case, the Court emphasized the need to respect the “principle of mutuality of consent” in evaluating the effects of reservations.¹³⁸

97. The rules applicable to reservations must therefore strike a dual balance between (a) the requirements of universality and integrity of the treaty; and (b) the freedom of consent of the reserving State and that of the other States parties, it being understood that these two “dialectical pairs” overlap to a large extent.

98. In the light of these requirements, it is necessary to inquire whether the legal regime for reservations envisaged by the 1969 and 1986 Vienna Conventions is generally applicable and, in particular, whether it is suited to the particular natures of normative treaties (or, more specifically, of the “normative clauses” articulated in general multilateral treaties).¹³⁹ As a first step, it can be determined that the authors of this regime showed themselves to be mindful of these requirements, and that they intended to adopt generally applicable rules to satisfy them.

2. A REGIME DESIGNED FOR GENERAL APPLICATION

99. Since the very beginning of its work on reservations, the Commission has been aware of the need to strike the above-mentioned dual balance¹⁴⁰ between the requirements of universality and integrity on the one hand and, on the other, between respect for the wishes expressed by the reserving State and that of the other parties, although the Commission has taken a number of very different positions as to the best way of achieving such a balance.

100. In accordance with its position of principle in favour of the rule of unanimity, the first report by Mr. Briery merely stresses the need for consent to the reservation, while admitting—and this is in itself an element of flexibility—that such consent could be implicit.¹⁴¹ However, beginning the following year, in response to the General Assembly’s invitation to the Commission to study the question of reservations to multilateral conventions,¹⁴² the Special Rapporteur fully discussed the question:

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

of the proposal of the reservations or at the same time or later” (*ibid.*, pp. 31–32). Moreover, it is clear that the majority and the dissenting judges held very divergent views on the way in which consent to a reservation should be expressed, but this difference does not affect the “principle of mutuality of consent” (see footnote 138 below), and it seems debatable to assert, as some eminent writers do, that in the opinion of the majority (which is the source of the Vienna regime), “the very principle of consent has been shaken” (Imbert, *op. cit.*, p. 69; see also pages 81 and 141 et seq.).

¹³⁸ *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, decision of 30 June 1977 (UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 42, paras. 60–61).

¹³⁹ See paragraphs 73–74 and 85–86 above; in the rest of this report, these two terms are used interchangeably.

¹⁴⁰ See paragraph 97 above.

¹⁴¹ *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 240.

¹⁴² General Assembly resolution 478 (V) of 16 November 1950; see the first report of the Special Rapporteur (footnote 2 above), p. 127, para. 14.

preferred that some degree of uniformity in the obligations of all parties to a multilateral instrument should be maintained. ...

Secondly, and on the other hand, there is the desirability of the widest possible application of multilateral conventions. ... If they are to be effective, multilateral conventions must be as widely in force or as generally accepted as possible.¹⁴³

101. The Commission agreed with the Special Rapporteur on this question but at the same time was somewhat uneasy:

When a multilateral convention is open for States generally to become parties, it is certainly desirable that it should have the widest possible acceptance. ... On the other hand, it is also desirable to maintain uniformity in the obligations of all the parties to a multilateral convention, and it may often be more important to maintain the integrity of a convention than to aim, at any price, at the widest possible acceptance of it.¹⁴⁴

Faced with this dilemma,

The Commission believes 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.¹⁴⁵

It concludes, nonetheless,

that its problem is not to recommend a rule which will be perfectly satisfactory, but that which seems to it to be the least unsatisfactory and to be suitable for application in the majority of cases,¹⁴⁶

it being understood that this rule can always be rejected, since States and international organizations are invited to “consider the insertion [in multilateral conventions] of provisions relating to ... reservations”.¹⁴⁷

102. It does not make much difference which system is decided on at this stage. It is significant that the Commission, while perfectly aware of the diversity of situations, has shown a firm determination since the outset to separate out a single, unique system of ordinary law, one that does the least possible harm and can be applied in all cases where the treaty is silent.

103. The reports submitted by Sir Hersch Lauterpacht in 1953 and 1954 are written along the same lines.¹⁴⁸ However, it is important to note that after a long section on the debates concerning reservations in the draft¹⁴⁹ Covenant on Human Rights,¹⁵⁰ the Special Rapporteur on the law of treaties concluded that it was incumbent on the General Assembly to choose a suitable system, and that the great variety of existing practice suggested “that it is neither necessary nor desirable to aim at a uniform solution”; he nevertheless went on to say:

What is both necessary and desirable is that the codification of the law of treaties shall contain a clear rule for the cases in which the parties have made no provision on the subject.¹⁵¹

¹⁴³ *Yearbook ... 1951*, vol. II, document A/CN.4/41, pp. 3–4, paras. 11–12 and 16.

¹⁴⁴ *Ibid.*, document A/1858, para. 26.

¹⁴⁵ *Ibid.*, para. 28.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*, para. 33.

¹⁴⁸ See the first report of the Special Rapporteur (footnote 2 above), pp. 129–130, paras. 23–29.

¹⁴⁹ The only one at the time.

¹⁵⁰ *Yearbook ... 1954*, vol. II, document A/CN.4/87, commentary on draft article 9, pp. 131–133.

¹⁵¹ *Ibid.*, p. 133.

104. The only report in which Sir Gerald Fitzmaurice dealt with the question of reservations is the first one, submitted in 1956.¹⁵² It is of twofold interest with regard to the problem at issue here:

(a) Endorsing the views of his predecessor, the Special Rapporteur felt that “even as a matter of *lex lata*, the strict traditional rule about reservations could be regarded as mitigated in practice by the following considerations which, taken together, allow an appreciable amount of latitude to States in this matter, and should meet all reasonable needs”,¹⁵³ thus reaffirming the idea that flexibility is a gauge of adaptability;

(b) In addition, Sir Gerald Fitzmaurice again pointed out the difference noted in an article published in 1953¹⁵⁴ between “treaties with limited participation” on the one hand and, on the other, “multilateral treaties”.¹⁵⁵

105. This distinction, mentioned again in 1962 by Sir Humphrey Waldock in his first report,¹⁵⁶ is the direct source of the current provisions of paragraphs 2 and 3 of the 1969 and 1986 Vienna Conventions. This result was not without its problems, however. The lengthy discussions on the Special Rapporteur’s suggestions¹⁵⁷ bear witness to profound differences on this point among the members of the Commission. The controversy was mainly about the validity of the exception to the general rule, as proposed by the Special Rapporteur and discussed in another form by the Drafting Committee, concerning “multilateral treaties concluded by a restricted group of States”.¹⁵⁸ Summarizing the debate, the Special Rapporteur noted that two courses were open to the Commission:

One was to draw a distinction between general multilateral treaties and other multilateral treaties; the other was to draw a distinction between treaties which dealt with matters of concern only to a restricted group of states and treaties which dealt with matters of more general concern.¹⁵⁹

106. The first of these two courses was defended by some members,¹⁶⁰ while others, even more clearly, asked expressly that the criterion of the object of the treaty should be reintroduced.¹⁶¹ These views, strongly opposed by other members,¹⁶² nonetheless remained minority

¹⁵² See the first report of the Special Rapporteur (footnote 2 above), paras. 30–33.

¹⁵³ *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 126, para. 92.

¹⁵⁴ “Reservations to multilateral conventions”, p. 13.

¹⁵⁵ *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 127, paras. 97–98. Note, however, that while Sir Gerald Fitzmaurice spoke expressly in the above-mentioned article (footnote 154 above) about “Conventions of the ‘normative’ types”, he did not use that expression in his report.

¹⁵⁶ *Yearbook ... 1962*, vol. II, document A/CN.4/144, draft arts. 17, para. 5, and 18, para. 3 (b).

¹⁵⁷ For a brief discussion of these debates, see the first report of the Special Rapporteur (footnote 2 above), paras. 43–45.

¹⁵⁸ See especially *Yearbook ... 1962*, vol. I, 663rd and 664th meetings, pp. 225–234.

¹⁵⁹ *Ibid.*, 664th meeting, p. 233, para. 48.

¹⁶⁰ *Ibid.*, the positions of Mr. Verdross (642nd meeting, p. 80, para. 56) or Sir Humphrey Waldock (663rd meeting, p. 228, paras. 91–93).

¹⁶¹ *Ibid.*, the positions of Messrs Jiménez de Aréchaga (652nd meeting, p. 146), Yasseen (664th meeting, p. 232) and Bartoš (664th meeting, p. 233).

¹⁶² See especially the very firm position of Mr. Ago (*ibid.*, 664th meeting, p. 233).

views and, after referral to the Drafting Committee, they were ultimately rejected. In its report, the Commission merely stated the following:

... the Commission also decided that there were insufficient reasons for making a distinction between multilateral treaties not of a general character between a considerable number of States and general multilateral treaties. The rules proposed by the Commission therefore cover all multilateral treaties, except those concluded between a small number of States, for which the unanimity rule is retained.¹⁶³

107. Neither the States in their commentaries on the draft articles nor the Commission itself ever returned to this point,¹⁶⁴ and in 1966, in its final report on the law of treaties, the Commission used the same formula—almost word-for-word—as in 1962:

... the Commission also decided that there were insufficient reasons for making a distinction between different kinds of multilateral treaties other than to exempt from the general rule those concluded between a small number of States for which the unanimity rule is retained.¹⁶⁵

108. The problem resurfaced briefly during the United Nations Conference on the Law of Treaties after the United States proposed an amendment which sought to introduce the nature of the treaty as one of the criteria to be taken into consideration in determining whether a reservation was permissible.¹⁶⁶ Supported by some States¹⁶⁷ and opposed by others,¹⁶⁸ the proposal was sent to the Drafting Committee,¹⁶⁹ which rejected it.¹⁷⁰ The Conference does not seem to have discussed the view expressed by WHO that draft article 19¹⁷¹ “should be interpreted as authorizing reciprocity only to the extent to which it is compatible with the nature of the treaty and of the reservation”.¹⁷²

¹⁶³ *Yearbook ... 1962*, vol. II, p. 180, document A/5209, para. 23, Draft articles on the law of treaties, arts. 18–20, Commentary, para. (14). See also pages 178 and 181.

¹⁶⁴ Except in passing; see the statement by Mr. Briggs during the 1965 debates, *Yearbook ... 1965*, vol. I, 798th meeting, p. 163.

¹⁶⁵ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 206, para (14). At the forty-seventh session, Mr. de Saram drew attention to this sentence (*Yearbook ... 1995*, vol. I, 2404th meeting, p. 166); see also the position of Mr. Srineevasa Rao (*ibid.*, pp. 171–172) and that of the United States during the Sixth Committee debate (*Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 13th meeting (A/C.6/50/SR.13), para. 50).

¹⁶⁶ *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.

¹⁶⁷ *Ibid.*, 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): United States, 21st meeting, p. 108, and 24th meeting, p. 130; Spain, 21st meeting, p. 109; and China, 23rd meeting, p. 121.

¹⁶⁸ *Ibid.*, Ukrainian SSR, 22nd meeting, p. 115; Poland, p. 118; Ghana, p. 119; Italy, p. 120; Hungary, 23rd meeting, p. 122; Argentina, 24th meeting, p. 130; and USSR, 25th meeting, p. 134.

¹⁶⁹ *Ibid.*, 25th meeting, p. 135.

¹⁷⁰ *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), 11th plenary meeting, reaction of the United States, p. 35.

¹⁷¹ Became article 21.

¹⁷² Analytical compilation of comments and observations made in 1966 and 1967 with respect to the final draft articles on the law of treaties (A/CONF.39/5 (vol. I)), p. 166.

109. The *travaux préparatoires* for the 1986 Vienna Convention do not reflect the substantive debate on this question. At the most, one can observe that, after some discussion,¹⁷³ the Commission disregarded the wishes of certain members to have a special regime for reservations by international organizations; in its 1982 report it stated:

After a thorough review of the problem, a consensus was reached in the Commission, which, choosing a simpler solution than the one it had adopted in first reading, assimilated international organizations to States for the purposes of the formulation of reservations.¹⁷⁴

110. Bringing the regime of reservations to treaties to which international organizations are parties into line with the regime applicable to treaties involving only States was highlighted once again at the 1986 United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations.¹⁷⁵ Here the fundamental unity of the reservation regime laid out in the 1969 and 1986 Vienna Conventions was made complete and confirmed, the sole exceptions being certain treaties concluded between a limited number of States and constituent instruments of international organizations.¹⁷⁶

111. The documents tracing the drafting of the 1969 and 1986 Vienna Conventions leave no doubt whatsoever: the Commission and, later, the codification conferences, deliberately, and after a thorough debate, sought to establish a single regime applicable to reservations to treaties regardless of their nature or their object. The Commission did not set out with any preconceived ideas to this end; as it clearly stated in 1962 and in 1966,¹⁷⁷ it had observed that there were no specific reasons for proceeding differently—and it is interesting to note, first, that the Commission adopted this reasoned position by looking specifically at the regime governing reservations to human rights treaties¹⁷⁸ and, secondly, that in the two cases in which it felt special rules were needed on certain points, it did not hesitate to derogate from the general regime.¹⁷⁹

3. THE LEGAL REGIME OF RESERVATIONS IS GENERALLY APPLICABLE

112. This argument is a familiar one. Whatever manifestation it takes, it holds that, given the importance of normative treaties for the international community as a whole, reservations to such instruments must be excluded, or at least discouraged, whereas the “flexible system” of the 1969 and 1986 Vienna Conventions unduly facilitates their formulation and amplifies their effects.

¹⁷³ See the first report of the Special Rapporteur (footnote 2 above), pp. 137–139, paras. 72–85.

¹⁷⁴ *Yearbook ... 1982*, vol. II (Part Two), p. 34, para. (13) of the general commentary to section 2.

¹⁷⁵ See the first report of the Special Rapporteur (footnote 2), pp. 139–140, paras. 87–88.

¹⁷⁶ See paragraph 72 above.

¹⁷⁷ See paragraphs 106–107 above.

¹⁷⁸ Particularly with regard to the International Covenants on Human Rights; see paragraph 103 and footnote 149 above.

¹⁷⁹ See article 20, paras. 2–3, of the 1969 and 1986 Vienna Conventions.

113. However, it is doubtless a matter of good doctrine to draw a distinction between two separate problems even if they are related: the very general problem of whether or not reservations to such instruments are appropriate and the more technical question of determining whether the “Vienna regime” addresses the various concerns expressed. But if the answer to the first question cannot be objective and depends far more on political—indeed, ideological—preferences than on legal technicalities, the latter considerations in turn make it possible to take a firm position with regard to the second question. And the two can in fact be considered separately.

(a) *A debate with no possible conclusion: the appropriateness of reservations to normative treaties*

114. The terms of the debate are clearly evident in the opposition between the majority and the dissenting judges in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case. The former held that:

The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis.¹⁸⁰

For the minority judges, on the other hand,

It is ... not universality at any price that forms the first consideration. It is rather the acceptance of common obligations—keeping step with like-minded States—in order to attain a high objective for all humanity, that is of paramount importance. ... In the interests of the international community, it would be better to lose as a party to the Convention a State which insists in face of objections on a modification of the terms of the Convention, than to permit it to become a party against the wish of a State or States which have irrevocably and unconditionally accepted all the obligations of the Convention.¹⁸¹

These [“multilateral conventions of a special character”¹⁸²], by reason of their nature and of the manner in which they have been formulated, constitute an indivisible whole. Therefore, they must not be made the subject of reservations, for that would be contrary to the purposes at which they are aimed, namely, the general interest and also the social interest.¹⁸³

115. This marked opposition of points of view elicits three observations:

(a) It arises at the outset of the controversy in connection with a human rights treaty par excellence, which as such falls in the subcategory of normative treaties, the category around which the debate has recently resurfaced.¹⁸⁴

(b) The two “camps” start from exactly the same premises (the aims of the Convention, which are pursued in the interest of all mankind) to reach radically opposing conclusions (reservations to the Convention must/must not be permitted);

(c) Everything was said in 1951; the ensuing dialogue of the deaf has gone on unabated for 45 years without either side displaying any fundamental change in its position.

116. As there is no possible way of ending the debate, let us content ourselves with setting out the undisputed facts.¹⁸⁵

117. Reservations to “normative” treaties are deleterious because:

(a) Permitting them is tantamount to encouraging partial acceptance of the treaty,¹⁸⁶ and

(b) Less careful drafting, since the parties can in fact modify their obligations later;¹⁸⁷

(c) The accumulation of reservations ultimately voids these treaties of any substance where the reserving State is concerned;¹⁸⁸ and

(d) In any event, compromises their quasi-legislative functioning and the uniformity of their implementation.¹⁸⁹

118. More specifically, as regards human rights treaties,

(a) The terms “reservations” and “human rights” seem at first to contradict each other. It is hard to see how a State can agree to be bound by a treaty on human rights if it is not in a position to honour its obligations in full, and needs a “reserved domain”,¹⁹⁰

(b) It is desirable in principle that States accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being.¹⁹¹

(c) Accompanying ratification with a series of reservations could give the reserving State an opportunity to enhance its international “image” at little cost without having really to accept any restrictive commitments.¹⁹²

¹⁸⁵ Subject to the more technical aspects of the debate, see paragraphs 126–162 below.

¹⁸⁶ Fitzmaurice, “Reservations to multilateral conventions”, pp. 17 and 19–20.

¹⁸⁷ *Ibid.*, p. 19.

¹⁸⁸ See Schabas, “Reservations to human rights treaties ...”, p. 41.

¹⁸⁹ See, in the area of environmental protection, Stewart, “Enforcement problems in the Endangered Species Convention: reservations regarding the reservation clauses”, p. 438 and, albeit indirectly, in the field of disarmament, Boniface, *Les sources du désarmement*, p. 68.

¹⁹⁰ Imbert, “Reservations and human rights conventions”, p. 28; see also Coccia, *loc. cit.*, p. 16; both authors endorse this opinion but do not claim it as their own. See also the position of Mr. Robinson during the debate on the first report of the Special Rapporteur (*Yearbook ... 1995*, vol. I, 2402nd meeting, pp. 157–159).

¹⁹¹ A/50/40 (footnote 87 above), vol. I, annex V, para. 4.

¹⁹² See Anand, “Reservations to multilateral conventions”; Imbert, *op. cit.*, p. 249; and Schabas, “Reservations to human rights treaties ...”, p. 41.

¹⁸⁰ Advisory Opinion, *I.C.J. Reports 1951*, p. 24.

¹⁸¹ *Ibid.*, Joint dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo, p. 47.

¹⁸² *Ibid.*, Dissenting opinion of Judge Alvarez, p. 51.

¹⁸³ *Ibid.*, p. 53.

¹⁸⁴ See paragraphs 56–62 above.

119. Conversely, it is argued that:

(a) Reservations are a “necessary evil”¹⁹³ resulting from the current state of international society; they

cannot be qualified at the ethical level; they reflect a fact, namely that there are minorities whose interests are as respectable as those of majorities;¹⁹⁴

(b) More positively, they are an “essential condition of life, of the dynamics” of treaties¹⁹⁵ that promotes the development of international law in the process;¹⁹⁶

(c) By “facilitating the conclusion of multilateral conventions”;¹⁹⁷ and

(d) By allowing a greater number of States to become parties;¹⁹⁸

(e) Since, ultimately, partial participation is better than no participation at all.¹⁹⁹

120. These considerations carry even more weight in the area of human rights:

(a) The possibility of entering reservations may encourage States which consider that they have difficulties in guaranteeing all the rights in [such treaties] nonetheless to accept the generality of obligations in that instrument;²⁰⁰

(b) Indeed, it could be argued that there is a particular need for a margin of flexibility in respect of human rights treaties which tend to touch on matters of particular sensitivity to States ...²⁰¹

¹⁹³ *Yearbook ... 1965*, vol. I, 797th meeting, statement by Mr. Ago, p. 151.

¹⁹⁴ *Yearbook ... 1975*, vol. II, document A/CN.4.285, fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations by Mr. Paul Reuter, Special Rapporteur, p. 36, para. (3) of the general commentary on section 2.

¹⁹⁵ Imbert, *op. cit.*, p. 463.

¹⁹⁶ *Ibid.*, p. 464.

¹⁹⁷ *I.C.J. Reports 1951* (footnote 47 above), p. 22. See also the position of Mr. Sreenivasa Rao during the debate on the first report of the Special Rapporteur (*Yearbook ... 1995*, vol. I, 2404th meeting, pp. 171–172, paras. 42–50).

¹⁹⁸ See, for example, Lachs, “Le développement et les fonctions des traités multilatéraux”, *Recueil des cours...* 1957–II, p. 311. See also the views expressed during the debate on the first report of the Special Rapporteur by Mr. Villagrán Kramer (*Yearbook ... 1995*, vol. I, 2403rd meeting, pp. 163–164) and Mr. Elaraby (“In a sense, reservations were the price paid for broader participation”, *ibid.*, 2404th meeting, p. 170, para. 35) and, in the area of the environment, Stewart, *loc. cit.*, p. 436.

¹⁹⁹ This is what Sir Gerald Fitzmaurice called, speaking in highly critical terms, “the half-a-loaf doctrine” (“Reservations to multilateral conventions”, p. 17): “... that in any case half a loaf is better than no bread—that it is better (especially as regards the law-making, social and humanitarian type of Convention) that States should become parties even if they cannot (or will not) carry out certain of the obligations involved, and that they should be bound by at least some of the obligations of the Convention, even if they disengage themselves from the rest” (*ibid.*, p. 11). For examples in a similar vein, see De Visscher, *Théories et réalités en droit international public*, pp. 292–293, and Imbert, *op. cit.*, pp. 372 and 438.

²⁰⁰ See footnote 191 above.

²⁰¹ Redgwell, *loc. cit.*, p. 279; see also Imbert, “Reservations and human rights conventions”, p. 30. Giegerich shows how *kultureller Relativismus* (cultural relativism) is often invoked in the area of human rights (“Reservations to human rights agreements: admissibility, validity, and review powers of treaty bodies—a constitutional approach”). See also the position of Mr. Sreenivasa Rao during the debate on the first report of the Special Rapporteur (footnote 197 above).

(c) Particularly when the terms of the convention are backed up by a monitoring mechanism which ensures a dynamic interpretation of the instrument;²⁰²

(d) The formulation of reservations would seem to constitute proof that States take their treaty obligations seriously; and

(e) Gives them an opportunity to harmonize their domestic law with the requirements of the convention while obligating them to abide by the most important provisions;

(f) Especially since the implementation of human rights treaties takes time;²⁰³ and

(g) Takes more resources, particularly financial resources, than it would appear at first.²⁰⁴

121. Similarly, it is argued that the usefulness of reservations in the area of human rights is borne out concretely by the fact that very few conventions concluded in this area exclude reservations²⁰⁵ and that this option is available even when a treaty is concluded among a small number of States.²⁰⁶ It is also obvious that the periodic calls for withdrawal of reservations to human rights treaties elicit only a faint response,²⁰⁷ which would seem to point out the usefulness of such reservations.

122. The same authors maintain that in reality, the scope of reservations to law-making treaties, including those in the field of human rights, is limited,²⁰⁸ a view contested by the doctrine opposing the use of reservations.²⁰⁹ Again, the question is one of appreciation, and this serves merely to confirm that there can be no objective answer to the question of whether the drawbacks of reservations to these instruments outweigh their advantages or vice versa.

123. The “truth” probably lies somewhere in between; everything depends on the circumstances and the purpose of the provisions in question. However, leaving the question unanswered presents few drawbacks: it is true that article 19 of the 1969 and 1986 Vienna Conventions sets out the principle of the right to formulate reservations;

²⁰² Imbert, “Reservations and human rights conventions”.

²⁰³ See McBride, *loc. cit.* See also the position of Mr. Sreenivasa Rao during the debate on the first report of the Special Rapporteur (footnote 197 above).

²⁰⁴ See McBride, *loc. cit.*

²⁰⁵ See paragraph 124 below.

²⁰⁶ As in the case of the Council of Europe; see article 64 of the European Convention on Human Rights (Imbert, “Reservations and human rights conventions”, p. 38).

²⁰⁷ See Parliamentary Assembly of the Council of Europe, “Reply to recommendation 1223 (1993) on reservations made by member states to Council of Europe conventions” (Doc. 7031, 21 February 1994); see also Clark, “The Vienna Convention reservations regime and the Convention on Discrimination against Women”, p. 288.

²⁰⁸ See Coccia, *loc. cit.*, p. 34; Gamble Jr., *loc. cit.*, *passim*; Imbert, *op. cit.*, pp. 347 et seq., and “Reservations to human rights conventions”, p. 31; Shelton, “State practice on reservations to human rights treaties”, pp. 225–227; Schmidt, “Reservations to United Nations human rights treaties: the case of the two Covenants”; and Sinclair, *The Vienna Convention on the Law of Treaties*, p. 77.

²⁰⁹ See Schabas, “Reservations to human rights treaties ...”, pp. 42 and 64; see also the concerns expressed by the Human Rights Committee, the Committee on the Elimination of Discrimination against Women and the chairpersons of human rights treaty bodies (paragraph 59 above).

however, like all rules governing reservations (and like the vast majority of other rules) set out in these Conventions, this is an optional residual rule which negotiators can reject if they find it useful to do so. If they feel that the treaty does not lend itself to the formulation of reservations, they need only insert a clause expressly excluding them, which is precisely the case contemplated in article 19 (a).

124. It is remarkable, however, that such provisions should be so rare in normative human rights treaties;²¹⁰ they seem to be equally rare in disarmament treaties.²¹¹

125. This infrequency of clauses prohibiting reservations would seem to be explained by the ordinary-law regime laid down in the 1969 and 1986 Vienna Conventions which is applied owing to the frequent silence²¹² of these treaties on the matter of reservations. Another striking phenomenon seems *prima facie* to lead to this conclusion: this is the wide range of reservation clauses found in normative treaties. While these treaties might seem by their very nature to warrant a different reservation regime than that applicable to other types of treaties, one might also expect to see parties use this system, if not regularly, then at least frequently. This is not the case, however. Where reservation clauses do exist in such treaties, including human rights treaties, they are notable for their great diversity.²¹³ These hints at the “acceptability” of the “Vienna regime” are confirmed when one looks at the special treatment given to this regime in human rights treaties.

(b) *Adapting the “Vienna regime” to the particular characteristics of multilateral normative treaties*

126. In the Special Rapporteur’s view, the real legal question here is not whether or not it is appropriate to authorize reservations to multilateral normative treaties, but whether, when contracting parties remain silent on the legal regime of reservations, the rules set out in the 1969 and 1986 Vienna Conventions can be adapted to any type of treaty, including “normative” treaties, and those in the field of human rights.

127. In truth, it would seem hard to argue that the answer to this question must be in the affirmative. Should one do so, however, it is not because reservations are a “good” thing or a “bad” thing in general either for nor-

native treaties or for human rights, but because the rules which are applicable to them under the 1969 and 1986 Vienna Conventions strike a good balance between the concerns raised by the “advocates” of reservations and those raised by their opponents, and provide a reasonable answer to their respective arguments on which a position need no longer be taken.

128. The general and uniform applicability of the legal regime of reservations set out in the 1969 and 1986 Vienna Conventions is related to the particular characteristics of this regime, which its architects sought to make flexible and adaptable precisely so that it could be applied in all situations. In fact, the system is adapted to the special features of general multilateral law-making treaties, including the requirements of human rights conventions.

(i) *Flexibility and adaptability of the “Vienna regime”*

129. The unique nature of the regime of reservations to treaties is due to the regime’s fundamental features, which enable it to meet the specific needs of all types of treaties and related instruments. Its flexibility guarantees its adaptability.

130. The system of unanimity which was the rule, at least at the universal level, until the ICJ advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,²¹⁴ was cumbersome and rigid. It was this rigidity that led to a preference for the pan-American system, which became widespread after 1951. As the Court noted with regard to the above-mentioned Convention:

Extensive participation in conventions of this type has already given rise to greater *flexibility* in the international practice concerning multilateral conventions. More general resort to reservations, very great allowance made for tacit assent to reservations, the existence of practices which go so far as to admit that the author of reservations which have been rejected by certain contracting parties is nevertheless to be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations—all these factors are manifestations of a new need for *flexibility* in the operation of multilateral conventions.*²¹⁵

131. “Flexibility”—this is the keyword of the new legal regime of reservations which is gradually replacing the old regime and becoming enshrined in the Vienna Conventions.

132. The first report of Sir Humphrey Waldock in 1962, which marks a departure by the Commission from the old reservation regime, contains a lengthy appeal, which is particularly eloquent and complete, in favour of a so-called “flexible system” under which, “as under the unanimity system, the essential interests of each individual State are to a very great extent safeguarded ...”.²¹⁶ The Special Rapporteur wishes to stress that the rules he is proposing—which have their origin largely in the rules set out in the 1969 and 1986 Vienna Conventions—are most likely to promote the universality of treaties yet will

²¹⁰ See, however, examples in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (art. 9), the Convention against discrimination in education (art. 9), Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (art. 4) or the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (art. 21), all of which prohibit any reservations to their provisions.

²¹¹ See, however, article XXII of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. The clauses prohibiting reservations seem to be more common in the field of environmental protection; see the Protocol to the Antarctic Treaty on Environmental Protection (art. 24), the United Nations Framework Convention on Climate Change (art. 24), and the Convention on Biological Diversity (art. 37), all of which exclude reservations.

²¹² See paragraph 134 below.

²¹³ On this question see Imbert, *op. cit.*, pp. 193–196, and Schabas, “Invalid reservations to the International Covenant on Civil and Political Rights: is the United States still a party?”, p. 286.

²¹⁴ *I.C.J. Reports 1951*, p. 15.

²¹⁵ *Ibid.*, pp. 21–22.

²¹⁶ *Yearbook ... 1962*, vol. II (document A/CN.4/144), p. 64. See also the first report of the Special Rapporteur (footnote 2 above), pp. 130–131, para. 36.

have only a minimal effect on both the integrity of the text of the treaty and the principle of agreement.²¹⁷

133. The principal elements that make this possible are the following:

(a) The permissibility of reservations must be considered in the light of the object and purpose of the treaty;²¹⁸ this fundamental rule in itself makes it pointless to modify a reservation regime in terms of the object of the treaty, for the object is taken into account in the very wording of the basic rule;

(b) The freedom of the other contracting parties to agree is entirely preserved, since they can change the scope of the reservations as they choose practically without restriction, through the mechanism of acceptances and objections;²¹⁹

(c) “The right to make reservations as recognized by the Vienna Conventions has a residual character: any treaty may restrict it, in particular by prohibiting reservations or certain types of reservations”;²²⁰ it can also institute its own regime for admissibility and monitoring reservations. Accordingly, the Vienna rules are simply a safety net which negotiators are free to reject or modify, particularly if they find it useful to do so because of the nature or the object of the treaty.

134. Moreover, it is not immaterial that, notwithstanding this possibility, many treaties do not contain reservation clauses, but simply refer implicitly to the regime set out in the 1969 and 1986 Vienna Conventions.

This silence no longer means what it once did: it is not solely a consequence of the need to avoid questioning an agreement of the inability for States to agree on a joint text; it corresponds largely to the desire of most States to submit reservations to the “flexible” system developed by the United Nations. The treaty’s silence then becomes the result of a positive choice,²²¹ and the residual rules then become the ordinary law deliberately chosen by the parties.²²²

135. It is likewise not immaterial that this solution of implicit—and, occasionally, explicit²²³—reference was used in a number of general multilateral normative treaties, in fields including human rights. This would seem to establish that the Vienna regime is suited to the particular characteristics generally attributed to treaties of this type.

(ii) *The “Vienna regime” is suited to the particular characteristics of normative treaties*

136. The objections made to the “flexible” regime of pan-American origin²²⁴ used in the 1969 and 1986 Vienna Conventions were synthesized forcefully and with skill by Sir Gerald Fitzmaurice in an important article published

in 1953. In it he stressed in particular the drawbacks the regime would present in the case of reservations to “normative” treaties.²²⁵ These arguments have been repeated numerous times since and revolve principally around three ideas: the pan-American or “Vienna” regime²²⁶ is ostensibly unsuitable to this type of treaty and especially to human rights treaties because:

(a) It would undermine the integrity of the rules set out therein, and uniform implementation of these rules is essential for the community of contracting States;

(b) It would be incompatible with the absence of reciprocity in commitments undertaken by the parties under such instruments; and

(c) It would fail to preserve equality between the parties.

a. *Problems related to the “integrity” of normative treaties*

137. It is undeniable that the “Vienna regime” does not guarantee the absolute integrity of treaties. Furthermore, the very concept of reservations is incompatible with this notion of integrity;²²⁷ by definition, a reservation “purports to exclude or to modify the legal effect of certain provisions of the treaty”.²²⁸ Thus far the only way to preserve this integrity completely has been to prohibit any reservations whatsoever; this, it cannot be repeated too often, is perfectly consistent with the 1969 and 1986 Vienna Conventions.²²⁹

138. The fact remains that, where a treaty is silent, the rules set out in the 1969 and 1986 Vienna Conventions, by not fully addressing the concerns of those who would defend the absolute integrity of normative treaties, guarantee, to all intents and purposes, that the essence of the treaty is preserved.

139. Article 19 (c) in fact prohibits the formulation of reservations that are incompatible “with the object and purpose of the treaty”, which means that in no case can the treaty be weakened by a reservation, contrary to the fears occasionally expressed by the proponents of the restrictive school.²³⁰ And this can lead to the prohibition of *any* reservations, because it is perfectly conceivable that a treaty on a very specific topic may have a small number of provisions that form an indissoluble whole. This situation, however, is probably the exception, if only because “purely normative” treaties are themselves rare.²³¹

140. This, however, is the rationale given by the ILO representative, Mr. C. W. Jenks, in his statement on 1 April 1968 to the United Nations Conference on the Law

²¹⁷ Ibid., pp. 64–65.

²¹⁸ See article 19 (c), of the 1969 and 1986 Vienna Conventions.

²¹⁹ See articles 20, paras. 3–5, and 21–22. See also the first report of the Special Rapporteur (footnote 2 above), p. 136, para. 61.

²²⁰ Reuter, *op. cit.*; see also paragraph 26 and the other references cited in footnote 44 above.

²²¹ Imbert, *op. cit.*, pp. 226–227.

²²² Ibid., p. 226.

²²³ See footnotes 18 and 19 above.

²²⁴ This origin was rightly emphasized by Mr. Barboza during the debate on the first report of the Special Rapporteur (*Yearbook ... 1995*, vol. I, 2404th meeting, p. 169).

²²⁵ Fitzmaurice, “Reservations ...”, pp. 15–22 in particular.

²²⁶ In reality, the two regimes differ somewhat in the way they are implemented, but they are identical in spirit, and have thus received similar criticism.

²²⁷ As ICJ noted: “It does not appear, moreover, that the conception of the absolute integrity of a convention has been transformed into a rule of international law.” (See advisory opinion, *I.C.J. Reports 1951*, p. 24.)

²²⁸ Art. 2, para. 1 (d), of the 1969 and 1986 Vienna Conventions.

²²⁹ See paragraph 133 above.

²³⁰ See paragraph 117 above.

²³¹ See paragraph 85 above.

of Treaties in support of the traditional prohibition of any reservation to international labour conventions.²³² According to him, ILO practice concerning reservations was based on the principle recognized in article 16²³³ that reservations incompatible with the object and purpose of the treaty were inadmissible. Reservations to international labour conventions were incompatible with the object and purpose of those conventions.²³⁴ Actually, this explanation seems somewhat artificial, and it is probably better to assume that in this specific case the prohibition of reservations is based on a practice which, most likely, assumed a customary value owing more to do with the tripartite structure of ILO than with the object and purpose of the treaty.²³⁵

141. The reserving State's obligation to respect them is not the only legal guarantee against the weakening of a treaty, normative or not, by means of reservations. Indeed, there can be no doubt that the provisions concerning peremptory norms of general international law (*jus cogens*) cannot be the subject of reservations. General comment No. 24 of the Human Rights Committee links this prohibition with the prohibition against any action contrary to the object and purpose of the treaty: "Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant."²³⁶ This wording is open to discussion²³⁷ and cannot, in any event, be generalized: one can well imagine a treaty referring, very indirectly, to a norm of *jus cogens* without that norm having anything to do with the object and purpose of the treaty. A reservation to such a provision would still be impermissible, for one cannot imagine a State using a reservation to a treaty provision, to avoid having to respect a rule which it was in any case obliged to respect as "a norm from which no derogation is permitted".²³⁸

142. Whatever its basis, the rule is no less definite and can have concrete effects in the area of human rights. There is no question that certain rules which seek to protect human rights are of a peremptory character; the Commission in fact provided two such examples in the commentary to draft article 50 (which became article 53 of the 1969 Vienna Convention) in its 1966 report: the prohibition of genocide and of slavery.²³⁹ However, this

²³² To which Mr. Razafindralambo drew attention during the debate on the first report of the Special Rapporteur (*Yearbook ... 1995*, vol. I, 2402th meeting, pp. 156–157).

²³³ Became article 19 of the Convention.

²³⁴ The text of this statement was transmitted to the Special Rapporteur by the ILO Legal Counsel. It was summarized in *Official Records of the United Nations Conference on the Law of Treaties ...* (footnote 167 above), 7th meeting, p. 37, para. 11.

²³⁵ In the same statement, the ILO representative added that the procedural arrangements concerning reservations embodied in the draft articles were entirely inapplicable to ILO by reason of its tripartite character as an organization in which, in the language of its Constitution, "representatives of employers and workers" enjoyed "equal status with those of governments". See also League of Nations, International Labour Conference—third session (Geneva, 1921), vol. II, third part (Appendices and Index), Appendix XVIII—Report of the Director presented to the Conference, p. 1046, and the Memorandum by the ILO Director dated 15 June 1927 (footnote 126 above).

²³⁶ A/50/40 (footnote 87 above), vol. I, annex V, para. 8.

²³⁷ See the doubts expressed in this connection by the United States in its observations (footnote 88 above) on general comment No. 24 (52) (A/50/40).

²³⁸ Art. 53 of the 1969 and 1986 Vienna Conventions.

²³⁹ *Yearbook ... 1966*, vol. II, p. 248.

is not the case with all rules that seek to protect rights,²⁴⁰ and the identification of these norms is not easy; this is in fact the main flaw in the notion of *jus cogens*. Yet the principle is not really debatable: peremptory provisions in treaties cannot be the subject of reservations, and this, taken together with respect for the object and purpose of the treaty, provides a further guarantee for the integrity of normative conventions, particularly in the field of human rights.

143. Should one go further and consider that reservations to treaties which reflect the rules of customary international law are always impermissible? The Human Rights Committee affirmed this, basing itself on the special characteristics of human rights treaties:

Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction.²⁴¹

144. This would seem to be debatable *prima facie*.

145. One might, after further study,²⁴² agree with the Human Rights Committee that reservations to customary norms are not excluded a priori—such norms are binding on States independently of whether they have expressed their acceptance of the treaty norm; however, unlike the case of peremptory norms, States can derogate from customary norms by agreement inter se. And one should not overlook the phenomenon of the "persistent objector", the party who can indeed refuse to apply a rule which it cannot oppose under general international law. As the United Kingdom pointed out in its observations on general comment No. 24, "there is a clear distinction between choosing not to enter into treaty obligations and trying to opt out of customary international law."²⁴³ But if this reasoning is correct, it is hard to see why it would not also apply to reservations to human rights treaties.

146. By way of justification, the Human Rights Committee limits itself to noting that these instruments are designed to protect the rights of individuals. What is involved is a simple matter of principle: implicitly, the Committee starts from the assumption that human rights treaties are legislative, not only in the material sense—which, with some reservations, is acceptable²⁴⁴—but also in the formal sense, which is not acceptable and is the product of a highly questionable amalgam.

147. In making this assumption, the Human Rights Committee is forgetting that these instruments, even though they are "designed to protect individuals", are still

²⁴⁰ See, for example, Coccia, loc. cit., p. 17; McBride, loc. cit.; Schabas, "Reservations to human rights treaties ...", pp. 49–50; however, see also the doubts raised by Suy, "Droits des traités et droits de l'homme", pp. 935–939.

²⁴¹ A/50/40 (footnote 87 above), annex V, para. 8. France, in its remarks (see footnote 88 above), rightly pointed out that "[p]aragraph 8 of general comment No. 24 (52) is drafted in such a way as to link the two distinct legal concepts of 'peremptory norms' and rules of 'customary international law'".

²⁴² See paragraph 74 above.

²⁴³ A/50/40 (footnote 88 above), annex VI, p. 132, para. 7. (However, one may well question what real motives a State might have for doing so.)

²⁴⁴ See paragraph 85 above.

treaties: it is true that they benefit individuals directly, but only because—and after—States have expressed their willingness to be bound by them. The rights of the individual derive from the State's consent to be bound by such instruments. Reservations are inseparable from such consent, and the Special Rapporteur believes that the order of factors cannot be reversed by stating—as the Committee does—that the rule exists as a matter of principle and is binding on the State, at least by virtue of the treaty, if the State has not consented to it. If, as the Committee maintains, States can “reserve *inter se* application of rules of general international law”, there is no legal reason why the same should not be true of human rights treaties; in any event, the Committee does not give any such reason.

b. *Problems with regard to the “non-reciprocity” of undertakings*

148. In fact, this somewhat marginal issue of whether reservations can be made to treaty provisions reproducing rules of customary law ties in with another, broader issue, that of whether the Vienna regime is not incompatible with the non-reciprocity that is one of the essential characteristics of human rights treaties and, more generally, normative treaties.

149. According to a recent article,

In contrast to most other multilateral treaties, human rights agreements do not establish a network of bilateral legal relationships among the states parties, but rather an objective regime for the protection of values accepted by all of them. A reservation entered by one state therefore cannot have the reciprocal effect of releasing one or all the other states parties from its or their treaty obligations.²⁴⁵

150. These arguments are largely correct, but while they may perhaps lead one to think that reservations to human rights treaties should be prohibited or permitted restrictively²⁴⁶—a decision that is solely up to the contracting parties—they do not in any way allow one to conclude that the common regime of reservations is inapplicable to such instruments.

151. These statements should first of all be qualified:

(a) If they are valid, they are not valid only for human rights, and while a rigorous quantitative analysis is not possible here, one might ask whether normative treaties are not the largest category of multilateral treaties so far concluded;

(b) While it is true that human rights treaties assume that the parties accept certain common values, it is still an open question whether they must necessarily accept *all* the values conveyed by a complex human rights treaty;

(c) It must also be admitted that the concept of reciprocity is not totally absent from normative treaties, including those in the area of human rights.²⁴⁷

²⁴⁵ Giegerich, loc. cit., English summary, p. 780; see also, *inter alia*, Cassese, “A new reservations clause (article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination)”, p. 268; Clark, loc. cit., p. 296; and Cook, loc. cit., p. 646.

²⁴⁶ See paragraphs 97–105 above.

²⁴⁷ See paragraph 85 above.

152. It is nevertheless true that reciprocity is certainly less omnipresent in human rights treaties than in other treaties and that, as the European Commission of Human Rights has noted, the obligations resulting from such treaties

are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties.²⁴⁸

Or, in the words of the Inter-American Court of Human Rights:

In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.²⁴⁹

153. Secondly, however, it is highly doubtful that this specific feature of human rights treaties would make the reservations regime inapplicable as a matter of principle.

154. Of course, force of circumstance and the actual nature of the “non-reciprocal” clauses to which the reservations apply result in a situation where “[t]he reciprocal sanction of the reservation mechanism is almost meaningless”.²⁵⁰

It would be simply absurd to conclude that the objections by the various European states to the United States reservations on the death penalty discharge them from their obligations under Articles 6 and 7 [of the International Covenant on Civil and Political Rights] as concerns the United States, and this is surely not their intention in making the objection.²⁵¹

155. But all that the Special Rapporteur can deduce from this is that when a State enters a reservation to a treaty provision that must apply without reciprocity, the provisions of article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions do not apply; that is all. Moreover, the same is true when it is not the provision to which the reservation applies but the reservation itself that, by its nature, does not lend itself to reciprocity.²⁵² This is the case with reservations that are territorial in scope: it is hardly conceivable, for instance, that France might respond to a reservation by which Denmark reserved the right not to apply a treaty to Greenland, by deciding not to apply that treaty to its own overseas departments. Besides, very generally speaking, the principle of reciprocity assumes “a certain equality in the positions of the parties in order for a State to be able to ‘respond’ to a reservation”.²⁵³

²⁴⁸ Council of Europe, Decision of the Commission as to the admissibility of application No. 788/60 lodged by the Government of the Republic of Austria against the Government of the Republic of Italy (11 January 1961), *Yearbook of the European Convention on Human Rights*, 1961, vol. 4 (The Hague, Martinus Nijhoff, 1962), pp. 116–183, at p. 140, para. 30.

²⁴⁹ Advisory Opinion OC–2/82 (footnote 82 above), para. 29.

²⁵⁰ Higgins, “Human rights: some questions of integrity”, p. 12; see also “Introduction”, p. xv.

²⁵¹ Schabas, “Reservations to human rights treaties ...”, p. 65. In the same vein, see Fitzmaurice, “Reservations to multilateral conventions”, pp. 15–16, and Higgins, “Introduction”.

²⁵² See to this effect Imbert, op. cit., p. 258, and the somewhat diverse examples given by that author, pp. 258–260.

²⁵³ *Ibid.*

156. But, unless it is by “doctrinal decree”, reciprocity is not a function inherent in a reservations regime and is not in any way the object of such a regime.²⁵⁴ Integrity and universality are reconciled in a treaty by preserving its object and its purpose, independently of any consideration having to do with the reciprocity of the parties’ undertakings, and it is hard to see why a reciprocity that the convention rules out would be reintroduced by means of reservations.

157. In fact, there are two choices:

(a) Either the provision to which the reservation applies imposes reciprocal obligations, in which case the exact balance of rights and obligations of each party is guaranteed by means of reservations, acceptances and objections, and article 21, paragraph 3, can and must be applied in full;

(b) Or the provision is “normative” or “objective”, and States do not expect reciprocity for the undertakings they have given; there is no point then in speculating about possible violations of a reciprocity which is not a precondition for the parties’ undertakings, and the provisions of article 21, paragraph 3, are not relevant. One simply cannot say here that the reservation is “established *with regard to another party*”.*

158. This does not mean that the reservations regime instituted by the 1969 and 1986 Vienna Conventions does not apply in this second case:

(a) The limitations imposed by article 19 on the freedom to formulate reservations remain entirely valid;

(b) Under article 20, paragraph 4 (b), an objecting State is always free to refuse to allow the treaty to enter into force as between itself and the reserving State;

(c) Even if this is not the case, objections are not without effect. In particular, they can play a major role in the interpretation of a treaty either by any bodies which the treaty may set up²⁵⁵ or by external mechanisms for the settlement of disputes,²⁵⁶ or even by national jurisdictions.

c. Problems of equality between the parties

159. Many authors link so-called problems of reciprocity to the fact that the reservations regime instituted by the 1969 and 1986 Vienna Conventions allegedly violates the principle of equality between the parties to normative treaties. Imbert sums up this argument²⁵⁷ as follows:

²⁵⁴ See paragraph 1 above.

²⁵⁵ See Imbert, “Reservations and human rights conventions” and the examples cited on pages 37–38; see also Clark, loc. cit., p. 318; and Schabas, “Invalid reservations ...”, pp. 313–314.

²⁵⁶ In the *Loizidou v. Turkey* case (footnote 81 above), the European Court of Human Rights based itself on the “subsequent reaction of various Contracting Parties to the Turkish declarations”, in view of “Turkey’s awareness of the legal position” created by declarations which the Court deemed invalid (para. 95).

²⁵⁷ Of which Sir Gerald Fitzmaurice was an ardent proponent (see “Reservations to multilateral conventions”, p. 16, and “The law and procedure of the International Court of Justice, 1951–4: treaty interpretation and other treaty points”, pp. 278, 282 and 287).

This lack of reciprocity meant that these reservations may strike a blow at another fundamental principle: that of equality between the Contracting Parties. States that do not formulate reservations are obliged to apply the treaty in full, including those provisions which the reserving State has declared it will not apply. The latter State will thus be in a privileged situation. ...

Nor can this inequality be alleviated by objections to reservations, as the objecting State will in any case be obliged to honour all its obligations even if it refuses to be bound with the reserving State.²⁵⁸

160. In his first report, Sir Humphrey Waldock countered this argument, noting that:

Too much weight ought not, however, to be given to this point. For normally the State wishing to make a reservation would equally have the assurance that the non-reserving State would be obliged to comply with the provisions of the treaty by reason of its obligations to other States,²⁵⁹ even if the reserving State remained completely outside the treaty. By entering into the treaty subject to its reservation, the reserving State at least submits itself in some measure to the régime of the treaty. The position of the non-reserving State is not made in any respect more onerous if the reserving State becomes a party to the treaty on a limited basis by reason of its reservation.²⁶⁰

The reservation does not create inequality, but attenuates it by enabling the author of the reservation, who without it would have remained outside the circle of contracting parties, to be partially bound by the treaty.²⁶¹

161. Once the reservation²⁶² has been made, article 19 and subsequent articles of the 1969 and 1986 Vienna Conventions guarantee the equality of the contracting parties in that:

(a) “The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*” (art. 21, para. 2); and

(b) These other parties may formulate an objection and draw whatever inferences they see fit.

However, by virtue of article 20, paragraph 4, the objecting State may restore the equality which it considers threatened by the reservation by preventing the entry into force of the treaty as between itself and the reserving State. This puts the two States in the same position as if the reserving State had not expressed its consent to be bound by the treaty.

²⁵⁸ Imbert, “Reservations and human rights conventions”, p. 34. The Commission showed itself sympathetic to this argument in *Yearbook ... 1951*, vol. II (footnote 48 above), in which it noted that, in treaties of a “law-making type”: “[e]ach State accepts limitations on its own freedom of action on the understanding that the other participating States will accept the same limitations on a basis of equality” (pp. 127–128, para. 22).

²⁵⁹ And, the Special Rapporteur might add, by reason of the very nature of the treaty.

²⁶⁰ *Yearbook ... 1962*, vol. II, p. 64. The Commission endorsed this reasoning (see its reports to the General Assembly in 1962, *ibid.*, p. 179, and 1966, *Yearbook ... 1966*, vol. II, p. 205).

²⁶¹ Cassese rightly emphasizes that equality could be adversely affected by the implementation of certain “collegiate” mechanisms for monitoring the permissibility of reservations (loc. cit., pp. 301–302). However, this is a very different problem, involving the possible breakdown of equality *between reserving States*, and is in any case caused not by the “Vienna regime” (which is not collegiate) but by the waiving of that regime.

²⁶² Which, it will be recalled, is a unilateral statement (art. 2, para. 1 (d), of the 1969 Vienna Convention).

162. Furthermore, both the argument based on the loss of equality between the parties and that based on non-reciprocity are difficult to comprehend in that it is hard to see why and how they could apply in the case of treaties which are specifically not based on reciprocity of obligations between the parties but rather constitute clusters of unilateral undertakings pursuing the same ends. It is illogical to suggest that each contracting party should consent to be bound only “because the others will do likewise, since its obligations are not the counterpart of those assumed by the others”.²⁶³ And it is not a little ironic that it is precisely the authors who insist most on the non-reciprocal nature of normative treaties, beginning with human rights instruments, who also invoke the adverse effects which the formulation of reservations has on reciprocity and equality: how could reservations affect the reciprocity ... of non-reciprocal undertakings?

**Conclusion: the “Vienna regime”
is generally applicable**

163. In concluding this analysis, it appears that:

(a) The reservations regime embodied in the 1969 and 1986 Vienna Conventions was conceived by its authors as being able to be, and being required to be, applied to all multilateral treaties, whatever their object,²⁶⁴ with the exception of certain treaties concluded among a limited number of parties and constituent instruments of an international organization, for which some limited exceptions were made;

(b) Because of its flexibility, this regime is suited to the particular characteristics of normative treaties, including human rights instruments;²⁶⁵

(c) While not ensuring their absolute integrity, which would scarcely be compatible with the actual definition of reservations, it preserves their essential content and guarantees that this is not distorted;

(d) This conclusion is not contradicted by the arguments alleging violation of the principles of reciprocity and equality among the parties; if such a violation occurred, it would be caused by the reservations themselves and not by the rules applicable to them; moreover, these objections are hardly compatible with the actual nature of

normative treaties, which are not based on reciprocity of the undertakings given by the parties;

(e) There is no need to take a position on the advisability of authorizing reservations to normative provisions, including those relating to human rights: if it is felt that they must be prohibited, the parties are entirely free to exclude them or to limit them as necessary by including an express clause to this effect in the treaty, a procedure which is perfectly compatible with the purely residual rules embodied in the 1969 and 1986 Vienna Conventions.

**C. Implementation of the general reservations
regime (application of the “Vienna regime” to
human rights treaties)**

164. The current controversy regarding the reservations regime applicable to human rights treaties²⁶⁶ is probably based, in part at least, on a misunderstanding. Despite what may have been understood from certain ambiguous or clumsy formulas, the monitoring bodies established by the human rights instruments do not challenge the principle of the applicability to these treaties of the rules relating to reservations contained in the 1969 and 1986 Vienna Conventions and, in particular, they do not deny that the permissibility of reservations must be determined, where the treaty is silent on the matter, on the basis of the fundamental criterion of the object and purpose of the treaty. The real problems lie elsewhere and relate to the existence and extent of the determining powers of these bodies in this matter.

1. THE FUNDAMENTAL CRITERION OF THE OBJECT
AND PURPOSE OF THE TREATY

165. An examination of the practice of States and international organizations and of the bodies established to monitor the implementation of treaties, including human rights treaties, confirms that the regime for reservations established by the 1969 and 1986 Vienna Conventions is not only generally applicable, but is also very widely applied. This examination shows in particular that the criterion of the object and purpose of the treaty, referred to in article 19 (c), is used principally in the case where the treaty is silent, although it is also used in those cases where there are reservation clauses.

166. Although it marked the starting point of the worldwide radical transformation of the reservation regime,²⁶⁷ the ICJ advisory opinion of 1951 was given on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* of 1948. It was, moreover, the special nature of this treaty which led the Court to distance itself from what was undeniably the dominant system at the time,²⁶⁸ namely unanimous acceptance of reservations, and to favour the more flexible system of the Pan American Union:

²⁶³ Imbert, *op. cit.*, p. 372.

²⁶⁴ To use the formula adopted by Mr. Sreenivasa Rao in discussing the first report of the Special Rapporteur, it achieves “a certain diversity in unity” (*Yearbook ... 1995*, vol. I, 2404th meeting, p. 171, para. 45).

²⁶⁵ This was, moreover, the position taken by most States whose representatives spoke on this point in the Sixth Committee at the fiftieth session of the General Assembly; see, *inter alia*, the statements on behalf of Algeria (Official Records of the General Assembly, Fiftieth Session, Sixth Committee, 23rd meeting (A/C.6/50/SR.23), para. 65), India (*ibid.*, 24th meeting (A/C.6/50/SR.24), para. 43) and Sri Lanka (*ibid.*, para. 82) emphasizing the desirable unity of the reservations regime; and the United States (*ibid.*, 13th meeting (A/C.6/50/SR.13), paras. 50–53), Pakistan (*ibid.*, 18th meeting (A/C.6/50/SR.18), para. 62), Spain (*ibid.*, 22nd meeting (A/C.6/50/SR.22), para. 44), France (*ibid.*, para. 54), Israel (23rd meeting (A/C.6/50/SR.23), para. 15), the Czech Republic (*ibid.*, para. 46) or Lebanon (*ibid.*, 25th meeting (A/C.6/50/SR.25), para. 20) rejecting the idea of a special regime for human rights treaties; see also the more tentative statements by Australia (*ibid.*, 24th meeting (A/C.6/50/SR.24), para. 10) and Jamaica (*ibid.*, paras. 19 and 21).

²⁶⁶ See paragraphs 56–60 above.

²⁶⁷ See Zemanek, “Some unresolved questions concerning reservations in the Vienna Convention on the Law of Treaties”, pp. 323–336.

²⁶⁸ As is convincingly shown by the joint dissenting opinion quoted above (footnote 137), *I.C.J. Reports 1951*, pp. 32–42.

(a) The Court confined its answers strictly to the questions put to it, which related exclusively to the 1948 Genocide Convention: “The questions [asked by the General Assembly] ... having a clearly defined object, the replies which the Court is called upon to give to them are necessary and strictly limited to that Convention”,²⁶⁹ and

(b) It referred expressly to the special character of this Convention: “The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect”,²⁷⁰ and

(c) It stressed the “purely humanitarian and civilizing purpose” of the contracting States and the fact that they did “not have any interests of their own”,²⁷¹ and

(d) The Court concluded by stating: “The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis.”²⁷²

167. It was therefore difficulties connected with reservations to a highly “normative” human rights treaty that gave rise to the definition of the present regime. As the United Kingdom pointed out in its observations on general comment No. 24 of the Human Rights Committee: “It was in the light precisely of those characteristics of the Genocide Convention, and in the light of the desirability of widespread adherence to it, that the Court set out its approach towards reservations.”²⁷³

168. In this regard, Judge Higgins observed that:

Although the Genocide Convention was indeed a “human rights treaty”, the Court was in 1951 concerned with the broad distinction between “contract treaties” and “normative treaties”. And the issue it was addressing was whether the old unanimity rule on reservations would prevail, and whether the contract/normative distinction was relevant to this answer. *The only questions* put to the Court related to the legal consequences, between ratifying States, of reservations made that had been objected to (and sometimes objected to by some States but not by others).

The Court favoured a “flexible” answer, rather than the unanimity rule, in respect of the precise questions asked of it; and it found no difference in that regard between contract and normative treaties.

She added, however:

But that cannot be said to determine the very different question: in a human rights treaty, in respect of which a monitoring body has been given certain functions, is it implicit in its functions and in the operation of the principles of Article 19(3) of the Vienna Convention, that the treaty body rather than Contracting States should decide whether a reservation is or is not compatible with the objects and purpose of the treaty?²⁷⁴

²⁶⁹ Ibid. p. 20; see also the operative part, pp. 29–30. Several statements made to the Court emphasized this point; one of these was the written statement of the United States (*I.C.J. Pleadings, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, pp. 33 and 42–47); this is particularly noteworthy as that country then applied the rule of unanimous consent in the exercise of its functions as depositary State (see Imbert, *op. cit.*, p. 61, footnote 98).

²⁷⁰ *I.C.J. Reports 1951* (footnote 47 above), p. 22–23.

²⁷¹ Ibid., p. 23; see also paragraph 114 above.

²⁷² Ibid., p. 24.

²⁷³ A/50/40 (footnote 88 above), p. 130, para. 4.

²⁷⁴ Higgins, “Introduction”, p. xix.

169. This is, indeed, a different question, which will be examined in detail further on.²⁷⁵ With regard to the question considered here, however, it will be noted that Mrs. Higgins recognized that it could be inferred from the 1951 opinion that ICJ rejected the distinction between “contract treaties” and “normative treaties” as regards the implementation of the reservations regime and that, in its view, general comment No. 24, in the preparation of which she played a determining role,²⁷⁶ did not reject this conclusion.

170. Quite surprisingly, moreover, the Human Rights Committee itself, in this general comment, considers that, in the absence of any express provision on the subject in the International Covenant on Civil and Political Rights, “[t]he matter of reservations ... is governed by international law”²⁷⁷ and goes on to make express reference to article 19, paragraph 3, of the 1969 Vienna Convention. Admittedly, it considers this as providing only “relevant guidance”,²⁷⁸ but the Committee immediately adds, in a footnote:

Although the Vienna Convention on the Law of Treaties was concluded in 1969 and entered into force in 1980—i.e., after the entry into force of the Covenant—its terms reflect the general international law on this matter as had already been affirmed by the International Court of Justice in *The Reservations to the Genocide Convention Case* of 1951.²⁷⁹

and makes use of this provision to give its view on the admissibility of reservations to the Covenant²⁸⁰ by adding:

Even though, unlike some other human rights treaties, the Covenant does not incorporate a specific reference to the object and purpose test, that test governs the matter of interpretation and acceptability of reservations.²⁸¹

The Committee again applied this criterion in 1995, during the consideration of the first report of the United States. Applying the principles enunciated in general comment No. 24, it noted that it believed certain reservations to the Covenant by the United States²⁸² “to be incompatible with the object and purpose of the Covenant”.²⁸³

171. This position seems to apply to all cases, including those where there are no reservation clauses. Thus, although the ILO practice, which results in a prohibition of reservations to the international labour conventions, is due, in fact, to other factors, that organization nevertheless justifies it on grounds based on respect for the object and purpose of those instruments.²⁸⁴ Similarly, in 1992 the persons chairing the human rights treaty bodies noted that some of the reservations lodged “would appear to

²⁷⁵ See paragraph 2 above and, in particular, paragraph 178 below.

²⁷⁶ See CCPR/C/SR.1366, para. 54, CCPR/C/SR.1380, para. 2 and CCPR/C/SR.1382, para. 11.

²⁷⁷ A/50/40 (footnote 87 above), para. 6.

²⁷⁸ Ibid.

²⁷⁹ Ibid., footnote e.

²⁸⁰ The question of the validity of this position cannot be dealt with in the present report.

²⁸¹ A/50/40 (footnote 87 above), para. 6.

²⁸² *Multilateral treaties deposited with the Secretary-General* (United Nations publication, Sales No. E.96.V.5, document ST/LEG/SER.E/14), chap. IV.4, p. 130.

²⁸³ A/50/40, para. 279, and annex VI (see footnotes 87–88 above); see also the observations made by the Chairman of the Committee, Mr. Aguilar, during the consideration of the report (CCPR/C/SR.1406, paras. 2–5).

²⁸⁴ See paragraph 140 above.

give rise to serious questions as to their compatibility with the object and purpose of the treaties in question”²⁸⁵ and, even more characteristically, they recommended in 1984 that treaty bodies “state clearly that certain reservations to international human rights instruments are contrary to the object and purpose of those instruments and consequently incompatible with treaty law”.²⁸⁶ It should be noted that, in doing so, they addressed bodies charged with monitoring treaties that contained or did not contain reservation clauses, thus showing their belief that this criterion constitutes a principle applying generally.

172. This same position is shown by the actual wording of the reservation clauses contained in international instruments, the variety of which has already been pointed out.²⁸⁷ However, despite this diversity, the constant desire of the drafters of the treaties to promote a reservations regime based on that of article 19 of the 1969 and 1986 Vienna Conventions²⁸⁸ is striking:

(a) As far as the Special Rapporteur is aware, it is the area of human rights in which the only treaty clause that expressly refers to the provisions of the 1969 Vienna Convention relating to reservations is to be found,²⁸⁹

(b) Many human rights treaties make express reference to the object and purpose as a criterion for determining the permissibility of reservations,²⁹⁰ and

(c) It is clear from the *travaux préparatoires* of treaties which do not contain reservations clauses that this silence must be interpreted as an implicit but deliberate reference to the ordinary-law regime established by the 1969 Vienna Convention.

173. Here too, the example of the International Covenant on Civil and Political Rights is significant. After much tergiversation,²⁹¹ it was decided not to include any reservations clause in this treaty, but the treaty silence on this matter must be interpreted, not as a rejection of reservations, but as reflecting the intention of the negotiators to rely on the “accepted principle of international law” that any State had the right “to make reservations to a multilateral treaty ... subject to the proviso that such reservations were not incompatible with the object and purposes of the treaty”.²⁹²

174. The European Convention on Human Rights, for its part, includes a reservations clause, but the clause

makes no reference to this criterion.²⁹³ The view that reservations to this instrument must not only fulfil the requirements of article 64, but must also be consistent with the purpose and object of the treaty seems difficult to support, according to some commentators.²⁹⁴ Nevertheless, the European Commission of Human Rights—quite clearly—and the European Court of Human Rights—less clearly—consider reservations whose permissibility is challenged before them in the light of the fundamental criterion of the object and purpose of the treaty.²⁹⁵ This approach, which seems quite a logical one—provided it is recognized that a reservation may distort the meaning of a treaty—confirms the universality of the object and purpose criterion and would seem to imply that every treaty includes an implicit clause limiting in this way the possibility of making reservations.

175. The objections of States to reservations to human rights treaties are also frequently expressly motivated by the incompatibility of the reservations with the object and purpose of these instruments. This is all the more true as States generally seem disinclined to express objections²⁹⁶ and, when they do so, they rarely give the reasons for their actions.²⁹⁷ It is therefore highly symptomatic that, for example, nine States parties to the Convention on the Elimination of All Forms of Discrimination against Women²⁹⁸ gave this as the reason for their objections to certain reservations,²⁹⁹ one of them³⁰⁰ referring expressly to article 19 (c) of the 1969 Vienna Convention.³⁰¹ Similarly, several

²⁹³ Article 64:

“(1) Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

“(2) Any reservation made under this Article shall contain a brief statement of the law concerned.”

²⁹⁴ Schabas, “Article 64”, p. 938; versus: Velu and Ergec, *La Convention européenne des droits de l’homme: extrait du Répertoire pratique du droit belge*, pp. 159–160.

²⁹⁵ See footnote 81 above: the Commission’s decision in the *Chrysothomos et al. v. Turkey* case, p. 277, para. 19; the Court’s judgement in the case of *Loizidou v. Turkey* (paras. 73 and 75), in which the Court bases its decision on the object and purpose of articles 25 and 46 of the Convention but appears to refer more to the rules concerning the interpretation of treaties than to those concerning reservations; and in the *Temeltasch v. Switzerland* case, the Commission considered that the provisions of the 1969 Vienna Convention enunciated essentially customary rules relating to reservations (para. 68) and based itself on the definition in article 2, paragraph 1 (d), of the Convention in determining the true nature of an interpretative declaration by the defending State (paras. 69 et seq.). See, on this point, Coccia, loc. cit., pp. 14–15.

²⁹⁶ See Coccia, loc. cit., pp. 34–35, and appendix, pp. 50–51; Imbert, op. cit., pp. 419–434; and Shelton, loc. cit., pp. 227–228.

²⁹⁷ See Bowett, “Reservations to non-restricted multilateral treaties”, p. 75; Redgwell, loc. cit., p. 276; and Zemanek, loc. cit., p. 334. See also the views expressed by the Human Rights Committee in general comment No. 24 (A/50/40 (footnote 87 above), annex V, para. 17).

²⁹⁸ Austria, Canada, Finland, Germany, Mexico, Netherlands, Norway, Portugal and Sweden.

²⁹⁹ Including those of Bangladesh, Brazil, Egypt, India, Iraq, Jamaica, Jordan, Libyan Arab Jamahiriya, Malawi, Maldives, Mauritius, Morocco, New Zealand, Republic of Korea, Thailand and Tunisia.

³⁰⁰ Portugal.

³⁰¹ Concerning these objections (and, more generally, concerning the reservations to the Convention on the Elimination of All Forms of Discrimination against Women), see Clark, loc. cit., pp. 299–302, and Cook, loc. cit., pp. 687–707; see also Jenefsky, “Permissibility of Egypt’s reservations to the Convention on the Elimination of All Forms of Discrimination against Women”, pp. 199–233.

²⁸⁵ A/47/628 (footnote 84 above), annex, para. 60; and also para. 36.

²⁸⁶ A/49/537 (footnote 84 above), annex, para. 30.

²⁸⁷ See paragraph 125 above.

²⁸⁸ Or, in the case of earlier treaties, on the pan-American “flexible regime” adopted in the 1951 ICJ opinion (footnote 47 above).

²⁸⁹ American Convention on Human Rights, art. 75 (footnote 49 above). In its 1983 advisory opinion on restrictions to the death penalty (footnote 82 above), the Inter-American Court of Human Rights considered that the reservations of Guatemala to article 4, paragraphs 2 and 4, of the Convention were permissible in view of their compatibility with the object and purpose of the Convention.

²⁹⁰ See the examples given in footnote 50 above.

²⁹¹ See Imbert, op. cit., pp. 223–224, and Higgins, “Derogations under human rights treaties”, pp. 317–318.

²⁹² *Official Records of the General Assembly, Twenty-first Session*, document A/6546, para. 142; see also the statements by the representatives of several States quoted by Imbert, op. cit., pp. 224 and 411–412.

objections to reservations to the International Covenant on Civil and Political Rights advanced as their justification, the incompatibility of the reservations with the object and purpose of the treaty. Thus, the 11 European States which filed objections to the reservations of the United States³⁰² gave as justification for their position the incompatibility of some of these reservations with the object and purpose, either of the Covenant as a whole, or of some of its provisions.³⁰³

176. It is therefore undeniable that “there is a general agreement that the Vienna principle of ‘object and purpose’ is the test”.³⁰⁴ With regard to this fundamental point, the central element of the “flexible system” adopted by ICJ in 1951 and enshrined in the 1969 and 1986 Vienna Conventions, namely the special nature of human rights treaties or, more generally, of normative treaties, therefore does not affect the reservations regime.

2. THE MACHINERY FOR MONITORING IMPLEMENTATION OF THE RESERVATIONS REGIME

177. One of the main “mysteries” of the reservations regime established by the 1969 and 1986 Vienna Conventions is clearly that of the relations which exist, might exist, or should exist, between article 19, on the one hand, and the following articles, on the other. There can be no question of attempting, within the framework of the present report, to dispel this mystery, as this would be tantamount to taking sides, prematurely, in the quarrel concerning “opposability” and “admissibility”.³⁰⁵

178. It is perhaps sufficient to note that “[i]n general, most of the problems posed by article 19 (c) disappear in practice”³⁰⁶ and that the modalities and effects of monitoring the permissibility of reservations are problems that are, primarily, of a practical nature. It would not be correct, however, to say that these problems “disappear” when a treaty establishes machinery for monitoring its implementation. In addition to the uncertainties inherent in the “Vienna regime”, there are other ones of which the drafters of the 1969 and 1986 Vienna Conventions do not seem to have thought³⁰⁷ and which are due to the concurrence of systems for verifying the permissibility of reservations

³⁰² See paragraph 170 above. These States are Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Portugal, Spain and Sweden.

³⁰³ See Schabas, “Invalid reservations ...”, pp. 310–314; and p. 289 for other examples.

³⁰⁴ Higgins, “Introduction”, p. xxi.

³⁰⁵ See paragraphs 42–45 above and the first report of the Special Rapporteur (footnote 2 above), pp. 142 et seq., paras. 97–108 and 115–123.

³⁰⁶ Imbert, *op. cit.*, p. 138.

³⁰⁷ As Mrs. Higgins wrote: “This question was simply never before the International Court in the *Reservations* case—nor at issue in the preparation of the Vienna Convention. Indeed, it could not have been. Neither in 1951 nor in 1969 did there yet exist the web of multilateral human rights treaties with their own treaty bodies. That phenomenon was to come later” (“Introduction”, p. xix); see also paragraph 168 above and, similarly: Shelton, *loc. cit.*, p. 229. Some commentators soon revealed their perplexity on this point. See, for example, Maresca: “There may be some perplexity and questions may need to be answered, particularly regarding *three aspects of the codified norm*: (a) what subject, what body and what entities have the power of determining whether the reservation made is *compatible* or not with the object and purpose of the treaty?” (*op. cit.*, p. 304).

that may be envisaged: in accordance with the—more “imprecise” than “flexible”—rules on this point, deriving from these conventions, on the one hand, or by the monitoring mechanisms themselves, on the other? And if the answer to this question leads to these mechanisms being taken into account, a second question has immediately to be answered: what is or what should be the effect of the verification they perform?

(a) *Determination by the monitoring bodies of the permissibility of reservations*

179. As was seen earlier,³⁰⁸ the “Vienna regime”, intended to be of general application, is substantively adapted to the particular requirements of the human rights treaties and the general mechanisms for determining the permissibility of reservations can also apply to reservations made in this area. However, the last 15 years have seen the development of additional forms of control carried out directly by the human rights treaty monitoring bodies, the existence, if not the permissibility, of which can scarcely be questioned. This raises the problem of the coexistence and combination of these two types of control.

(i) *Role of the traditional mechanisms*

180. Apart from any uncertainties which may exist regarding the link between articles 19 and 20 of the 1969 and 1986 Vienna Conventions, there is general agreement that the reservations regime which they establish “is based on the consensual character of treaties”.³⁰⁹ This view constitutes the fundamental “creed” of the “opposability” school, which is based on the idea that “the validity of a reservation depends solely on the acceptance of the reservation by another contracting State”.³¹⁰ It is not rejected, however, by the supporters of “admissibility”. Thus, for example, Bowett points out that where a treaty contains no provisions concerning the settlement of disputes, “there is at present no alternative to the system in which each Party decides for itself whether another Party’s reservations are permissible”.³¹¹

181. This conventional—and imperfect—mechanism for verifying the permissibility of reservations is employed in the case of the human rights treaties:

(a) Certain reservations clauses included in these treaties “are definitely subject to the ‘play of acceptance and objection’”;³¹²

(b) States do not hesitate to object to reservations to such treaties made by other parties, even in the absence of any express provision in the treaties;³¹³ and

³⁰⁸ Paras. 70–88 above.

³⁰⁹ Elias, *The Modern Law of Treaties*, p. 34. See also Bishop Jr., *loc. cit.*, p. 337; Redgwell, *loc. cit.*, p. 268; and Tomuschat, *loc. cit.*, p. 466.

³¹⁰ Ruda, *loc. cit.*, p. 190. See also the first report of the Special Rapporteur (footnote 2 above), pp. 142–143, para. 102.

³¹¹ Bowett, *loc. cit.*, p. 81.

³¹² Imbert, “Reservations and human rights conventions”, p. 40; see, for example, article 8 of the Convention on the nationality of married women and article 75 of the American Convention on Human Rights (footnote 49 above), which makes reference to the 1969 Vienna Convention.

³¹³ See paragraph 175 above.

(c) The other parties may induce the State making the reservation to withdraw the latter;³¹⁴

(d) While the treaty monitoring bodies may take account of this in interpreting the treaty or determining the fate of the reservation;³¹⁵ and

(e) The persons chairing the human rights treaty bodies believe: “[I]t is essential, if the present system relating to reservations is to function adequately, that States that are already parties to a particular treaty should give full consideration to lodging an objection on each occasion when that may be appropriate.”³¹⁶

182. There is nothing, of course, to prevent the parties from adopting a different system—either collegial or jurisdictional—for determining the validity of reservations. Both of these possibilities were envisaged on various occasions during the *travaux préparatoires* for the 1969 Vienna Convention, but were eventually rejected. Thus, the first two of the four “alternative drafts” proposed *de lege ferenda* by Sir Hersch Lauterpacht in his first report on the law of treaties in 1953 was based on a collegial control of the validity of reservations by two thirds of the States concerned,³¹⁷ while under the two other drafts this control was entrusted to a committee appointed by the parties,³¹⁸ or to an ICJ chamber of summary procedure.^{319, 320}

183. Although these proposals were not incorporated in the 1969 and 1986 Vienna Conventions, they were included in some of the reservations clauses inserted in multilateral treaties. Thus, in the area of human rights, article 20, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination provides as follows:

A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible

or inhibitive if at least two thirds of the States Parties to this Convention object to it.³²¹

184. In cases such as these, determination of the admissibility of a reservation is entrusted, not to each State acting for itself, but to the totality of the parties as a collective body. This does not, however, modify the essence of the system: the consent of the parties is expressed (a) by adoption of the reservations clause itself; (b) collectively by the traditional system of acceptance (which may be tacit) or objection.

185. This second element of the consensual principle disappears if control of the admissibility of the reservation is entrusted to a jurisdictional or quasi-jurisdictional type of body.

186. As far as the Special Rapporteur is aware, there is no express reservations clause providing for this last arrangement. The Special Rapporteur may, however, consider that the mere fact that a treaty provides for the settlement of disputes connected with its implementation through a jurisdictional or arbitral body automatically empowers the latter to determine the admissibility of reservations or the validity of objections.

The question of permissibility, since it is governed by the treaty itself, is eminently a legal question and entirely suitable for judicial determination and, so far as the treaty itself or some other general treaty requiring legal settlement of disputes requires the Parties to submit this type of legal question to adjudication, this would be the appropriate means of resolving the question.³²²

Here too, we remain in the context of mechanisms that are well established in general international law.

187. There does exist, moreover, an arbitral and judicial practice of this nature, although it is admittedly limited.

188. In the *English Channel* case, for example, the United Kingdom of Great Britain and Northern Ireland maintained before the arbitral tribunal to which the dispute was submitted, that the three French reservations to article 6 of the Convention on the Continental Shelf “should be left out of consideration altogether as being either inadmissible or not true reservations”.³²³ In its decision of 30 June 1977, the tribunal implicitly recognized itself competent to rule on these matters and considered “that the three reservations to Article 6 are true reservations and admissible”.³²⁴

189. Similarly, in the case concerning *Right of Passage over Indian Territory*, ICJ examined, and rejected, India’s

³¹⁴ Australia and the Republic of Korea withdrew some of their reservations to the International Covenant on Civil and Political Rights following objections lodged by other States parties (see *Multilateral treaties deposited with the Secretary-General* (footnote 282 above), pp. 122, 127 and 131–134).

³¹⁵ See paragraph 158 above.

³¹⁶ A/47/628, annex (footnote 84 above), para. 64; see also paragraph 36, and the Report of the Committee on the Elimination of Discrimination against Women (A/48/38(footnote 86 above)), p. 2, para. 4 (d).

³¹⁷ *Yearbook ... 1953*, vol. II, document A/CN.4/63, pp. 124–133.

³¹⁸ *Ibid.*, pp. 133–134.

³¹⁹ *Ibid.*, pp. 134–135.

³²⁰ See also the position taken by Sir Hersch Lauterpacht, “Some possible solutions of the problem of reservations to treaties”, pp. 108 et seq. Surprisingly, Sir Gerald Fitzmaurice, who considered a collegial system to be “an ideal system” (“Reservations to multilateral conventions”, pp. 23–26), did not take up this idea in his first report (*Yearbook ... 1956*, vol. II, document A/CN.4/101, pp. 126–128). During the deliberations in 1962 several members of the Commission supported the adoption of such a system, while others successfully opposed the idea (see Cassese, loc. cit., p. 272); some States also submitted amendments to this effect at the United Nations Conference on the Law of Treaties: see, for example, the proposals of Japan (*Official Records of the United Nations Conference on the Law of Treaties ...*, document A/CONF.39/C.1/L.133/Rev.1, p. 133, and *ibid.*, First Session (footnote 167 above), 21st meeting, pp. 109–110) and of the United Kingdom (*ibid.*, pp. 113–114).

³²¹ For a detailed commentary on this provision, see Cassese, loc. cit., pp. 266–304. Comparable clauses exist in other areas; see, for example, article 39 of the Customs Convention on the Temporary Importation of Private Road Vehicles, article 20 of the Convention concerning Customs Facilities for Touring (and article 14 of the Additional Protocol thereto, relating to the importation of tourist publicity documents and material) and article 50 of the Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961. Other treaties, including treaties concluded under the auspices of FAO, incorporate the principle of the unanimous consent of the parties (see Imbert, op. cit., pp. 174–175).

³²² Bowett, loc. cit., p. 81. Likewise: Coccia, loc. cit., p. 26. The latter considers, however, that a State which accepts a reservation is no longer entitled to take advantage of its inadmissibility.

³²³ See decision of 30 June 1977 (footnote 138 above), para. 49.

³²⁴ *Ibid.*, para. 56; see also paragraphs 50–55.

first preliminary objection that “the Portuguese Declaration of Acceptance of the jurisdiction of the Court of December 19th, 1955, is invalid for the reason that the Third Condition of the Declaration is incompatible with the object and purpose of the Optional Clause”.³²⁵ Although the Court itself never declared impermissible a reservation to an optional declaration of acceptance of its compulsory jurisdiction, Sir Hersch Lauterpacht twice held in well-supported opinions, that the Court should have done so.^{326, 327}

190. What the Court can do in litigious cases, it can obviously also do in consultative matters. As the Court observed, the questions submitted to it in 1951 were

purely abstract in character. They refer neither to the reservations which have, in fact, been made to the Convention by certain States, nor to the objections which have been made to such reservations by other States. They do not even refer to the reservations which may in future be made in respect of any particular article; nor do they refer to the objections to which these reservations might give rise.³²⁸

However, there is nothing to prevent this being the case and the human rights treaty monitoring bodies would be perfectly entitled to seek an advisory opinion regarding the permissibility of reservations to these instruments, as some have, moreover, contemplated doing,³²⁹ and, juridically, there is nothing to prevent such a body requesting the Economic and Social Council or the General Assembly, as appropriate, “to request an advisory opinion on the issue from the International Court of Justice” in relation to reservations with the object and purpose of the treaty, nor, from a legal standpoint, is there anything to prevent the inclusion in a future human rights treaty of “a provision permitting the relevant treaty body to request an advisory opinion from the International Court of Justice in relation to any reservation that it considers might be incompatible with the object and purpose of the treaty”, as was suggested by the chairpersons of the human rights treaty bodies in 1992.³³⁰

191. The Inter-American Court of Human Rights could also exercise its consultative competence in this area, including the matter of problems that might arise in the interpretation or implementation of treaties other than the American Convention on Human Rights³³¹ and the same

³²⁵ *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1958*, p. 141; see the Court’s response, pp. 141–144.

³²⁶ *Case of Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, separate opinion of Sir Hersch Lauterpacht, pp. 34–66; and case of *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, dissenting opinion of Sir Hersch Lauterpacht, pp. 95–122; see also pp. 75–82 and 85–94, dissenting opinions of President Klaestad and of Judge Armand-Ugon, respectively.

³²⁷ In its judgement in the *Loizidou v. Turkey* case, the European Court of Human Rights considered that reservations concerning its competence could not be judged according to the same criteria as those applicable to determination of the permissibility of reservations to declarations made under Article 36, paragraph 2, of the ICJ Statute (footnote 81 above), paras. 83–85. While there may be doubts regarding this distinction, it relates to the substance of the applicable law and not to the modalities of control.

³²⁸ *I.C.J. Reports 1951* (footnote 47 above), p. 21.

³²⁹ See A/48/38 (footnote 86 above).

³³⁰ A/47/628 (footnote 84 above), paras. 61 and 65.

³³¹ See article 64, para. 1, of the Convention and “*Other Treaties Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, Advisory Opinion OC–1/82 of 24 September 1982, Series A, No. 1; see also Cook, loc. cit., p. 711.

applies to the European Court of Human Rights,³³² to which it was proposed to submit, preventively, the question of the conformity of future reservations with article 64 of the European Convention on Human Rights.³³³

192. From all these standpoints, the mechanisms for verifying the permissibility of reservations to human rights treaties are entirely conventional:

(a) The ordinary-law mechanism is the ordinary-law inter-State system, as reflected in article 20 of the 1969 and 1986 Vienna Conventions;

(b) It is sometimes modified or corrected by specific reservation clauses calling for majority or unanimous determination of permissibility;

(c) The jurisdictional or arbitral organs having competence to settle disputes connected with the implementation of treaties have never hesitated to give their opinion, where necessary, regarding the permissibility of reservations made by the parties;

(d) A fortiori, these organs have the competence to give advisory opinions on this matter.

(ii) *Role of the human rights treaty monitoring bodies*

193. To these traditional mechanisms for determining the permissibility of reservations have been added, since the early 1980s, other such mechanisms in the area of human rights, because the bodies for monitoring the implementation of treaties concluded in this area have deemed themselves to have in this regard a right and a duty of control which do not, in principle, seem likely to be challenged.

a. *Development of the practice of the monitoring bodies*

194. Initially, it is true these bodies showed themselves to be very hesitant and reserved on this point:

(a) In 1978, in accordance with a very firm legal opinion given to the Director of the Division of Human Rights by the Office of Legal Affairs,³³⁴ the Committee on the Elimination of Racial Discrimination decided: “The Committee must take the reservations made by States parties at the time of ratification or accession into account: it has no authority to do otherwise. A decision—even a unanimous decision—by the Committee that a reservation is unacceptable could not have any legal effect”.³³⁵

³³² See Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions.

³³³ See *Chorherr v. Austria*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 266–B, judgment of 25 August 1993, partly dissenting opinion of Judge Valticos (Council of Europe, Strasbourg, 1993), p. 42.

³³⁴ Memorandum of 5 April 1976 (see in particular paragraph 8, whose wording was almost fully repeated by the Committee), United Nations, *Juridical Yearbook 1976* (Sales No. E.78.V.5), pp. 219–221. See also Note by the Secretary-General (CERD/C/R.93).

³³⁵ *Official Records of the General Assembly, Thirty-third Session, Supplement No. 18 (A/33/18)*, para. 374 (a). See in this connection the observations of Imbert, “Reservations and human rights conventions”, pp. 41–42, and Shelton, loc. cit., pp. 229–230.

(b) The Legal Counsel of the United Nations took the same position regarding the powers of the Committee on the Elimination of Discrimination against Women,³³⁶ and, although some members of the Committee questioned the government representatives during the consideration of the country reports, regarding the scope of the reservations made,³³⁷ the Committee itself refrained from taking a position on the matter until 1987;³³⁸

(c) The Human Rights Committee, for its part, has long maintained a prudent waiting policy in this regard. During the examination of country reports some of its members expressed themselves in favour of consideration of the validity of reservations to the International Covenant on Civil and Political Rights, while others opposed the idea.³³⁹ However, it is felt that the Committee, although prepared to “reclassify” an interpretative declaration as a reservation, if necessary, seemed not inclined to determine the permissibility of reservations.³⁴⁰

195. At the regional level, the bodies established under the European Convention on Human Rights also adopted a waiting attitude, for a long time, and avoided taking sides in the debate between the experts on the question of whether those bodies were entitled to give an opinion on the question of the permissibility of reservations to the Convention.³⁴¹ From the outset, the European Commission of Human Rights and the European Court considered that they should interpret these reservations and give them practical meaning,³⁴² but the bodies themselves refrained from going any further or even implying that they might undertake a verification of permissibility.

³³⁶ See the Report of the Committee on the Elimination of Discrimination against Women, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 45 (A/39/45)*, vol. II, annex III.

³³⁷ See the examples given in this connection by Cook, loc. cit., p. 708, footnote 303.

³³⁸ See Clark, loc. cit., pp. 283–289.

³³⁹ See the examples of this given by Imbert, “Reservations and human rights conventions”, pp. 42–43 and Shelton, loc. cit., pp. 230–231.

³⁴⁰ See *M. K. v. France* and *T. K. v. France* (communication Nos. 220/1987 and 222/1987), decisions on admissibility of 8 November 1989, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40)*, vol. II, annex X, pp. 118–123 and 127–131, respectively, in which the Committee declares the complaints inadmissible on the ground that the French “declaration” relating to article 27 of the Covenant constitutes a genuine reservation; versus: the opinion of Mrs. Higgins (ibid., appendix II, pp. 125–126 and 133–134) who considers that the declaration is one that is not binding on the Committee, which, *a contrario*, seemed to indicate, in both cases, that the Committee lacked the competence to determine the permissibility of reservations formulated by the States parties. See, on this point: Schmidt, loc. cit., pp. 20–34.

³⁴¹ See, in particular, the controversy between Golsong (*Actes du quatrième colloque international sur la Convention européenne des droits de l’homme* (Council of Europe, Strasbourg, 1976), meeting of 7 November 1975, pp. 269–270, and “Les réserves aux instruments internationaux pour la protection des droits de l’homme”, pp. 23–42) and Imbert (“Reservations and human rights conventions”, pp. 35–36).

³⁴² See, for example, Council of Europe, *Application No. 473/59*, decision of the Commission of 29 August 1959, *Yearbook of the European Convention on Human Rights*, 1958–1959, vol. 2 (The Hague, Martinus Nijhoff, 1960), pp. 400–406, at p. 405, and *Application No. 1008/61*, decision of the Commission of 5 March 1962, ibid., 1962, vol. 5, pp. 82–86, at p. 86; and, in particular, the extracts referred to by Imbert, op. cit., pp. 176–277.

196. The report adopted by the European Commission on 5 May 1982 in the *Temeltasch v. Switzerland* case,³⁴³ constitutes a turning point in this regard. The Commission points out that,

even assuming that some legal effect were to be attributed to an acceptance or an objection made in respect of a reservation to the Convention, this could not rule out the Commission’s competence to express an opinion on the compliance of a given reservation or an interpretative declaration with the Convention,³⁴⁴

and, basing itself on the “specific nature” of the European Convention on Human Rights, it “considers that the very system of the Convention confers on it the competence to consider whether, in a specific case, a reservation or an interpretative declaration has or has not been made in accordance with the Convention.”³⁴⁵ Consequently, the Commission finds that the Swiss interpretative declaration concerning article 6, paragraph 3 (e), of the Convention constitutes a reservation³⁴⁶ and it finds, also, that the declaration is not in conformity with the provisions of article 64 of the Convention.³⁴⁷

197. As the European Commission of Human Rights, surprisingly, did not refer this matter to the European Court of Human Rights, it was the Committee of Ministers that, pursuant to article 32 of the European Convention, approved the Commission’s report on this case³⁴⁸ and it was only six years later, by its judgement in the *Belilos* case, that the Court adopted the Commission’s position of principle.³⁴⁹ In its turn, it proceeded to “reclassify” as a reservation an “interpretative declaration” of Switzerland (concerning article 6, paragraph 1, of the Convention)³⁵⁰ and held that “the declaration in question does not satisfy two of the requirements of Article 64 of the Convention, with the result that it must be held to be invalid”,³⁵¹ after having noted that

[t]he Court’s competence to determine the validity under Article 64 of the Convention of a reservation or, where appropriate, of an interpretative declaration has not given rise to dispute in the instant case. That the Court has jurisdiction is apparent from Articles 45 and 49 of the Convention ... and from Article 19 and the Court’s case-law (see, as the most recent authority, the *Ettl and Others* judgment of 23 April 1987, Series A no. 117, p. 19, § 42).³⁵²

³⁴³ Application No. 9116/30 (footnote 81 above); see Cohen-Jonathan, *La Convention européenne des droits de l’homme*, pp. 86–93; Imbert, “Reservations to the European Convention on Human Rights before the Strasbourg Commission: the *Temeltasch* case”.

³⁴⁴ Application No. 9116/30 (footnote 81 above), para. 61.

³⁴⁵ Ibid., para. 65.

³⁴⁶ Ibid., paras. 68–82.

³⁴⁷ Ibid., paras. 83–92.

³⁴⁸ Ibid., resolution DH (83) 6 of 24 March 1983, p. 153.

³⁴⁹ *Judgment of 29 April 1988* (footnote 81 above); see Bourguignon, “The *Belilos* case: new light on reservations to multilateral treaties”; 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)”; Macdonald, “Reservations under the European Convention on Human Rights”; and Marks, “Reservations untinged: the *Belilos* case before the European Court of Human Rights”.

³⁵⁰ *Judgment of 29 April 1988* (footnote 81 above), paras. 40–49.

³⁵¹ Ibid., para. 60; see also paragraphs 51–59.

³⁵² Ibid., para. 50; in paragraph 42 of the case of *Ettl and Others* (European Court of Human Rights, Series A: *Judgments and Decisions*, vol. 117, *judgment of 23 April 1987* (Council of Europe, Strasbourg, 1987), the Court made use of the reservation of Austria to article 6, paragraph 1, of the Convention and referred to its judgement in the *Ringeisen* case (ibid., *judgment of 16 July 1971*, pp. 40–41, para. 98), which merely draws the consequences of this reservation, which is interpreted in a very liberal manner (in favour of the State).

198. Since that time, the European Commission and the European Court of Human Rights have made use of this jurisprudence on a virtually routine basis³⁵³ and have extended it to reservations formulated by States in respect of their own competence. Thus, in its decision of 4 March 1991 concerning the admissibility of three applications made against Turkey,³⁵⁴ the Commission considered that certain restrictions of its competence formulated by the respondent State in its declaration of acceptance of individual applications under article 25 were “not permitted by this Article”.³⁵⁵ More categorically, in its judgement in the *Loizidou v. Turkey* case,³⁵⁶ the Court held that “the object and the purpose of the Convention system”³⁵⁷ precludes States from limiting the scope of their declarations under articles 25 and 46 of the Convention by means of declarations or reservations, which confirms the practice followed by States parties:

Taking into consideration the character of the Convention, the ordinary meaning of Articles 25 and 46 in their context and in the light of their object and purpose and the practice of Contracting Parties, the Court concludes that the restrictions *ratione loci* attached to Turkey’s Article 25 and Article 46 declarations are invalid.³⁵⁸

199. As far as the Special Rapporteur is aware, the Inter-American Court of Human Rights has not as yet had to determine, in contentious proceedings, the permissibility of reservations formulated by States parties under article 75 of the American Convention on Human Rights. It can, however, be deduced from some of its advisory opinions that, in appropriate cases, it would adopt a position similar to that of the European Court of Human Rights. Thus, in its Advisory Opinion OC-2/82, *The effect of reservations on the entry into force of the American Convention (arts. 74 and 75)*,³⁵⁹ it considered that the parties have a legitimate interest in opposing reservations incompatible with the purpose and object of the Convention and “are free to assert that interest through the adjudicatory and advisory machinery established by the Convention”.³⁶⁰ In particular, in its Advisory Opinion OC-3/83 of 8 September 1983 in the *Restrictions to the death penalty* case,³⁶¹ the Inter-American Court held that certain reservations by Guatemala were inadmissible.³⁶²

200. It is in this context that the monitoring bodies established under the universal human rights instruments adopted a much more critical attitude regarding the validity of reservations, compared with the very prudent attitude they had traditionally maintained.³⁶³ This is particularly noteworthy in the case of the Committee on the Elimination of Discrimination against Women³⁶⁴ and, especially, the Human Rights Committee.

201. In general comment No. 24,³⁶⁵ the Committee states:

It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is 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. In order to know the scope of its duty to examine a State’s compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles.³⁶⁶

b. Basis of the control exercised by the monitoring bodies

202. This ground, which is similar to that invoked by the European and inter-American regional organs,³⁶⁷ is also the one invoked by some of those writers who believe the human rights treaty monitoring bodies have competence to verify the permissibility of reservations. For example, it has been asserted that:

(a) The special character of these treaties excludes

the possibilities of objection or acceptance by the other contracting States which customary international law has developed since the advisory opinion of the International Court of Justice in the case of the Convention on the Prevention and Punishment of the Crime of Genocide, traces of which are to be found in articles 19 to 23 of the Vienna Convention on the Law of Treaties;³⁶⁸

(b) Their objective character would seem to call for an objective control;³⁶⁹

(c) It would be impossible for the bodies they establish to perform their general monitoring functions “without establishing which obligations bind the party concerned”;³⁷⁰

(d) In practice, the objections system would not really function.³⁷¹

203. These arguments have been challenged and are certainly not all of equal validity.

204. In the first place, as has been made clear above,³⁷² neither the allegedly “objective” character of human rights treaties, nor the absence of reciprocity characterizing most of their substantive provisions, constitutes convincing reasons for a regime departing from ordinary law. This might at most be a ground for saying that it might be *desirable* for the permissibility of reservations to those instruments to be determined by an independent and technically qualified body, but that would not result in the ex-

³⁵³ See the examples quoted in footnote 81 above.

³⁵⁴ *Chrysostomos et al. v. Turkey* (see footnote 81 above).

³⁵⁵ *Ibid.*, para. 42.

³⁵⁶ See footnote 81 above.

³⁵⁷ *Judgment of 23 March 1995* (footnote 81 above), para. 75.

³⁵⁸ *Ibid.*, para. 89; see also paragraphs 65–89.

³⁵⁹ See footnote 82 above.

³⁶⁰ Advisory Opinion OC-2/82 (see footnote 82 above), para. 38.

³⁶¹ See footnote 82 above.

³⁶² See footnote 289 above.

³⁶³ See paragraph 194 above.

³⁶⁴ See paragraph 59 above.

³⁶⁵ A/50/40 (footnote 87 above).

³⁶⁶ *Ibid.*, para. 18.

³⁶⁷ See paragraphs 196–199 above.

³⁶⁸ Golsong, *Actes du quatrième colloque ...* (footnote 341 above), p. 269; see also the partly dissenting opinion of Judge Valticos in the *Chorherr v. Austria* case (footnote 333 above), p. 41.

³⁶⁹ See Giegerich, *loc. cit.*, pp. 780–781, and Higgins, “Introduction”, p. xxii.

³⁷⁰ Schabas, “Reservations to human rights treaties ...”, p. 68.

³⁷¹ See McBride, *loc. cit.*, and Higgins, “Introduction”, p. xxiv.

³⁷² See, in particular, paragraphs 136–162.

isting machinery being vested with such competence if it was not provided for in the treaties by which the bodies were established.³⁷³

205. As for the claim that the acceptance and objection mechanism does not function satisfactorily, that is a matter of judgement, which, in any event, does not constitute an argument either; the fact that the existing mechanism may be questionable does not mean that the alternative system would be legally acceptable. In particular, the criticisms of the effectiveness of the “Vienna regime” are, in fact, tantamount to a challenging of the very bases of contemporary international law. As was noted by Sir Humphrey Waldock, speaking as expert-consultant at the United Nations Conference on the Law of Treaties:

It was true that, although the International Law Commission had intended to state an objective criterion, the method of application proposed in the draft articles was subjective, in that it depended on the judgement of States. *But that situation was characteristic of many spheres of international law in the absence of a judicial decision, which in any case would bind only the State concerned and that only with respect to the case decided.*³⁷⁴

This may be seen as an unfortunate situation, but it is a fundamental characteristic of international law as a whole and, as such, affects the implementation of any treaty, irrespective of its object.

206. In fact, from the standpoint of the reservations regime, the truly special nature of the International Covenant on Civil and Political Rights and the European and American conventions on human rights, as well as many instruments of more limited scope, is not that they are human rights treaties, but that they establish bodies for monitoring their implementation. Once such bodies are established, they have, in accordance with a general legal principle that is well established and recognized in general international law, the competence that is vested in them by their own powers. This is the only genuinely convincing argument in favour of determination of the permissibility of reservations: these bodies could not perform the functions vested in them if they could not determine the exact extent of their competence vis-à-vis the States concerned, whether in examining applications by States or by individuals or periodic reports or in exercising a consultative competence.

207. The point has been made, in this connection, that these bodies function in a context that is “quite distinct” from that of ICJ, which “is called on *inter alia* to examine any legal dispute between States that might occur in any part of the globe” and “any area of international law”, whereas the role of the monitoring bodies is “exclusively limited to direct supervisory functions in respect of a law-making treaty”, and that, consequently, there can be no possible analogy between the competencies of these bodies and those of the Court.³⁷⁵ This is a very debatable and even harmful argument.

³⁷³ See the statement by Jamaica (*Official Records of the General Assembly, Fiftieth Session, Sixth Committee, 24th meeting (A/C.6/50/SR.24)*, para. 20).

³⁷⁴ *Official Records of the United Nations Conference on the Law of Treaties ...* (footnote 167 above), p. 126, para. 10.

³⁷⁵ *Loizidou v. Turkey* case (footnote 81 above), paras. 84–85.

208. The first ground justifying the exercise by human rights treaty monitoring bodies of the power to determine the permissibility of reservations lies in the need for these bodies to check their own competence, and therefore to determine the exact extent of the commitments entered into by the State involved; and this is possible only on the basis of any reservations which that State has attached to its undertaking. As the possibility of formulating reservations is not unlimited, this necessarily implies that the reservations must be permissible. This reasoning applies to these bodies as it does to ICJ³⁷⁶ or any other jurisdictional or quasi-jurisdictional organ which has to apply any treaty, and is based on the “principle of mutuality of consent”³⁷⁷ which must be respected, in particular, in the case of a dispute between States. It is pointed out in this connection that the functions of human rights treaty monitoring bodies are never limited exclusively to the consideration of applications from individuals; these bodies are also all vested with certain powers to hear complaints from other States parties³⁷⁸ and, in the circumstances, they have, undeniably, to determine the extent of their competence.

209. It is therefore not because of their undeniably special nature that human rights treaties require determination of the permissibility of reservations formulated in respect of them, by monitoring bodies, but rather because of the “ordinariness” of these bodies. Being established by treaties, they derive their competence from those instruments and must verify the extent of that competence on the basis of the consent of the States parties and of the general rules of the law of treaties.

210. To this it may be added that, even if the validity of this conclusion were to be challenged, the now many concurring positions taken by the human rights treaty monitoring bodies have probably created a situation which it would probably be difficult to alter. Particularly since, regarding the very principle of control, the attitude of the States concerned is not such as would establish the existence of a contrary *opinio juris*:

(a) Switzerland, although it contemplated doing so,³⁷⁹ did not denounce the European Convention on Human Rights following the judgements of the European Court of Human Rights in the *Belilos* and *Weber* cases;

(b) Nor did Turkey do so following the *Loizidou* judgement;

(c) The Committee of Ministers of the Council of Europe approved the solution adopted by the European Commission of Human Rights in the *Temeltasch v. Switzerland* case;³⁸⁰

(d) The Parliamentary Assembly of the Council of Europe wishes to develop the jurisprudence of the organs of the Convention in this area;³⁸¹

³⁷⁶ See paragraph 189 above.

³⁷⁷ See paragraph 96 above.

³⁷⁸ See article 41 of the International Covenant on Civil and Political Rights, article 24 of the European Convention on Human Rights and article 45 of the American Convention on Human Rights; see the observations of the United Kingdom on general comment No. 24 (footnote 88 above), para. 5.

³⁷⁹ See Cameron and Horn, loc. cit., p. 117.

³⁸⁰ See paragraph 197 above.

³⁸¹ See recommendation 1223 (1993) (footnote 89 above), para. 7.A.ii.

(e) Guatemala appears to have taken the desired action following the advisory opinion given by the Inter-American Court of Human Rights in the matter of *Restrictions to the Death Penalty*;³⁸² and

(f) Although some States reacted negatively to the Human Rights Committee's general comment No. 24,³⁸³ their criticisms related more to the Committee's consequential action following its verification of the permissibility of reservations than to the actual principle of such verification.³⁸⁴

(iii) *Combination of different methods of determining the permissibility of reservations*

211. The present situation regarding verification of the permissibility of reservations to human rights treaties is therefore one in which there is concurrence, or at least coexistence, of several mechanisms for determining the permissibility of these reservations:

(a) One of these—which constitutes the ordinary law—is the purely inter-State one provided for in the 1969 and 1986 Vienna Conventions. This can be adapted by special reservation clauses contained in the treaties concerned;

(b) Where the treaty establishes a body to monitor its implementation, it is now accepted—for reasons which are not all improper—that that body can also give its view on the permissibility of reservations;

(c) But this still leaves the possibility for the States parties to have recourse, where appropriate, to the customary methods of peaceful settlements of disputes, including jurisdictional or arbitral methods, in the event of a dispute arising among them concerning the permissibility of a reservation;³⁸⁵

(d) It may well be, moreover, that national courts, like those in Switzerland,³⁸⁶ also consider themselves entitled to determine the validity of a reservation in the light of international law.

212. The number of these various possibilities of verifying permissibility presents certain disadvantages, not least of which is the risk of conflict between the positions different parties might take on the same reservation (or on two identical reservations of different States).³⁸⁷

³⁸² See Cerna, "La Cour interaméricaine des droits de l'homme: ses premières affaires", p. 312.

³⁸³ See paragraph 60 above.

³⁸⁴ Thus: "The United Kingdom shares the analysis that the Committee must necessarily be able to take a view of the status and effect of a reservation where this is required in order to permit the Committee to carry out its substantive functions under the Covenant" (A/50/40 (footnote 88 above), p. 132, para. 11).

³⁸⁵ Subject, however, to the existence of "self-contained regimes". These certainly include those established by the European and American conventions on human rights (see Simma, "Self-contained regimes", pp. 130 et seq., and Meron, *Human Rights and Humanitarian Norms as Customary Law*, pp. 230 et seq.).

³⁸⁶ See *Elisabeth F. v. Council of State of the Canton of Thurgau*, decision of the Federal Tribunal of 17 December 1992, *Europäische Grundrechte Zeitschrift*, vol. 20, No. 31 (March 1993), p. 72; see, more generally, the very well-informed article by 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".

³⁸⁷ See, in particular, Imbert, "Reservations to the European Convention ...", pp. 590–591; the writer draws attention to the risks of

However, this risk is in fact inherent in any verification system—over time, any given body may take conflicting decisions—and it is perhaps better to have too much verification than no verification at all.

213. A more serious danger is that constituted by the succession of verifications over time, in the absence of any limitation of the duration of the period during which the verifications may be carried out. The problem does not arise in the case of the "Vienna regime" because article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions sets a time limit of 12 months following the date of receipt of notification of the reservation (or expression by the objecting State of its consent to be bound by the Treaty),³⁸⁸ on the period during which a State may formulate an objection. A real problem arises, however, in all cases of jurisdictional or quasi-jurisdictional control, which must be assumed to be aleatory and to depend on reference of the question to the monitoring or settlement body. In order to overcome this problem, it has been proposed that the right of the monitoring bodies to give their opinion should also be limited to a 12-month period.³⁸⁹ Apart from the fact that none of the relevant texts currently in force provide for such a limitation, the limitation seems scarcely compatible with the very basis for action by monitoring bodies, which is designed to ensure respect for the general principles of international law (preservation of the purpose and object of the treaty). Furthermore, as has been pointed out, one of the reasons why States lodge few objections is precisely that the 12-month rule often allows them insufficient time;³⁹⁰ the same problem is liable to arise a fortiori in the case of the monitoring bodies, as a result of which the latter may find themselves paralysed.

214. It seems, moreover, that the possibilities of cross-verifications in fact strengthen the opportunity for the reservations regime to play its real role. The problem is not one of setting one up against the other or, in the case of a single system, of seeking to affirm its monopoly over the others,³⁹¹ but of combining them so as to strengthen their overall effectiveness, for while their modalities differ, their end purpose is the same: the aim is always to reconcile the two conflicting but fundamental requirements of integrity of the treaty and universality of participation.³⁹² It is only natural that the States which wished to conclude the treaty should be able to express their point of view; it is also natural that the monitoring bodies should play

incompatibility within the European Convention system, in particular between the position of the Court and that of the Committee of Ministers.

³⁸⁸ It should be noted, however, that a problem nevertheless arises owing to the spreading over time of ratifications and accessions.

³⁸⁹ See Imbert, *op. cit.*, p. 146, footnote 25, and "Reservations and human rights conventions", pp. 36 and 44; versus: Golsong, "Les réserves aux instruments ...", p. 34, and Edwards Jr., "Reservations to treaties", pp. 387–388.

³⁹⁰ See Clark, *loc. cit.*, pp. 312–314.

³⁹¹ This is in fact their natural tendency; see the conflict between the points of view of the Human Rights Committee: "it is an inappropriate task for States parties in relation to human rights treaties" (A/50/40 (footnote 87 above), para. 18) (see paragraph 201 above), and France: "it is therefore for the [States parties], and for them alone, unless the treaty states otherwise, to decide whether a reservation is incompatible with the object and purpose of the treaty" (see A/51/40 (footnote 88 above), p. 106, para. 14).

³⁹² See paragraphs 90–98 above.

fully the role of guardians of the treaty entrusted to them by the parties.

215. This does not exclude—in fact it implies—a degree of complementarity among the different control methods, as well as cooperation among the bodies responsible for control. In particular, it is essential that, in determining the permissibility of a reservation, the monitoring bodies (as well as the organs for the settlement of disputes) should take fully into account the positions taken by contracting parties through acceptances and objections. Conversely, the States, which are required to abide by the decisions taken by the monitoring bodies, when they have given those bodies a power of decision, should pay serious attention to the well-thought-out and reasoned positions of those bodies, even though they may not be able to take legally binding decisions.³⁹³

(b) *Consequences of the findings of monitoring bodies*

216. This raises, very directly, the question of the consequences of a finding of impermissibility of a reservation by a human rights treaty monitoring body.

217. Once it is recognized that such a body can determine whether a reservation meets the permissibility requirements of ordinary law (compatibility with the object and purpose of the treaty) or of a special reservations clause, “it remains to be determined what the [Human Rights] Committee is empowered to do should it consider that a particular reservation does not meet this requirement”, a “particularly important and delicate” question, as Mrs. Higgins pointed out during the preparation of general comment No. 24,³⁹⁴ and one which in fact gave rise to a very lively debate. To this question must be added another, which is closely linked to it, but which it seems preferable to deal with separately for reasons of clarity. This is the question of the obligations (and the rights) of the State whose reservation has been considered inadmissible.

³⁹³ See, however, the extremely strong reaction to general comment No. 24 reflected by the Foreign Relations Revitalization Act of 1995 (104th Congress, 1st session, S. 908 (report No. 104–95), title III, chap. 2, sect. 314.), submitted in the United States Senate by Senator Helms on 9 June 1995, which provided that “no funds authorized to be appropriated by this Act nor any other Act, or otherwise made available may be obligated or expended for the conduct of any activity which has the purpose or effect of:

“(A) reporting to the Human Rights Committee in accordance with Article 40 of the International Covenant on Civil and Political Rights; or

“(B) responding to any effort by the Human Rights Committee to use the procedures of Articles 41 and 42 of the International Covenant on Civil and Political Rights to resolve claims by other parties to the Covenant that the United States is not fulfilling its obligations under the Covenant, until the President has submitted to the Congress the certification described in paragraph (2).

“(2) certification. The certification referred to in paragraph (1) is a certification by the President to the Congress that the Human Rights Committee established under the International Covenant on Civil and Political Rights has:

“(A) revoked its General Comment No. 24 adopted on November 2, 1994; and

“(B) expressly recognized the validity as a matter of international law of the reservations, understandings, and declarations contained in the United States instrument of ratification of the International Covenant on Civil and Political Rights.”

³⁹⁴ CCPR/C/SR.1366, para. 54.

(i) *Rights and duties of the monitoring body*

218. The problem of the action to be taken by the monitoring body if it finds that a reservation is impermissible is generally stated in terms of “severability”,³⁹⁵ in the sense that commentators and the monitoring bodies themselves wonder whether the reservation can be separated from the consent to be bound and whether the State making the reservation can and should be regarded as being bound by the treaty as a whole despite the impermissibility of the reservation it has formulated.

219. All the monitoring bodies which have asked themselves this question have so far answered in the affirmative:

(a) In the *Belilos* case, the European Court of Human Rights, indicating the grounds for its judgement, stated, laconically: “... it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration”.³⁹⁶

(b) The Court was more explicit in the case of *Loizidou v. Turkey*, in which, after recalling its judgement of 1988,³⁹⁷ it dismisses the statements made by Turkey during the course of the proceedings but

observes that the respondent Government must have been aware, in view of the consistent practice of Contracting Parties under Articles 25 and 46 to accept unconditionally the competence of the Commission and Court, that the impugned restrictive clauses were of questionable validity under the Convention system and that might be deemed impermissible by the Convention organs.

...

The subsequent reaction of various Contracting Parties to the Turkish declarations ... lends convincing support to the above observation concerning Turkey’s awareness of the legal position. ... Seen in this light, the *ex post facto* statements by Turkish representatives cannot be relied upon to detract from the respondent Government’s basic—albeit qualified—intention to accept the competence of the Commission and Court.

It thus falls to the Court, in the exercise of its responsibilities under Article 19, to decide this issue with reference to the texts of the respective declarations and the special character of the Convention regime. The latter, it must be said, militates in favour of the severance of the impugned clauses since it is by this technique that the rights and freedoms set out in the Convention may be ensured in all areas falling within Turkey’s “jurisdiction” within the meaning of Article 1 of the Convention.

The Court has examined the text of the declarations and the wording of the restrictions with a view to determining whether the impugned restrictions can be severed from the instruments of acceptance or whether they form an integral and inseparable part of them. Even considering the texts of the Article 25 and 46 declarations taken together, it considers that the impugned restrictions can be separated from the remainder of the text leaving intact the acceptance of the optional clauses.³⁹⁸

(c) The Human Rights Committee stated that:

The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.³⁹⁹

³⁹⁵ See Edwards Jr., loc. cit., p. 376.

³⁹⁶ See footnote 81 above, *judgment of 29 April 1988*, para. 60.

³⁹⁷ *Ibid.*, *judgment of 23 March 1995*, para. 94.

³⁹⁸ *Ibid.*, paras. 95–97.

³⁹⁹ A/50/40 (footnote 87 above), p. 124, para. 18.

220. Although the European Court of Human Rights emphasizes the differences between the context in which it operates and that in which ICJ functions,⁴⁰⁰ the similarities between this reasoning and that of Sir Hersch Lauterpacht in his separate opinion attached to the ICJ judgment in the *Case of Certain Norwegian Loans*⁴⁰¹ are very striking, although the European Court is more circumspect than the ICJ judge in making use of it and, above all, totally ignores the starting point of all his reasoning, which was based on a clear alternative:

If the clause of the Acceptance reserving to the declaring Government the right of unilateral determination is invalid, then there are *only two alternatives* open to the Court: it may either treat as invalid that particular part of the reservation or it may consider the entire Acceptance to be tainted with invalidity. (There is a third possibility—which has *only to be mentioned in order to be dismissed*—namely, that the clause in question invalidates not the Acceptance as a whole but the particular reservation. This would mean that the entire reservation of matters of national jurisdiction would be treated as invalid while the Declaration of Acceptance as such would be treated as fully in force.)⁴⁰²

221. It is precisely this “third possibility” (which Sir Hersch Lauterpacht mentions only immediately to reject it) that the European Court utilizes in the judgements cited above and that the Human Rights Committee contemplates in general comment No. 24.

222. These positions are perhaps due to the confusion of two very different concepts:

(a) First of all there is the concept of “separability” of the provisions of the treaty itself,⁴⁰³ which, in relation to reservations, raises the question whether the provision in respect of which the reservation is made can be separated from the treaty without compromising the latter’s object and purpose. This may probably be deemed a prerequisite for permissibility of the reservation, since otherwise the provisions of articles 20, paragraph 4, and 21, paragraph 1, of the 1969 and 1986 Vienna Conventions would be meaningless.⁴⁰⁴

(b) Then there is the concept of the “severability” of the reservation from the consent of the State making the reservation to be generally bound by the treaty, which is something quite different⁴⁰⁵ and raises the question whether the reservation was or was not a prerequisite for the State’s commitment.

223. It is by no means impossible to foresee what might be the consequences of the “severability” of the provision in respect of which the reservation that is held to be unlawful was made. In its observations on the Human Rights Committee’s general comment No. 24, the United Kingdom, supporting Sir Hersch Lauterpacht’s argument,⁴⁰⁶

agrees that severability⁴⁰⁷ of a kind may well offer a solution in appropriate cases, although its contours are only beginning to be explored in State practice. However, the United Kingdom is absolutely clear that severability would entail excising both the reservation *and* the parts of the treaty to which it applies. Any other solution they would find deeply contrary to principle, notably the fundamental rule reflected in Article 38 (1) of the Statute of the International Court of Justice, that international conventions establish rules “expressly recognized by” the Contracting States.⁴⁰⁸

224. The “severability” practised by the European Court of Human Rights and contemplated by the Human Rights Committee leads precisely to this “other solution”.⁴⁰⁹

225. During the discussion of general comment No. 24 in the Human Rights Committee, Mrs. Higgins explained that “in the case of the human rights treaties, it is undesirable to exclude States parties; it is preferable, on the contrary, to keep them; hence the formulation employed in the penultimate sentence of paragraph 20”.^{410,411} As far as the Special Rapporteur is aware, this is the only explanation of “severability” to be found in the *travaux préparatoires* for general comment No. 24, and it is also the principal justification given by the commentators who expressed support for it.⁴¹²

226. This explanation presents very serious legal difficulties. In law, it is not a question of determining whether or not reserving States parties should be “kept”, but whether or not they have consented to be bound and, to paraphrase the Human Rights Committee, it is the States themselves—and not external bodies, however well-intentioned and technically above criticism they may be—who are “particularly well placed to perform this task”.⁴¹³ Moreover it is difficult to see how such external bodies could replace the States in carrying out the determination. The opposite solution could give rise to serious political and constitutional difficulties for the reserving State, particularly where the Parliament has attached conditions to the authorization to ratify or accede.⁴¹⁴

227. It would seem odd, moreover, for the monitoring bodies to be able to go further than the States themselves can do in their relations inter se. Under the 1969 and 1986 Vienna Conventions and in accordance with practice, only two possibilities are open to them: exclusion of application of the provision that is the subject of the reservation (art. 21, para. 1 (a)) or of the treaty as a whole (art. 20, para. 4 (b)); but the Conventions do “not even contemplate the possibility that the full treaty might come into force for the reserving State”.⁴¹⁵

⁴⁰⁷ The United Kingdom designates here by “severability” what has been defined as “separability” (para. 222 above).

⁴⁰⁸ A/50/40 (footnote 88 above), p. 133, para. 14; this possibility is likely to occur only rarely in practice.

⁴⁰⁹ See paragraph 219 above.

⁴¹⁰ Later para. 18.

⁴¹¹ CCPR/C/SR.1382, para. 11.

⁴¹² See Giegerich, loc. cit., p. 782 (surprisingly, however, this commentator adds that this solution “also prevents legal uncertainty as to the status of the reserving state as a contracting party”).

⁴¹³ See A/50/40 (footnote 87 above), p. 128, para. 18.

⁴¹⁴ See, in this connection, the statement by the United States (*Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 13th meeting (A/C.6/50/SR.13), para. 53).

⁴¹⁵ A/50/40 (footnote 88 above), observations of the United States, sect. 5, p. 129.

⁴⁰⁰ See footnote 327 above.

⁴⁰¹ *I.C.J. Reports 1957*, pp. 56–59 (see footnote 326 above).

⁴⁰² *Ibid.*, pp. 55–56.

⁴⁰³ See Reuter, op. cit., pp. 37–38.

⁴⁰⁴ It is in accordance with this first meaning that the most authoritative commentators on the question of reservations refer to “separability” (see, for example, Reuter, op. cit., p. 84; Bowett, loc. cit., p. 89; and Sinclair, op. cit., p. 68).

⁴⁰⁵ This appears to have been confused with the preceding concept by the European Court of Human Rights in the *Loizidou* case (see paragraph 219 and footnote 81 above).

⁴⁰⁶ See paragraph 220 above.

228. However, the most serious criticism one might level at “severability” is that it takes no account whatsoever of the consensual character constituting the very essence of any treaty commitment. The three States which have so far reacted to general comment No. 24 are in agreement on this point. Their view was expressed particularly clearly by France, which stated that

agreements, whatever their nature, are governed by the law of treaties, that they are based on States’ consent and that reservations are conditions which States attach to that consent; it necessarily follows that if these reservations are deemed incompatible with the purpose and object of the treaty, the only course open is to declare that this consent is not valid and decide that these States cannot be considered parties to the instrument in question.⁴¹⁶

229. Subject to the possible consequences of the “severability” of the provision that is the subject of the reservation,⁴¹⁷ this conclusion seems to be the correct one. Irrespective of its object, a treaty remains a juridical act based on the will of States, whose meaning cannot be presumed or invented. Human rights treaties do not escape the general law: their object and purpose do not effect any “transubstantiation” and do not transform them into international “legislation” which would bind States against their will.

230. This is the risk monitoring bodies take if they venture to determine what the *intention* of a State was when it bound itself by a treaty, while it was, *at the same time*, formulating a reservation. Not only may the determination of this intention prove extremely delicate,⁴¹⁸ and not only are the precedents constituted by the *Belilos* and *Loizidou* cases very unconvincing in this regard,⁴¹⁹ but the very principle of such determination gives rise to serious objections.

(ii) *Rights and duties of the reserving State*

231. If the points made above are considered accepted,

(a) The human rights treaty monitoring bodies may determine the permissibility of reservations formulated by States in the light of the applicable reservations regime;

(b) If they consider the reservation to be impermissible, they can only conclude that the reserving State is not currently bound;⁴²⁰

⁴¹⁶ A/51/40 (footnote 88 above), observations of France, p. 106, para. 13; see also the observations of the United States, A/50/40, sect. 5, and of the United Kingdom, p. 122, para. 14 (footnote 88 above).

⁴¹⁷ See paragraph 223 above.

⁴¹⁸ See the opinion of Sir Hersch Lauterpacht in the *Interhandel* case (footnote 326 above), pp. 112–116; see also Edwards Jr., loc. cit., p. 375.

⁴¹⁹ In the *Belilos* case, the European Court of Human Rights very clearly underestimated the importance of the reservation in the eyes of the Swiss authorities, as is shown by Switzerland’s reluctance to remain a party to the European Convention on Human Rights following the handing down of the judgement (see footnote 379 above). Furthermore, the entirely contrary grounds given by the European Court in support of its decision in the *Loizidou* case reflect an offhand attitude, to say the least, on the part of the Court, towards a sovereign State, in simply casting doubt on formal statements made before it in the written proceedings (see paragraph 219 above).

⁴²⁰ Except in the case of “separability”, which is difficult to conceive in practice (see paragraphs 220–223 above).

(c) But they cannot take the place of the reserving State in order to determine whether the latter wishes or does not wish to be bound by the treaty despite the impermissibility of the reservation accompanying the expression of its consent to be bound by the treaty.

232. The attitude of the reserving State is therefore crucial and the question is whether that State is bound by legal rules or enjoys a purely discretionary competence.

233. Here again, it is convenient to divide the problem into two questions that are separate even though linked:

(a) Are the findings of the monitoring body binding on the reserving State?

(b) Irrespective of the answer to the preceding question, has the State a choice between several types of reaction?

a. *Binding force of the findings of the monitoring body*

234. Although it seems controversial,⁴²¹ the answer to this first question does not present any problem. Indeed, it seems almost obvious that the authority of the findings made by the monitoring body on the question of reservations will depend on the powers with which the body is invested: they will have the force of *res judicata* where the body is jurisdictional in character, or is arbitral and adjudicates and will have the status of advisory opinions or recommendations in other cases.

235. Admittedly, things are somewhat more complex in practice. On the one hand, it is not always easy to determine the exact nature of the body required to make a determination, especially as one and the same body may successively exercise different competences. Furthermore, the latter do not necessarily fall into well-defined categories that are clearly identified in law. Finally, the exact scope of certain instruments is the subject of doctrinal controversy and, even where this is not the case, practical problems may also arise.⁴²² Real as they are, these problems are not specific to the area of reservations. It is therefore sufficient to rely on the very general directive set out in paragraph 234 above.

236. It should be noted, however, that, even on this point, the Human Rights Committee’s general comment No. 24 has not escaped criticism. In particular, the United Kingdom criticized it for having used “the verb ‘determine’ in connection with the Committee’s functions towards the status of reservations” and of having done so, “moreover in the context of its *dictum* that the task in question is inappropriate for the States Parties”.⁴²³

237. Although the Human Rights Committee meant by this that it had to take decisions that were binding on the States parties, this objection is very probably well founded: the “comments”, “reports” and “finding” adopted by the Committee under articles 40 and 41 of the International Covenant on Civil and Political Rights or article 5 of the Optional Protocol to it are certainly not legally bind-

⁴²¹ See paragraphs 236 et seq.

⁴²² See, for example, paragraph 241 below.

⁴²³ A/50/40 (footnote 88 above), p. 132, para. 11.

ing.⁴²⁴ “Findings” would have been more accurate, but it is certainly true that “too much is not to be read into the verb ‘determine’”:⁴²⁵ the Committee can take a position regarding the permissibility or impermissibility of reservations formulated by the States parties to the Covenant in the exercise of its general functions of monitoring the implementation of that instrument, but “a competence to do something” should not be confused with “the binding effect of that which is done”.⁴²⁶

238. Furthermore, when it considered the first report of the United States, following the adoption of general comment No. 24, the Human Rights Committee confined itself to “regretting” the extent of the State party’s reservations, declarations and understandings to the International Covenant on Civil and Political Rights, stating that it was “also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant”.⁴²⁷ Furthermore, at the last meeting devoted to consideration of this report, the Chairman of the Committee, responding to the concerns expressed by the United States, pointed out that: “The Committee’s interpretations as set out in its general comments were not strictly binding, although it hoped that the comments carried a certain weight and authority.”⁴²⁸

239. The formulas used by the chairpersons of the bodies set up under international human rights instruments in their 1992 and 1994 reports⁴²⁹ call for similar comments. They are of different types and in any event cannot imply that the bodies concerned have greater powers in this area than those conferred on them by their statutes.

240. These powers also vary greatly, depending on circumstances and from body to body. It is nevertheless clear that by ratifying the treaties which establish these bodies, the States parties undertake to execute them in good faith, which implies at least that they will examine in good faith the comments and recommendations made to them by the bodies concerned.⁴³⁰

b. *The reactions expected from the reserving State*

241. The juridical value of the findings of the monitoring bodies naturally has some bearing on the nature and scope of the consequential obligations for a reserving State whose reservation is declared inadmissible. Where

⁴²⁴ Higgins, “Introduction”, p. xviii, footnote 7: “The legally binding nature of any ‘determination’ of the Committee, whether on this issue or otherwise, is problematic.”

⁴²⁵ *Ibid.*

⁴²⁶ *Ibid.*, p. xxii.

⁴²⁷ A/50/40 (footnote 87 above), para. 279.

⁴²⁸ CCPR/C/SR.1406, para. 3.

⁴²⁹ See footnote 84 above. “The treaty bodies should systematically review reservations made when considering a report and include in the list of questions to be addressed to reporting Governments a question as to whether a given reservation was still necessary and whether a State party would consider withdrawing a reservation that might be considered by the treaty body concerned as being incompatible with the object and purpose of the treaty” (A/47/628, para. 36). “They recommend that treaty bodies state clearly that certain reservations to international human rights instruments are contrary to the object and purpose of those instruments and consequently incompatible with treaty law” (A/49/537, para. 30).

⁴³⁰ See Higgins, “Introduction”, p. xviii; and, more generally, Nguyen Quoc, Dailier and Pellet, *op. cit.*, p. 372.

the body concerned is vested with decision-making powers, the State must conform to the body’s decisions. However, this rule is tempered by two factors:

(a) In the first place, it is not entirely obvious, from the strictly legal standpoint, that a State would be legally bound to withdraw a reservation declared impermissible if this question does not constitute the actual subject of the decision; in the case of the human rights treaty monitoring bodies this is likely to occur only rarely,⁴³¹

(b) Secondly, and again from a strictly legal standpoint, assuming that such a decision were handed down, it would have the *relative* authority of *res judicata* and would therefore impose an obligation on the defending State only in relation to the applicant or applicants.⁴³²

242. Too much importance should not, however, be attached to these strictly technical considerations: it is scarcely conceivable that a State anxious to observe the law—and to preserve its international image—would adopt such a restrictive position. This applies at least to any findings that might be made in such circumstances and to the recommendations made or advisory opinions given. While such instruments have no binding force, they do grant permission⁴³³ and States parties cannot, without breaching the principle of good faith, remain indifferent to findings regarding the scope of their commitments, made, in the exercise of its functions (contentious, consultative or other), by an organ established under a treaty by which they have wished to be bound.

243. In all cases where such a body has found a reservation to be impermissible, the State therefore finds itself confronted with a choice. Except in special cases, it alone must determine whether the impermissible reservation that it attached to the expression of its consent to be bound constituted an essential element of that consent.⁴³⁴

244. The State has two options: (a) simply to withdraw the reservation; or (b) to terminate its participation in the treaty.

245. In both these cases, it must be borne in mind that the State’s decision produces its effects, or in any event certain effects, *ab initio*. By definition, if the reservation is incompatible with the object and purpose of the treaty,⁴³⁵

⁴³¹ This might, however, be the case if a State (the reserving State or the objecting State) were to submit to the European Court of Human Rights a dispute relating to reservations under article 46 of the European Convention on Human Rights or article 62 of the American Convention on Human Rights. On the other hand, it is generally considered that the principle of *res judicata* extends only to the substantive provisions of jurisdictional or arbitral decisions and to the grounds on which they are necessarily based, but not to those decisions as a whole. While a jurisdictional organ may give its views on the permissibility of a reservation when an individual or inter-State application is made to it in relation to the implementation of the convention, it is doubtful that observations made in connection with the matter can be considered *res judicata*.

⁴³² See the position of Sir Humphrey Waldock (para. 205 above).

⁴³³ See, for example: Jacqué, *Eléments pour une théorie de l’acte juridique en droit international public*, p. 238; and Nguyen Quoc, Dailier and Pellet, *op. cit.*, pp. 373–374.

⁴³⁴ See paragraphs 228–231 above.

⁴³⁵ Bowett (*loc. cit.*, p. 77) makes a distinction between a reservation that is “fundamentally inconsistent with the object and purpose of the treaty” and a reservation that is simply “impermissible” and draws

it alters the latter's nature, emptying it of its substance, so that it is difficult to consider that the reserving State was really a party to the treaty.⁴³⁶ Consequently, the Special Rapporteur cannot regard as too absolute the nullity which would result from incompatibility of the reservation with the object and purpose of the treaty; the finding of impermissibility of the reservation may be made a long time after expression by the State of its consent to be bound⁴³⁷ and may, in the meantime, have produced effects in law which it may be difficult or impossible to alter.

246. Certainly, the decision of the reserving State to end its relationships under the treaty following a finding that its reservation is impermissible presents real drawbacks. In particular, as was noted by Macdonald: "To exclude the application of an obligation by reason of an invalid reservation is in effect to give full force and effect to the reservation."⁴³⁸ This statement calls for two comments, however:

(a) The author assumes here the case of "separability";⁴³⁹ but what is envisaged here is different: in this case the State renounces the benefits of the treaty as a whole (or withdraws the challenged reservation);

(b) Consequently, a decision of the reserving State to terminate its relationships under the treaty simply has the effect of restoring the *status quo ante*.

247. Yet if this "all or nothing" situation is related to the functions of the reservations regime,⁴⁴⁰ it is unsatisfactory and is liable to compromise the objective of universality by encouraging the reserving State to leave the treaty circle. The question therefore is whether this State cannot move towards an intermediate solution that will preserve the integrity of the treaty and yet allow the State to continue its participation without this causing it insuperable difficulties. In other words, is it conceivable, from a legal standpoint, for the State concerned to modify its reservation in order to make it compatible with the object and purpose of the treaty?⁴⁴¹

248. Prima facie, such an intermediate solution seems scarcely compatible with the Vienna regime since, under the provisions of article 19 of the 1969 and 1986 Vienna Conventions, the formulation of a reservation can take place only "when signing, ratifying, accepting, approving or acceding to a treaty". Furthermore, the possibility of raising an objection to a reservation is restricted by the time limit set in article 20, paragraph 5.

249. However, the objection does not appear to be diriment. In the first place, if it is considered that the State has never in fact expressed a valid consent to be bound by the treaty,⁴⁴² the "regularization" of its reservation would

seem, in fact, to be concomitant with the expression of its consent to be bound. Secondly, and above all, if, as seems inevitable without serious prejudice to the fundamental principle of consent which underlies every treaty commitment,⁴⁴³ the reserving State can give up its participation in the treaty, it is difficult to see why it could not equally well modify the sense of its reservation, so as to make it compatible with the object and purpose of the treaty, and thus permissible. This solution, which is not incompatible with the Vienna rules, has the advantage of reconciling the requirements of integrity and universality that are inherent in any reservations regime.

250. As Mr. Valticos wrote in the partly dissenting opinion which he appended to the *Chorherr v. Austria* judgement of the European Court of Human Rights, rejection of this possibility

would ... be unreasonable, because the government concerned have been informed of the non-validity of their reservation only several years after the ratification. The government in question should therefore have the opportunity to rectify the situation and to submit a valid reservation within a reasonable time and on the basis of their former reservation.⁴⁴⁴

251. There is, moreover, at least one precedent for such action. Although, by the *Belilos* judgement, the European Court of Human Rights considered that Switzerland was bound "irrespective of the validity of the declaration", which it had found not in conformity with article 64 of the European Convention on Human Rights,⁴⁴⁵ that country, in accordance, moreover, with a suggestion it had made to the Court and which the latter had not adopted,⁴⁴⁶ formulated a new declaration,⁴⁴⁷ without, seemingly, giving rise to any objection or protest. More generally, moreover, it probably must be recognized that States, which can at any time withdraw their reservations, may also "tone them down"; here again, the recent practice of the Secretary-General as depositary reflects the same approach.⁴⁴⁸

⁴⁴³ See paragraph 228 above.

⁴⁴⁴ *Judgment of 25 August 1993* (footnote 333 above), p. 42. Mr. Valticos further suggested that any new declaration or reservation should be submitted to the European Court of Human Rights for the latter to determine its validity. There is nothing to prevent this *de lege ferenda*, but a text should expressly provide for this or, alternatively, it would simply be possible to follow the advisory opinion procedure of Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions.

⁴⁴⁵ See paragraph 219 above.

⁴⁴⁶ See Schabas, "Reservations to human rights treaties ...", pp. 76–77.

⁴⁴⁷ Council of Europe, *Yearbook of the European Convention on Human Rights*, 1988, vol. 31 (Dordrecht, Martinus Nijhoff, 1993), p. 5. Switzerland even modified its declaration again the following year and Liechtenstein—whose own, identical declaration had nevertheless not been declared invalid by the Court—did likewise in 1992 (see Schabas, "Reservations to human rights treaties ...", p. 77).

⁴⁴⁸ Following several objections, the Government of the Libyan Arab Jamahiriya informed the Secretary-General on 5 July 1995 of its intention to "modify by making more specific" the general reservation it had formulated on its accession to the Convention on the Elimination of All Forms of Discrimination against Women. The Secretary-General communicated this modification (see *Multilateral Treaties Deposited with the Secretary-General* (footnote 282 above), chap. IV.8, pp. 172, 177–180 and 182, footnote 21), without this giving rise to any objection or criticism. (See also the Government of Finland's notification to the Secretary-General dated 10 February 1994 to amend, by reducing its scope, a reservation to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 26 October 1961, *ibid.*, chap. XIV.3, pp. 666 and 670, footnote 5.)

the conclusion that only the former "is a nullity and if severable can be struck out (*ibid.*, p. 84). Versus: Redgwell, *loc. cit.*, pp. 267–268.

⁴³⁶ Notwithstanding the point made in footnote 435 above, the situation may be different if a reservation is prohibited by the treaty—because of a reservations clause—but yet cannot be regarded as contrary to the object and purpose of the treaty.

⁴³⁷ See paragraph 213 above.

⁴³⁸ Macdonald, *loc. cit.*, p. 449.

⁴³⁹ See paragraph 222 above.

⁴⁴⁰ See paragraphs 90–98 above.

⁴⁴¹ Or could it rectify whatever was the cause of the impermissibility of its reservation?

⁴⁴² See paragraph 245 above.

Conclusion: coexistence of monitoring mechanisms

252. In conclusion, it would seem that:

(a) While, as far as their content is concerned, the human rights treaties are not of such a special nature as to justify applying to them a different reservations regime, the establishment, by most of these treaties, of monitoring bodies influences the modalities of determination of the permissibility of reservations;

(b) Although no provision is made for this in their statutes, these bodies have undertaken to determine the permissibility of reservations to their constituent instruments. Their competence to do so must be recognized: it is a prerequisite for the exercise of the general monitoring functions with which they are invested;

(c) Like the contracting parties themselves in their relations inter se or any other bodies which may have competence to settle disputes, the monitoring bodies determine the permissibility of reservations to human rights treaties on the basis of the criterion of the treaty's object and purpose, thus confirming the adaptation to these instruments of the flexible reservations regime provided for in the 1969 and 1986 Vienna Conventions;

(d) The legal force of the findings made by these bodies in the exercise of this determination power cannot exceed that resulting from the powers given them for the performance of their general monitoring role; in all cases, however, the States must examine these findings in good faith and, where necessary, rectify the factors found to exist which render the reservation impermissible;

(e) No organ for determining the permissibility of reservations can take the place of the reserving State in determining the latter's intentions regarding the scope of the treaty obligations it is prepared to assume. The State alone, therefore, is responsible for deciding how to put an end to the defect in the expression of its consent arising from the impermissibility of the reservation;

(f) This "action to ensure conformity" may consist simply in withdrawal of the inadmissible reservation or in its modification.

CONCLUSIONS

253. In view of the importance of the problems raised by the recent practice of the human rights treaty monitoring bodies with regard to reservations and the extent of the controversy this practice has generated, the Special Rapporteur has thought it necessary to depart somewhat from his intentions announced at the time of submission of his first report, regarding the order of dealing with the various issues raised by the question of "reservations to treaties". He believes it necessary for the Commission to present in this debate the viewpoint of general international law, of which it is one of the organs, a debate that is sometimes obscured, and in any event distorted, by certain approaches that are sometimes adopted with the best of intentions, but which, being too sectorial, tend to exaggerate the special aspects of particular areas, particular branches of law and particular treaties, to the detriment of the unity of the rules of international law.

254. Unity is not, of course, an end in itself and it is quite conceivable to envisage applying diverse rules to different situations when the situations so justify. Reservations to treaties do not, however, seem to require such a normative diversification: the existing regime is characterized by its flexibility and its adaptability and it achieves satisfactorily the necessary balance between the conflicting requirement of the integrity and the universality of the treaty.

255. Whatever may have been said or written on the subject, this objective of equilibrium is universal. Whatever its object, a treaty remains a treaty and expresses the will of the States (or international organizations) that are parties to it. The purpose of the reservations regime is to enable these wishes of States to be expressed in a balanced fashion and it succeeds in doing so in a generally satisfactory manner. It would be unfortunate to bring the regime into question by attaching undue importance to sectorial considerations that can perfectly well be accommodated within the existing regime.

256. This general conclusion must nevertheless be tempered by two considerations:

(a) First, it is undeniable that the law was not frozen in 1951 nor in 1969;⁴⁴⁹ issues which did not arise (or scarcely arose) at that time have since emerged and call for answers. The Special Rapporteur believes that the answers must be found in the spirit of the "Vienna rules", although these will have to be adapted and extended, as appropriate, whenever this is found to be necessary;

(b) Secondly, it should be borne in mind that the normal way of adapting the general rules of international law to particular needs and circumstances is to adopt appropriate rules by the conclusion of treaties. In the area of reservations, this can easily be done through the adoption of derogating reservations clauses, if the parties see a need for this.

257. More specifically, no determining factor seems to require the adoption of a special reservations regime for normative treaties, nor even for human rights treaties. The special nature of the latter was fully taken into account by the judges in 1951 and the "codifiers" of later years and it did not seem to them to justify an overall derogating regime. This view is shared by the Special Rapporteur.

258. There is reason to believe, however, that the drafters of the 1969 and 1986 Vienna Conventions never envisaged the role which the bodies for monitoring the implementation of certain treaties would later have to play, especially in the area of protection of human rights, in applying the reservations regime which they established. This role can in fact be quite easily circumscribed by the application of general principles of international law and by taking account of both the functions of a reservations regime and the responsibilities vested in those bodies.

259. There are, however, two circumstances—the second one in particular—that may justify the adoption of special reservation clauses, a measure that will in any case help to avoid sterile controversy.

⁴⁴⁹ See the first report of the Special Rapporteur (footnote 2 above), p. 152, paras. 161–162.

260. In the light of the foregoing, it seems to the Special Rapporteur that the Commission would be fully performing its role of promoting the progressive development of international law and its codification,⁴⁵⁰ by adopting a resolution addressed to the General Assembly, which the latter might wish to bring to the attention of States and the various parties concerned, in the hope of clarifying the legal aspects of the matter. It is in this spirit that the Special Rapporteur has prepared the draft resolution reproduced below.

DRAFT RESOLUTION OF THE INTERNATIONAL LAW COMMISSION ON RESERVATIONS TO NORMATIVE MULTILATERAL TREATIES, INCLUDING HUMAN RIGHTS TREATIES

The International Law Commission,

Having considered, at its forty-eighth session, the question of the unity or diversity of the juridical regime for reservations,

Aware of the discussion currently taking place in other forums on the subject of reservations to normative multilateral treaties, and particularly treaties concerning human rights,

Desiring that the voice of international law be heard in this discussion,

1. *Reaffirms* its attachment to the effective application of the reservations regime established by articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986, and particularly to the fundamental criterion of the object and purpose of the treaty as the fundamental criterion for determining the permissibility of reservations;

2. *Considers* that, because of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty;

3. *Also considers* that these objectives apply equally in the case of reservations to normative multilateral treaties, including treaties in the area of human rights and that, consequently, the general rules enunci-

ated in the above-mentioned Vienna Conventions are fully applicable to reservations to such instruments;

4. *Nevertheless considers* that the establishment of monitoring machinery by many human rights treaties creates special problems that were not envisaged at the time of the drafting of those conventions, connected with determination of the permissibility of reservations formulated by States;

5. *Further considers* that, although these treaties are silent on the subject, the bodies which they establish necessarily have competence to carry out this determination function, which is essential for the performance of the functions vested in them, but that the control they can exercise over the permissibility of reservations does not exclude the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the 1969 and 1986 Vienna Conventions and, where appropriate, by the organs for settling any dispute that may arise concerning the implementation of the treaty;

6. *Is firmly of the view* that it is only the reserving State that has the responsibility of taking appropriate action in the event of incompatibility of the reservation which it formulated with the object and purpose of the treaty. This action may consist in the State either forgoing becoming a party or withdrawing its reservation, or modifying the latter so as to rectify the impermissibility that has been observed;

7. *Calls* on States to cooperate fully and in good faith with the bodies responsible for determining the permissibility of reservations, where such bodies exist;

8. *Suggests* that it would be desirable if, in future, specific clauses were inserted in multilateral normative treaties, including human rights treaties, in order to eliminate any uncertainty regarding the applicable reservations regime, the power to determine the permissibility of reservations enjoyed by the monitoring bodies established by the treaties and the legal effects of such determination;

9. *Expresses the hope* that the principles enunciated above will help to clarify the reservations regime applicable to normative multilateral treaties, particularly in the area of human rights; and

10. *Suggests* to the General Assembly that it bring the present resolution to the attention of States and bodies which might have to determine the permissibility of such reservations.

⁴⁵⁰ See article 1 of the statute of the Commission.

ANNEX I

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ANNEX II

**Questionnaire on the topic of reservations to treaties
addressed to States Members of the United Nations or of a
specialized agency or parties to the ICJ Statute***

Prepared by Mr. Alain Pellet, Special Rapporteur on the topic of reservations to treaties, in accordance with paragraph 489 of the report of the Commission on the work of its forty-seventh session

1. During its forty-seventh session (2 May–21 July 1995), the International Law Commission considered the preliminary report of Mr. Alain Pellet, the Special Rapporteur for the topic “The law and practice of reservations to treaties”.
2. Subsequently, “[at] its 2416th meeting on 13 July 1995, the Commission, in accordance with its earlier practice, authorized the Special Rapporteur to prepare a detailed questionnaire, as regards reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which are depositaries of multilateral conventions. This questionnaire will be sent through the Secretariat to its addressees.¹
3. In paragraph 5 of its resolution 50/45 entitled “Report of the International Law Commission on the work of its forty-seventh session”, the General Assembly invited States and international organizations, particularly those which are depositaries of multilateral conventions, to reply promptly to the questionnaire prepared by the Special Rapporteur.
4. The questionnaire is addressed to States Members of the United Nations or of a specialized agency or parties to the ICJ Statute pursuant to the above provisions. A separate questionnaire has been addressed to international organizations.
5. The Special Rapporteur has prepared the attached questionnaire with all possible care, but is aware that it is long and imposes an additional burden of work on States. However, he wishes to emphasize how useful detailed, reasoned replies will be for the continuation of the Commission’s work, with a view to offering an optimum response to the concerns of States and to solving the difficulties they face in connection with reservations to treaties. Nevertheless, partial replies are obviously preferable to silence.
6. Should it prove impossible or difficult to complete the questionnaire as a whole quickly, replies may be sent to the Secretariat in sections. Since the Special Rapporteur intends to deal in his next report with the definition of reservations and with the legal regime of interpretative declarations, it would be particularly useful if replies to questions 1.4, 3.1 to 3.13.2 and 5.1 to 5.2.1 could be sent to the Secretariat as quickly as possible. The replies to the other questions should reach the Secretariat before 31 October 1996, with the exception of those concerning State succession, which need not reach the Secretariat until 31 October 1997.
7. The Commission and the Special Rapporteur take this opportunity to express, in anticipation, their gratitude to States for completing the attached questionnaire.

* The following States have sent the Special Rapporteur replies that are often very detailed and extremely useful for the further work of the Commission: Chile, Denmark, Ecuador, Estonia, Finland, San Marino, Slovakia, Slovenia, Spain, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of America. The Special Rapporteur wishes to express his warmest thanks to these States.

¹ *Yearbook... 1995*, vol. II (Part Two), p. 108, para. 489.

QUESTIONNAIRE

Period covered in principle by replies: 19..–19..²

I. FORMULATION AND WITHDRAWAL OF RESERVATIONS

1.1 How many multilateral treaties has the State become party to during the period under consideration?

1.2 How many of these treaties have been the subject of reservations by the State? (Please list the treaties and attach the text of the reservations)

1.3 Which of the treaties to which the reservations apply contain provisions concerning reservations? (Please list the treaties and, if possible, attach the text of the relevant provisions)

1.4 Has the State formulated reservations to bilateral treaties? (Please list the treaties and attach the text of the reservations)

1.5 What were the reasons for each of the reservations mentioned in the replies to questions 1.2 and 1.4:

- (i) Political considerations? Were such considerations internal or international in nature?
- (ii) Desire to maintain the application of the national rules currently in force?
- (iii) Doubts about the soundness of the provision to which the reservation refers?
- (iv) Other reasons?

1.6 Were or are some or all the State's reservations formulated for a specific period of time?

1.6.1 If so, what was/were the reason/reasons for specifying that period of time?

1.6.2 If not, has the State withdrawn or modified some reservations? (Please attach the text of the documents notifying the withdrawals)

1.6.2.1 If so,

- (i) What period of time elapsed between the State's expression of consent to be bound and the withdrawal?
- (ii) What was/were the reason/reasons?

1.7 At the internal level, which authority or authorities decide(s) that the State will formulate a reservation:

- The Head of State?
- The Government or a government body?
- The parliament?

1.7.1 If it is not always the same authority which has competence to decide that a reservation will be formulated, on what criteria is this competence based?

1.7.2 If the decision is taken by the Executive, is the parliament informed of the decision? A priori or a posteriori? Invited to discuss the text of the intended reservation(s)?

² Please specify the period considered for the purpose of replying to this questionnaire. It is suggested that the most comprehensive answers possible be given for the past 20 years at least.

1.8 Is it possible for a national judicial body to oppose or insist on the formulation of certain reservations?

1.8.1 If so, which authority and how is it seized of the matter?

1.8.2 What reason(s) can it invoke in taking such a decision? (Where appropriate, please attach the relevant decisions)

1.9 Do reservations appear in an official national publication?

1.9.1 If this publication is not issued on a regular basis, what are the criteria for its issuance?

1.10 Of the reservations mentioned in the replies to questions 1.2 and 1.4, which were formulated:

- At the time when the treaty was signed?
- At the time when definitive consent to be bound was expressed?
- After the treaty entered into force with respect to the State? If so, according to which procedure?

1.10.1 Was the timing of the formulation of the reservations based on any particular considerations? If so, what considerations?

1.10.2 If reservations were formulated at the time when the treaty was signed, were they formally confirmed when the State expressed its definitive consent to be bound? If so, which reservations?

1.10.2.1 If not, does the State consider that the foundation of those reservations was valid?

II. ACCEPTANCE OF RESERVATIONS AND OBJECTIONS TO RESERVATIONS, EFFECTS OF RESERVATIONS

2.1 *Acceptance of reservations formulated by the State and objections to those reservations*

2.1.1 Have any of the reservations mentioned in the replies to questions 1.2 and 1.4 been formally accepted? (Please list the reservations and attach the text of the acceptances)

2.1.2 Have objections been made to any of the reservations mentioned in the replies to questions 1.2 and 1.4? (Please list the reservations and attach the text of the objections)

2.1.2.1 If so, have the objecting States or international organizations expressed the intention that the objection should preclude the entry into force of the treaty between the author of the objection and the reserving State?

2.1.3 If there have been formal acceptances of or objections to the reservations mentioned in the replies to questions 1.2 and 1.4, were such acceptances or objections preceded or followed by diplomatic discussions or exchanges of notes between the two States, between the State and the international organization or between the State and the depositary? (If possible, please attach the text of the relevant documents)

2.1.3.1 Following such discussions or exchanges of notes, has the other State or the international organization concerned ever decided not to raise an objection which it had originally envisaged?

2.1.4 Has the interpretation or implementation of the reservations mentioned in the replies to questions 1.2 and 1.4 given rise to any particular difficulties in the application of the treaty? If so, what difficulties?

- 2.1.4.1 In particular, have those difficulties:
- Given rise to diplomatic protests? (If possible, please attach the text of the protests)
 - Been examined by an international judicial body or a body monitoring the application of the treaty? (Please attach the text of the relevant decisions and/or opinions)
- 2.1.4.2 Has a judicial body or other national authority ruled on the meaning or effects of the reservations? (Please attach the text of the relevant decisions)
- 2.1.5 If any of the reservations mentioned in the reply to question 1.2 were formulated in relation to the constituent instrument of an international organization, were those reservations accepted by an organ of that organization? (Please attach the text of the relevant deliberations)
- 2.1.6 Has the withdrawal of a reservation formulated by the State (see reply to question 1.6.2) given rise to any particular difficulties? If so, what difficulties?
- 2.1.7 Have any of the objections mentioned in the reply to question 2.1.2 been withdrawn? (Please attach the text of the instruments of notification of the withdrawals)
- 2.1.7.1 If so, have the withdrawals given rise to any particular difficulties? What difficulties?
- 2.2 *Acceptance by the State of reservations formulated by another State or by an international organization and objection by the State to those reservations*
- 2.2.1 Has the State formally accepted any reservations formulated by another State or by an international organization? (Please list, and provide the text of, the formal acceptances)
- 2.2.1.1 In the absence of a formal acceptance, does silence on the part of the State imply that it accepts the reservation(s) in question?
- 2.2.2 Has the State made objections to any reservations formulated by another State or by an international organization? (Please list, and provide the text of, the objections)
- 2.2.2.1 What were the reasons for each of the objections:
- (i) Political considerations? Were such considerations internal or international in nature?
 - (ii) Desire to ensure the integrity of the treaty?
 - (iii) Incompatibility of the reservation with the purpose and object of the treaty?
 - (iv) Other reasons?
- 2.2.2.2 At the internal level, which authority or authorities take(s) the decision to make objections to reservations formulated by other Contracting Parties?
- 2.2.2.3 Do objections to reservations appear in an official national publication?
- 2.2.2.4 How much time elapsed between the notification of the reservation and the formulation of the objections mentioned in the reply to question 2.2.2?
- 2.2.3 In formulating the objections mentioned in the reply to question 2.2.2, did the State express the intention that the objection should preclude the entry into force of the treaty between itself and the reserving State or international organization?
- 2.2.3.1 If so, what were the reasons for that position:

- (i) Political considerations? Were such considerations internal or international in nature?
- (ii) Desire to ensure the integrity of the treaty?
- (iii) Incompatibility of the reservation with the purpose and object of the treaty?
- (iv) Other reasons?

2.2.3.2 If not, what were the reasons for that position? And what effects did the objections have?

2.2.4 Were the formal acceptances or objections mentioned in the replies to questions 2.2.1 and 2.2.2 preceded or followed by diplomatic discussions or exchanges of notes with the reserving State or international organization or with the depositary of the treaty? (If possible, please attach the text of the relevant documents)

2.2.4.1 Following such negotiations or exchanges of notes, has the State ever modified, or decided not to raise, an objection which it had originally envisaged?

2.2.5 Has the interpretation or implementation of the objections mentioned in the reply to question 2.2.2 given rise to any particular difficulties in the application of the treaty? If so, what difficulties?

2.2.5.1 In particular, have those objections:

- Given rise to diplomatic protests? (If possible, please attach the text of the protests)
- Been examined by an international judicial body or a body monitoring the application of the treaty? (Please attach the text of the relevant decisions and/or opinions)

2.2.5.2 Has a judicial body or other national authority ruled on the meaning or effects of the objections? (Please attach the text of the relevant decisions)

2.2.6 Has the State withdrawn or modified any of the objections mentioned in the reply to question 2.2.2?

2.2.6.1 If so, which ones and why?

III. INTERPRETATIVE DECLARATIONS

3.1 Has the State attached any interpretative declarations to the expression of its consent to be bound by the multilateral treaties to which it is a party? (Please list the treaties and provide the text of the declarations)

3.2 Which of those treaties contain provisions concerning interpretative declarations? (Please list the treaties and, if possible, attach the text of the relevant provisions)

3.3 Has the State attached any interpretative declarations to the expression of its consent to be bound by bilateral treaties? (Please list the treaties and attach the text of the declarations)

3.4 Please give the reason(s) for each of the interpretative declarations mentioned in the replies to questions 3.1 and 3.3.

3.5 At the internal level, what authority or authorities take(s) the decision to make such interpretative declarations?

3.5.1 Is the parliament involved in the formulation of these declarations?

3.6 Do interpretative declarations appear in an official national publication?

3.7 Of the interpretative declarations mentioned in the replies to questions 3.1 and 3.3, which ones were made:

- At the time when the treaty was signed?
- At the time when definitive consent to be bound was expressed?
- After the treaty entered into force with respect to the State? If so, according to which procedure?

3.7.1 Have any of the declarations been modified or withdrawn?

3.7.2 Was the timing of the interpretative declarations based on any particular considerations? If so, what considerations?

3.8 Did the interpretative declarations mentioned in the replies to questions 3.2 and 3.3 evoke any response from other Contracting Parties or the depositary of the treaty?

3.8.1 If so, what form did the responses take? (Please attach the relevant documents)

3.8.2 Were the responses preceded or followed by diplomatic discussions or exchanges of notes? (If possible, please attach the relevant documents)

3.8.2.1 Following such discussions or exchanges of notes, has the State ever modified, or decided not to make, an interpretative declaration which it had originally envisaged?

3.9 Has the interpretation or scope of the interpretative declarations mentioned in the replies to questions 3.1 and 3.3 given rise to any particular difficulties in the application of the treaty? If so, what difficulties?

3.9.1 In particular, have the difficulties:

- Given rise to diplomatic protests? (If possible, please attach the text of the protests)
- Been examined by an international judicial body or a body monitoring the application of the treaty? (Please attach the text of the relevant decisions and/or positions)

3.9.2 Has a judicial body or other national authority ruled on the scope or meaning of the declarations? (Please attach the text of the relevant decisions)

3.10 If any of the interpretative declarations mentioned in the reply to question 3.1 concern the constituent instrument of an international organization, were those declarations examined by an organ of that organization? (Please attach the text of the relevant deliberations)

3.11 Has the State responded formally to any interpretative declarations made by another State or by an international organization? (Please list the responses and attach the relevant text)

3.11.1 What were the reason(s) for the responses?

3.11.2 How much time elapsed between the notification of the interpretative declarations mentioned in the reply to question 3.11 and the formulation of the responses?

3.11.3 At the internal level, which authority or authorities take(s) the decision to formulate such responses?

3.11.4 Do the responses appear in an official national publication?

3.12 Were the responses mentioned in the reply to question 3.11 preceded or followed by diplomatic discussions or exchanges of notes with the State or international organization which formulated the interpretative declaration or with the depositary of the treaty? (If possible, please attach the text of the relevant documents)

3.12.1 Following such discussions or exchanges of notes, has the State ever modified, or decided not to make, a response which it had originally envisaged?

3.13 Has the interpretation or scope of the responses mentioned in the reply to question 3.11 given rise to any particular difficulties in the application of the treaty? If so, what difficulties?

3.13.1 In particular, have those difficulties:

- Given rise to diplomatic protests? (If possible, please attach the text of the protests)
- Been examined by an international judicial body or a body monitoring the application of the treaty? (Please attach the text of the relevant decisions and/or positions)

3.13.2 Has a judicial body or other national authority ruled on the meaning or scope of the responses? (Please attach the text of the relevant decisions)

IV. STATE SUCCESSION

4.1 *Practice of the State as a successor State*³

4.1.1 According to which procedure(s) did the successor State succeed to the multilateral treaties to which the predecessor State was a party at the date of the succession of States? (A brief summary of the procedure or procedures, according to the nature of the treaties in question, will suffice)

4.1.2 Did the successor State maintain the reservations formulated by the predecessor State to treaties applicable at the date of the succession of States? (Please list the treaties and attach the text of the reservations)

4.1.2.1 Were the reservations of the predecessor State maintained:

- *Ipso facto*, simply as a result of succession to the treaty?
- By means of a formal indication to that effect in the notification of succession? (Please attach the relevant instrument(s))
- By means of the formulation of reservations identical to those of the predecessor State? (Please attach the relevant instruments)

4.1.2.2 If the successor State maintained only some reservations of the predecessor State, did it:

- Formally repudiate all the reservations of the predecessor State? (Please attach the relevant instrument)
- Formally express the intention to renounce some reservations of the predecessor State? (Please attach the relevant instruments)

4.1.3 When making a notification of succession, did the successor State formulate new reservations to the treaty or treaties to which it succeeded or modify the reservations of the predecessor State? (Please attach the relevant instruments)

4.1.4 Did the successor State maintain the objections made by the predecessor State to the reservations formulated by other Contracting Parties to treaties applicable at the date of the succession of States? (Please list the treaties and attach the text of the objections)

³ This section applies only to States which have replaced another State in the responsibility for the international relations of territory on the occurrence of a succession of States.

- 4.1.4.1 Were the objections of the predecessor State maintained:
- *Ipso facto*, simply as a result of succession to the treaty?
 - By means of a formal indication to that effect in the notification of succession? (Please attach the relevant instrument(s))
 - By means of the formulation of objections identical to those of the predecessor State? (Please attach the relevant instruments)
- 4.1.4.2 If the successor State maintained only some objections of the predecessor State, did it:
- Formally repudiate all the objections of the predecessor State? (Please attach the relevant instrument)
 - Formally express the intention to renounce some objections of the predecessor State? (Please attach the relevant instruments)
- 4.1.5 When making a notification of succession, did the successor State formulate new objections to the reservations made by other Contracting Parties to the treaty or treaties to which it succeeded or modify the objections of the predecessor State? (Please attach the relevant instruments)
- 4.1.6 Did the successor State maintain the interpretative declarations made by the predecessor State to the treaties applicable at the date of the succession of States? Did it modify those declarations? (Please list the treaties and attach the text of the declarations)
- 4.1.6.1 If so, what procedures were followed in maintaining or modifying them? (Please attach the relevant instruments)
- 4.1.7 Did the successor State maintain the responses of the predecessor State to the interpretative declarations formulated by other Contracting Parties to the treaties applicable at the date of the succession of States? (Please list the treaties and attach the text of the declarations)
- 4.1.7.1 If so, what procedures were followed in maintaining them? (Please attach the relevant instruments)
- 4.1.8 Has the successor State's maintenance of the predecessor State's reservations, objections to reservations, interpretative declarations and responses to interpretative declarations, or its refusal to maintain them, given rise to any particular difficulties? If so, what difficulties?
- 4.1.8.1 In particular, have these difficulties:
- Given rise to diplomatic protests? (If possible, please attach the text of the protests)
 - Been examined by an international judicial body or a body monitoring the application of the treaty? (Please attach the text of the relevant decisions)
- 4.1.8.2 Has a judicial body or other national authority ruled on these difficulties? (Please attach the text of the relevant decisions)
- 4.2 *Practice of the State as a predecessor State*⁴
- 4.2.1 Did a succession of States have an impact on the reservations, objections to reservations, interpretative declarations or responses to interpretative declarations of the predecessor State?

⁴ This section applies only to States which were replaced by another in the responsibility for the international relations of territory on the occurrence of a succession of States.

4.2.1.1 If so, what impact did it have? In particular, was the predecessor State led, by reason of the succession of States, to withdraw or modify reservations, objections, interpretative declarations or responses to interpretative declarations? (Please attach the relevant instruments)

4.2.2 Did the predecessor State communicate to the successor State the text of the reservations, objections to reservations, interpretative declarations or reactions to interpretative declarations which were in force at the date of the succession of States? (If possible, please attach the relevant instrument(s))

4.3 *Practice of the State as a third State in relation to a succession of States*⁵

4.3.1 Did any successions of States have an impact on the reservations, objections to reservations, interpretative declarations or responses to interpretative declarations of the State?

4.3.1.1 If so, what impact did they have? In particular, was the State led, by reason of the succession of States, to withdraw or modify reservations, objections to reservations, interpretative declarations or responses to interpretative declarations? (Please attach the relevant instruments)

4.3.1.2 If a successor State, following the succession of States, formulated new reservations or made new interpretative declarations concerning a treaty to which the third State is a party, did the latter formally accept such reservations? Did it object? Did it respond to the interpretative declarations? (Please attach the relevant instruments)

4.3.1.3 If a successor State, following the succession of States, made new objections to one or more of the reservations formulated by the third State, or new responses to the interpretative declarations made by that State, what effect did those objections or responses have? Did they give rise to any particular difficulties? If so, what difficulties? (Please attach the relevant documents)

4.3.1.4 If a successor State maintained reservations or interpretative declarations of the predecessor State, did the third State confirm any objections or responses it may have made to the reservations or interpretative declarations of the predecessor State? If so, for what reason(s)? Did this give rise to any particular difficulties? (Please attach the relevant documents)

4.3.1.5 If a successor State maintained objections formulated by the predecessor State to the third State's reservations or responses by the predecessor State to its interpretative declarations, did maintaining them give rise to any particular difficulties? If so, what difficulties? (Please attach the relevant documents)

V. PRACTICE OF THE STATE AS A DEPOSITARY⁶

5.1 Is the State a depositary of multilateral treaties? (Please list the treaties)

5.2 In its capacity as depositary, has the State encountered any particular difficulties with regard to reservations, objections to reservations, interpretative declarations or responses to interpretative declarations? If so, what difficulties?

5.2.1 When such difficulties arose, did the State:

- Refer the problem to the Contracting Parties?
- Itself take a position with regard to the difficulties? (Please attach the relevant documents)

⁵ This section applies to all States agreeing to reply to this questionnaire. For depositary States, see also question 5.4 below.

⁶ This section applies only to States which are depositaries of multilateral treaties.

5.3 In particular, did problems arise in respect of the entry into force of the treaty because of the formulation of reservations or objections to reservations?

5.3.1 If so, how were such problems resolved? (Please attach the relevant documents)

5.4 In its capacity as depositary, has the State encountered any particular difficulties with regard to reservations, objections, interpretative declarations or responses to interpretative declarations, which arose in connection with one or more instances of succession of States? If so, what difficulties? (Please attach the relevant documents)

VI. MISCELLANEOUS OBSERVATIONS

6.1 In the State's view, what are the main problems arising in connection with reservations to treaties that are not resolved, or not resolved satisfactorily, by the relevant provisions of the 1969 Vienna Convention on the Law of Treaties, the 1969 Vienna Convention on Succession of States in respect of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations?

6.2 Please add here any relevant information on the practice of the State relating to reservations to treaties which could not be included in the replies to the above questions.

ANNEX III

**Questionnaire on the topic of reservations to treaties
addressed to international organizations**

Prepared by the Special Rapporteur on the topic of reservations to treaties,
in accordance with paragraph 489 of the report of the Commission
on the work of its forty-seventh session

1. Following its consideration of the preliminary report of Mr. Alain Pellet, the Special Rapporteur for the topic of reservations to treaties, the Commission authorized the Special Rapporteur “to prepare a detailed questionnaire, as regards reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which are depositaries of multilateral conventions. This questionnaire will be sent through the Secretariat to its addressees”.¹
2. In paragraph 5 of its resolution 50/45, entitled “Report of the International Law Commission on the work of its forty-seventh session”, the General Assembly invited States and international organizations, particularly those which are depositaries of multilateral conventions, to answer promptly the questionnaire prepared by the Special Rapporteur.
3. This questionnaire is addressed to the specialized agencies and other international organizations that are depositaries of multilateral treaties pursuant to the above provisions. A separate questionnaire has been sent by the Legal Counsel of the United Nations to the States Members of the United Nations or of a specialized agency or parties to the ICJ Statute.
4. The Special Rapporteur has prepared the attached questionnaire with all possible care, but is aware that it is long and imposes an additional burden of work on the international organizations to which it is addressed (particularly as not all questions are relevant to every organization). However, he wishes to emphasize how useful detailed and reasoned replies will be for the continuation of the Commission’s work, which is intended to provide an optimum response to the concerns of States and international organizations and to solve the difficulties they face in connection with reservations to treaties. Nevertheless, partial replies are obviously preferable to silence.²
5. Should it prove impossible or difficult to complete the questionnaire as a whole quickly, replies may be sent to the Secretariat in sections. Since the Special Rapporteur intends to deal in his third report with the definition of reservations and with the legal regime of interpretative declarations, it would be particularly useful if replies to questions 2.1 to 2.2.1, 3.4 and 5.1 to 5.13.2 could be sent to the Secretariat as quickly as possible, since the report must be completed by March 1997. If they are to be useful, the replies to the other questions should reach the Secretariat before 31 October 1997 with the exception of those concerning succession of States or international organizations, which need not reach the Secretariat until 31 October 1998.
6. The Commission and the Special Rapporteur take this opportunity to express, in anticipation, their gratitude to States for completing the attached questionnaire.

¹ *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 489.

² Pursuant to an initial request addressed to them by the Under-Secretary-General for Legal Affairs, the Legal Counsel of the United Nations, the following international organizations sent the Special Rapporteur preliminary information concerning their practice with regard to reservations: the Council of Europe, FAO, ICAO, ILO, IMF, IMO, ITU, OAS and WIPO. The Special Rapporteur once again expresses his sincere gratitude to them (see his first report, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, p. 141, footnote 127) and wishes to thank them in advance for any additional information they may provide in response to this questionnaire.

QUESTIONNAIRE

Period covered in principle by replies: 19..–19..³

I. RESERVATIONS AND INTERPRETATIVE DECLARATIONS TO THE CONSTITUENT INSTRUMENT OF THE ORGANIZATION

1.1 Does the constituent instrument of the organization provide for the possibility of reservations or interpretative declarations? (Please attach the text of the relevant provisions)

1.1.1 Have any reservations or interpretative declarations been formulated pursuant to these provisions? (Please attach the text of the reservations)

1.1.1.1 If so, have they elicited any objections or reactions? and what decision was ultimately taken? (If possible, please attach the text of the relevant documents)

1.1.2 If no reservations or interpretative declarations have been formulated pursuant to these provisions, what are the reasons for abstention by States or international organizations members of the organization?

1.2 If the constituent instrument of the organization is silent as to the possibility of reservations or interpretative declarations, was the problem contemplated when the instrument was drafted? (Please attach copies of the relevant *travaux préparatoires*)

1.3 Should the constituent instrument's silence on the subject of reservations or interpretative declarations be interpreted as authorizing or prohibiting all or some reservations or interpretative declarations? Why?

1.3.1 If the constituent instrument is silent, have States or other international organizations formulated reservations or interpretative declarations to the constituent instrument? (Please provide the text of these reservations and interpretative declarations)

1.3.1.1 When were the reservations or interpretative declarations formulated?

- At the time the States or international organizations concerned applied for membership?
- At the time the constituent instrument was signed?
- At the time of accession or when consent to be bound was expressed?
- After accession?

1.3.2 Was the validity of the reservations or interpretative declarations examined by one or more organs of the organization or by an inter-agency coordinating body? Which body or bodies? According to which procedure? (Please attach the relevant documents)

1.3.2.1 If the validity of the reservations or interpretative declarations was the subject of a review, what was the final decision taken?

1.3.2.1.1 If the competent organ or organs challenged the validity of the reservations or interpretative declarations, what was the reaction of the author? (Please attach the relevant documents)

1.3.3 Have the reservations or interpretative declarations been the subject of objections or reactions from States or other international organizations members of the organization? (Please attach the relevant documents)

³ Please specify the period considered for the purposes of replying to this questionnaire. It is suggested that the most comprehensive answers possible be given for the past 20 years at least.

1.3.3.1 What has been the effect of these objections or reactions?

1.3.4 Has the implementation of these reservations or interpretative declarations given rise to any difficulties? If so, what difficulties? (Please attach the relevant documents)

II. PRACTICE OF THE ORGANIZATION OR CHIEF EXECUTIVE OFFICER AS DEPOSITARY AND RELATED PROBLEMS⁴

2.1 Is the organization or its chief executive officer a depositary in respect of international treaties? (Please attach a list of these treaties)

2.2 As a depositary, does the organization or its chief executive officer encounter any particular difficulties with regard to reservations, objections to reservations, interpretative declarations or reactions to interpretative declarations? If so, what difficulties?

2.2.1 In the face of such difficulties, does the organization or its chief executive officer:

- Transmit the problem to the Contracting Parties?
- Take a position vis-à-vis the Contracting Parties?

2.2.1.1 In the second case, what organ(s) of the organization has/have taken a position? On what grounds?

2.2.1.2 In both cases, how have these problems been resolved? (Please attach the relevant documents)

2.2.2 In particular, have problems arisen because reservations or objections to reservations were formulated with regard to the entry into force of the treaty?

2.2.2.1 If so, how were these problems solved? (Please attach the relevant documents)

2.3 Do the conventions concluded under the auspices of the organization pose any particular problems in the area of reservations, objections, interpretative declarations or reactions to interpretative declarations? If so, what problems? (Please attach the relevant documents)

2.4 As a depositary, has the organization or its chief executive officer encountered any particular problems in the area of reservations, objections, interpretative declarations or reactions to interpretative declarations having to do with one or more phenomena associated with the succession of States? If so, what problems? (Please attach the relevant documents)

III. RESERVATIONS AND INTERPRETATIVE DECLARATIONS TO TREATIES TO WHICH THE ORGANIZATION IS PARTY

A. Formulation and withdrawal of reservations⁵

3.1 How many multilateral treaties has the organization become party to during the period under consideration?

⁴ This heading is relevant only if the organization is a depositary in respect of multilateral conventions or if conventions are concluded under its auspices.

⁵ This section applies only if the organization has formulated reservations to treaties to which it is a party.

3.2 How many of these treaties have been the subject of reservations by the organization? (Please list the treaties and attach the text of the reservations)

3.3 Which of the treaties to which the reservations apply contain provisions concerning reservations? (Please list the treaties and, if possible, attach the text of the relevant provisions)

3.4 Has the organization formulated reservations to bilateral treaties? (Please list the treaties and attach the text of the reservations)

3.5 What were the reasons for each of the reservations mentioned in the replies to questions 3.2 and 3.4:

- (i) Political considerations?
- (ii) Desire to maintain the application of the internal rules of the organization?
- (iii) Doubts about the soundness of the provision to which the reservation refers?
- (iv) Other reasons?

3.6 Were or are some or all the organization's reservations formulated for a specific period of time?

3.6.1 If so, what was/were the reason(s) for specifying that period of time?

3.6.2 If not, has the organization withdrawn or modified some reservations? (Please attach the text of the instruments notifying such withdrawals)

3.6.2.1 If so,

- (i) What period of time elapsed between the organization's expression of consent to be bound and the withdrawal?
- (ii) What was/were the reason(s)?

At the internal level, which organ(s) decide(s) that the State will formulate a reservation:

- The chief executive officer?
- The general assembly?
- Another organ?

3.7.1 If it is not always the same organ that has competence to decide that a reservation will be formulated, on what criteria is this competence based?

3.7.2 If the decision is taken by the chief executive officer, is the general assembly:

- Informed of the decision? A priori or a posteriori?
- Invited to discuss the text of the intended reservation(s)?

3.8 Do reservations appear in an official publication of the organization?

3.9 Of the reservations mentioned in the replies to questions 3.2 and 3.4, which were formulated:

- At the time the treaty was signed?
- At the time when definitive consent to be bound was expressed?
- After the treaty entered into force with respect to the organization? If so, according to which procedure?

3.9.1 Was the timing of the formulation of the reservations based on any particular considerations? If so, what considerations?

3.9.2 If reservations were formulated at the time the treaty was signed, were they formally confirmed when the organization expressed its definitive consent to be bound? If so, which reservations?

3.9.2.1 If not, does the organization consider that the foundation of those reservations was valid?

B. Acceptance of reservations and objections to reservations, effects of reservations

4.1 *Acceptance of reservations formulated by the organization and objections to those reservations*⁶

4.1.1 Have any of the reservations mentioned in the replies to questions 3.2 and 3.4 been formally accepted? (Please list the reservations and attach the text of the acceptances)

4.1.2 Have objections been made to any of the reservations mentioned in the replies to questions 3.2 and 3.4? (Please list the reservations and attach the text of the objections)

4.1.2.1 If so, have the objecting States or international organizations expressed the intention that the objection should preclude the entry into force of the treaty between the author of the objection and the reserving organization?

4.1.3 If there have been formal acceptances of or objections to the reservations mentioned in the replies to questions 3.2 and 3.4, were such acceptances or objections preceded or followed by diplomatic discussions or exchanges of notes between the State or international organization and the reserving organization or between the organization and the depositary? (If possible, please attach the text of the relevant documents)

4.1.3.1 Following such discussions or exchanges of notes, has the State or the other international organization concerned ever decided not to raise an objection which it had originally envisaged?

4.1.4 Has the interpretation or implementation of the reservations mentioned in the replies to questions 3.2 and 3.4 given rise to any particular difficulties in the application of the treaty? If so, what difficulties?

4.1.4.1 In particular, have those difficulties:

- Given rise to diplomatic protests? (If possible, please attach the text of the protests)
- Been examined by an international judicial body or a body monitoring the application of the treaty? (Please attach the text of the relevant decisions and/or opinions)

4.1.4.2 Has an organ of the organization, an arbitrator, an international or national judicial body or other national authority ruled on the meaning or effects of the reservations? (Please attach the text of the relevant decisions)

4.1.5 If any of the reservations mentioned in the reply to question 3.2 were formulated in relation to the constituent instrument of an international organization, of which the organization is a member, were those reservations accepted by an organ of that organization? (Please attach the text of the relevant deliberations)

⁶ This section applies only if the organization has formulated reservations to treaties to which it is a party.

4.1.6 Has the withdrawal of a reservation formulated by the organization (see reply to question 3.6.2) given rise to any particular difficulties? If so, what difficulties?

4.1.7 Have any of the objections mentioned in the reply to question 4.1.2 been withdrawn? (Please attach the text of the instruments of notification of the withdrawals)

4.1.7.1 If so, have the withdrawals given rise to any particular difficulties? What difficulties?

4.2 *Acceptance by the organization of reservations formulated by a State or by another international organization and objection by the organization to those reservations*

4.2.1 Has the organization formally accepted any reservations formulated by a State or by another international organization? (Please list, and provide the text of, the formal acceptances)

4.2.1.1 In the absence of a formal acceptance, does silence on the part of the organization imply that it accepts the reservation(s) in question?

4.2.2 Has the organization made objections to any reservations formulated by a State or by another international organization? (Please list, and provide the text of, the objections)

4.2.2.1 What were the reasons for each of the objections:

- (i) Political considerations?
- (ii) Desire to ensure the integrity of the treaty?
- (iii) Incompatibility of the reservation with the purpose and object of the treaty?
- (iv) Other reasons?

4.2.2.2 At the internal level, which organ(s) take(s) the decision to make objections to reservations formulated by other Contracting Parties?

4.2.2.3 Do objections to reservations appear in an official publication of the organization?

4.2.2.4 How much time elapsed between the notification of the reservation and the formulation of the objections mentioned in the reply to question 4.2.2?

4.2.3 In formulating the objections mentioned in the reply to question 4.2.2, did the organization express the intention that the objection should preclude the entry into force of the treaty between itself and the reserving State or other international organization?

4.2.3.1 If so, what were the reasons for that position:

- (i) Political considerations?
- (ii) Desire to ensure the integrity of the treaty?
- (iii) Incompatibility of the reservation with the purpose and object of the treaty?
- (iv) Other reasons?

4.2.3.2 If not, what were the reasons for that position? And what effects did the objections have?

4.2.4 Were the formal acceptances or objections mentioned in the replies to questions 4.2.1 and 4.2.2 preceded or followed by diplomatic discussions or exchanges

of notes with the reserving State or other international organization or with the depositary of the treaty? (If possible, please attach the text of the relevant documents)

4.2.4.1 Following such negotiations or exchanges of notes, has the organization ever modified, or decided not to raise, an objection which it had originally envisaged?

4.2.5 Has the interpretation or implementation of the objections mentioned in the reply to question 4.2.2 given rise to any particular difficulties in the application of the treaty? If so, what difficulties?

4.2.5.1 In particular, have those objections:

- Given rise to protests? (If possible, please attach the text of the protests)
- Been examined by an organ of the organization, an international judicial body or a body monitoring the application of the treaty? (Please attach the text of the relevant decisions and/or opinions)

4.2.5.2 Has an organ of the organization, an arbitrator, an international or national judicial body or other national authority ruled on the meaning or effects of the objections? (Please attach the text of the relevant decisions)

4.2.6 Has the organization withdrawn or modified any of the objections mentioned in the reply to question 4.2.2?

4.2.6.1 If so, which ones and why?

C. Interpretative declarations⁷

5.1 Has the organization attached any interpretative declarations to the expression of its consent to be bound by the multilateral treaties to which it is a party? (Please list the treaties and provide the text of the declarations)

5.2 Which of those treaties contain provisions concerning interpretative declarations? (Please list the treaties and, if possible, attach the text of the relevant provisions)

5.3 Has the organization attached any interpretative declarations to the expression of its consent to be bound by bilateral treaties? (Please list the treaties and attach the text of the declarations)

5.4 Please give the reason(s) for each of the interpretative declarations mentioned in the replies to questions 5.1 and 5.3.

5.5 What organ(s) take(s) the decision to make such interpretative declarations?

- The chief executive officer?
- The General Assembly?
- Other organs?

5.6 Do interpretative declarations appear in an official publication?

5.7 Of the interpretative declarations mentioned in the replies to questions 5.1 and 5.3, which ones were made:

- At the time the treaty was signed?
- At the time when definitive consent to be bound was expressed?

⁷ This section applies only if the organization has made interpretative declarations (questions 5.1 to 5.10) or responded to declarations made by other parties to treaties to which it is itself a party (questions 5.11 to 5.13.2).

- After the treaty entered into force with respect to the organization? If so, according to which procedure?
- 5.7.1 Have any of the declarations been modified or withdrawn?
- 5.7.2 Was the timing of the interpretative declarations based on any particular considerations? If so, what considerations?
- 5.8 Did the interpretative declarations mentioned in the replies to questions 5.2 and 5.3 evoke any response from other Contracting Parties or the depositary of the treaty?
- 5.8.1 If so, what form did the responses take? (Please attach the relevant documents)
- 5.8.2 Were the responses preceded or followed by diplomatic discussions or exchanges of notes? (If possible, please attach the relevant documents)
- 5.8.2.1 Following such discussions or exchanges of notes, has the organization ever modified, or decided not to make, an interpretative declaration which it had originally envisaged?
- 5.9 Has the interpretation or scope of the interpretative declarations mentioned in the replies to questions 5.1 and 5.3 given rise to any particular difficulties in the application of the treaty? If so, what difficulties?
- 5.9.1 In particular, have the difficulties:
- Given rise to diplomatic protests? (If possible, please attach the text of the protests)
 - Been examined by an organ of the organization, an international judicial body or a body monitoring the application of the treaty? (Please attach the text of the relevant decisions and/or positions)
- 5.9.2 Has a judicial body or other national authority ruled on the scope or meaning of the declarations? (Please attach the text of the relevant decisions)
- 5.10 If any of the interpretative declarations mentioned in the reply to question 5.1 concern the constituent instrument of another international organization, were those declarations examined by an organ of that organization? (Please attach the text of the relevant deliberations)
- 5.11 Has the organization responded formally to any interpretative declarations made by a State or by another international organization? (Please list the responses and attach the relevant text)
- 5.11.1 What were the reason(s) for the responses?
- 5.11.2 How much time elapsed between the notification of the interpretative declarations mentioned in the reply to question 5.11 and the formulation of the responses?
- 5.11.3 Which organ or organs of the organization take(s) the decision to formulate such responses?
- 5.11.4 Do the responses appear in an official publication of the organization?
- 5.12 Were the responses mentioned in the reply to question 5.11 preceded or followed by diplomatic discussions or exchanges of notes with the State or international organization which formulated the interpretative declaration or with the depositary of the treaty? (If possible, please attach the text of the relevant documents)

5.12.1 Following such discussions or exchanges of notes, has the organization ever modified, or decided not to make, a response which it had originally envisaged?

5.13 Has the interpretation or scope of the responses mentioned in the reply to question 5.11 given rise to any particular difficulties in the application of the treaty? If so, what difficulties?

5.13.1 In particular, have those difficulties:

- Given rise to diplomatic protests? (If possible, please attach the text of the protests)
- Been examined by an international judicial body or a body monitoring the application of the treaty? (Please attach the text of the relevant decisions and/or positions)

5.13.2 Has a judicial body or other national authority or an organ of the organization ruled on the meaning or scope of the responses? (Please attach the text of the relevant decisions)

D. Succession of States or international organizations

6.1 *Practice of the organization as a successor organization*⁸

6.1.1 According to which procedure(s) did the organization succeed to the multilateral treaties to which the predecessor organization was a party at the date of the succession? (A brief summary of the procedure or procedures, according to the nature of the treaties in question, will suffice)

6.1.2 Did the organization maintain the reservations formulated by the predecessor organization to treaties applicable at the date of the succession? (Please list the treaties and attach the text of the reservations)

6.1.2.1 Were the reservations of the predecessor organization maintained:

- *Ipso facto*, simply as a result of succession to the treaty?
- By means of a formal indication to that effect in the notification of succession addressed to the other parties or to the depositary? (Please attach the relevant instrument(s))

6.1.2.2 If the successor organization maintained only some reservations of the predecessor organization, did it:

- Formally repudiate all the reservations of the predecessor organization? (Please attach the relevant instrument)
- Formally express the intention to renounce some reservations of the predecessor organization? (Please attach the relevant instruments)

6.1.3 At the time of succession, did the successor organization formulate new reservations to the treaty or treaties to which it succeeded or modify the reservations of the predecessor organization? (Please attach the relevant instruments)

6.1.4 Did the successor organization maintain the objections made by the predecessor organization to the reservations formulated by other Contracting Parties to treaties applicable at the date of the succession? (Please list the treaties and attach the text of the objections)

6.1.4.1 Were the objections of the predecessor organization maintained:

⁸ This section applies only to international organizations which have “succeeded” another international organization in respect of treaties (e.g. League of Nations/United Nations or European Space Research Organization/European Space Agency).

- *Ipsa facto*, simply as a result of succession to the treaty?
- By means of a formal indication to that effect in the notification of succession addressed to the other parties or to the depositary? (Please attach the relevant instrument(s))

6.1.4.2 If the successor organization maintained only some objections of the predecessor organization, did it:

- Formally repudiate all the objections of the predecessor organization? (Please attach the relevant instrument)
- Formally express the intention to renounce some objections of the predecessor organization? (Please attach the relevant instruments)

6.1.5 At the time of succession, did the successor organization formulate new objections to the reservations made by other Contracting Parties to the treaty or treaties to which it succeeded or modify the objections of the predecessor organization? (Please attach the relevant instruments)

6.1.6 Did the successor organization maintain the interpretative declarations made by the predecessor organization to the treaties applicable at the date of the succession? Did it modify those declarations? (Please list the treaties and attach the text of the declarations)

6.1.6.1 If so, what procedures were followed in maintaining or modifying them? (Please attach the relevant instruments)

6.1.7 Did the successor organization maintain the responses of the predecessor organization to the interpretative declarations formulated by other Contracting Parties to the treaties applicable at the date of the succession? (Please list the treaties and attach the text of the declarations)

6.1.7.1 If so, what procedures were followed in maintaining them? (Please attach the relevant instruments)

6.1.8 Has the successor organization's maintenance of the predecessor organization's reservations, objections to reservations, interpretative declarations and responses to interpretative declarations, or its refusal to maintain them, given rise to any particular difficulties? If so, what difficulties?

6.1.8.1 In particular, have these difficulties:

- Given rise to diplomatic protests? (If possible, please attach the text of the protests)
- Been examined by an organ of the organization, an international judicial body or a body monitoring the application of the treaty?

6.1.8.2 Has a judicial body or other national authority of a contracting State ruled on these difficulties? (Please attach the text of the relevant decisions)

6.2 *Practice of the organization as a third party in relation to a succession of States*⁹

6.2.1 Did any successions of States have an impact on the reservations, objections to reservations, interpretative declarations or responses to interpretative declarations of the organization?

6.2.1.1 If so, what impact did they have? In particular, was the organization led, by reason of the succession of States, to withdraw or modify reservations, objections

⁹This section applies to all international organizations agreeing to reply to this questionnaire. For depositary organizations, see also question 2.4 above.

to reservations, interpretative declarations or responses to interpretative declarations?
(Please attach the relevant instruments)

6.2.1.2 If a successor State, following the succession of States, formulated new reservations or made new interpretative declarations concerning a treaty to which the organization is a party, did the latter formally accept such reservations? Did it object? Did it respond to the interpretative declarations? (Please attach the relevant instruments)

6.2.1.3 If a successor State, following the succession of States, made new objections to one or more of the reservations formulated by the organization, or new responses to the interpretative declarations made by that organization, what effect did those objections or responses have? Did they give rise to any particular difficulties? If so, what difficulties? (Please attach the relevant documents)

6.2.1.4 If a successor State maintained reservations or interpretative declarations of the predecessor State, did the organization confirm any objections or responses it may have made to the reservations or interpretative declarations of the predecessor State? If so, for what reason(s)? Did this give rise to any particular difficulties? (Please attach the relevant documents)

6.2.1.5 If a successor State maintained objections formulated by the predecessor State to the organization's reservations or responses by the predecessor State to its interpretative declarations, did maintaining them give rise to any particular difficulties? If so, what difficulties? (Please attach the relevant documents)

IV. MISCELLANEOUS OBSERVATIONS

7.1 In the organization's view, what are the main problems arising in connection with reservations to treaties that are not resolved, or not resolved satisfactorily, by the relevant provisions of the 1969 Vienna Convention on the Law of Treaties, the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations?

7.2 Please add here any relevant information on the practice of the organization relating to reservations to treaties which could not be included in the replies to the above questions.

STATE SUCCESSION AND ITS IMPACT ON THE NATIONALITY OF NATURAL AND LEGAL PERSONS

[Agenda item 6]

DOCUMENT A/CN.4/474*

Second report on State succession and its impact on the nationality of natural and legal persons, by Mr. Václav Mikulka, Special Rapporteur

[Original: English/French/Spanish]
[17 April 1996]

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Treaty of Peace between the Allied and Associated Powers and Austria (Peace Treaty of Saint-Germain-en-Laye) (Saint-Germain-en-Laye, 10 September 1919)	<i>Ibid.</i> , p. 317.
Treaty of Peace between the Allied and Associated Powers and Bulgaria (Treaty of Neuilly-sur-Seine) (Neuilly-sur-Seine, 27 November 1919)	<i>Ibid.</i> , p. 781.
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Treaty of Peace [between the British Empire, France, Italy, Japan, Greece, Roumania and the Serb-Croat-Slovene State and Turkey] (Treaty of Lausanne) (Lausanne, 24 July 1923)	<i>Ibid.</i> , vol. XXVIII, p. 11.
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Introduction

A. Previous work on the topic

1. At its forty-fifth session, in 1993, the International Law Commission decided to include in its agenda the topic entitled “State succession and its impact on the nationality of natural and legal persons”.¹ The General Assembly endorsed this decision in paragraph 7 of its resolution 48/31 and, one year later, in paragraph 6 of its resolution 49/51, it endorsed the intention of the Commission to undertake work on the topic, on the understanding that the final form to be given to the work should be decided after a preliminary study had been presented to the Assembly. The Assembly also invited Governments to

submit relevant materials including national legislation, decisions of national tribunals and diplomatic and official correspondence relevant to the topic.

1. CONSIDERATION OF THE TOPIC AT THE FORTY-SEVENTH SESSION OF THE COMMISSION

2. The first report of the Special Rapporteur² was considered by the Commission during its forty-seventh session. A summary of this debate is contained in chapter III of the report of the Commission on the work of its forty-seventh session.³

² *Yearbook ... 1995*, vol. II (Part One), p. 157, document A/CN.4/467.

³ *Ibid.*, vol. II (Part Two), pp. 36–38, paras. 165–193.

¹ *Yearbook ... 1993*, vol. II (Part Two), p. 97, para. 440.

3. Following this debate, the Commission decided to establish a Working Group on State succession and its impact on the nationality of natural and legal persons, with the mandate to undertake a detailed substantive study of the issues raised in the Special Rapporteur's first report. The Working Group's report⁴ was also considered by the Commission,⁵ after which the latter decided⁶ to reconvene the Working Group at the forty-eighth session to enable it to complete its task, namely, "to identify issues arising out of the topic, categorize those issues which are closely related thereto, give guidance to the Commission as to which issues could be most profitably pursued given contemporary concerns and present the Commission with a calendar of action".⁷ This should enable the Commission to meet the request contained in paragraph 6 of General Assembly resolution 49/51.

2. VIEWS EXPRESSED BY STATES IN THE SIXTH COMMITTEE DURING THE FIFTIETH SESSION OF THE GENERAL ASSEMBLY

4. During consideration of the report of the Commission by the Sixth Committee at the fiftieth session of the General Assembly, 26 delegations expressed their views on chapter III of the report, which concerned the topic of State succession and its impact on the nationality of natural and legal persons.⁸ The progress achieved by the Commission on this topic was generally welcomed. It was further stressed that the Commission's work on this subject pertained both to codification and to progressive development of international law.⁹ Comments made on specific issues will be referred to under the relevant sections below.

3. GENERAL ASSEMBLY RESOLUTION 50/45

5. In its resolution 50/45 entitled "Report of the International Law Commission on the work of its forty-seventh session", the General Assembly noted, among other things, the beginning of the work on State succession and its impact on the nationality of natural and legal persons and invited the Commission to continue its work on this topic along the lines indicated in the report (para. 4). The Assembly also requested the Secretary-General to again invite Governments to submit as soon as possible relevant materials, including treaties, national legislation, decisions of national tribunals and diplomatic and official correspondence relevant to this topic (para. 6). By means of this resolution, the Commission received a clear instruction to complete the preliminary study on this subject during its forty-eighth session.

⁴ *Ibid.*, annex, p. 113.

⁵ *Ibid.*, pp. 38–42, paras. 194–228, and vol. I, 2411th and 2413th meetings.

⁶ *Ibid.*, vol. II (Part Two), p. 42, para. 229.

⁷ *Ibid.*, p. 33, para. 147; see also *Yearbook ... 1996*, vol. II (Part Two), p. 74, paras. 67–68.

⁸ See *Official Records of the General Assembly, Fiftieth Session, Sixth Committee* (A/C.6/50/SR.13, 15–16, 18 and 20–24 and A/C.6/50/SR.1–46/Corrigendum), as well as the topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fiftieth session of the General Assembly (A/CN.4/472/Add.1), paras. 1–29.

⁹ A/CN.4/472/Add.1, paras. 1 and 3.

B. Consideration in other bodies of the problems of nationality arising in the context of State succession

6. In his first report, the Special Rapporteur had made reference to the work of several international bodies currently dealing with issues of nationality in relation to State succession.¹⁰ The progress achieved by these bodies and organizations is worth noting and can be a source of inspiration and encouragement for the Commission. Thus, the Committee of experts on nationality of the Council of Europe is drafting a European Convention on Nationality, containing basic principles, including the right to a nationality, the obligation to avoid statelessness, the inadmissibility of arbitrary deprivation of nationality, non-discrimination, as well as specific provisions concerning the loss and acquisition of nationality in situations of State succession. Another organ of the Council of Europe, the European Commission for Democracy through Law, is currently preparing a draft set of principles for State practice in relation to the impact of State succession on nationality. As for the problem of statelessness, including statelessness resulting from State succession, it appears to be of growing interest to UNHCR.¹¹

C. Work remaining in order to complete the preliminary study of the topic

7. While some members of the Commission were of the view that the first report of the Special Rapporteur and the summary of the Commission's discussion thereon had already satisfied the request for a "preliminary study",¹² others considered that the Commission should present the General Assembly with a number of options and possible solutions.¹³ A similar divergency of views characterized the discussion of the report of the Working Group. While the majority of members were of the view that the results obtained were more positive than might have been expected so early in the study of a field that remains largely unexplored, the view was also expressed that the Working Group had not yet fulfilled its mandate and that its report did not contain the specific guidelines which the Commission needed in order to undertake practical work and to move finally beyond the stage of theory.¹⁴ The Commission also regretted the Working Group's failure to provide a calendar of action for the Commission's future work on this topic.¹⁵

8. According to yet another view, instead of identifying the issues and then making recommendations on

¹⁰ Para. 31 of the report (see footnote 2 above).

¹¹ For a review of the recent activities of UNHCR in this field, see Batchelor, "UNHCR and issues related to nationality". See also the Addendum to the Report of the United Nations High Commissioner for Refugees (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 12A* (A/50/12/Add.1), para. 20), the Report of the Subcommittee of the Whole on International Protection (A/AC.96/858), paras. 21–27), as well as General Assembly resolution 50/152 of 21 December 1995 entitled "Office of the United Nations High Commissioner for Refugees".

¹² See *Yearbook ... 1995*, vol. I, 2389th meeting, statement by Mr. Pellet, p. 66, para. 28.

¹³ *Ibid.*, 2387th meeting, statement by Mr. Tomuschat, p. 54, para. 16.

¹⁴ *Ibid.*, 2411th meeting, statement by Mr. Yankov, p. 217, paras. 39–40.

¹⁵ *Ibid.*, vol. II (Part Two), p. 39, para. 205.

how they should be addressed, the report of the Working Group listed a number of “obligations” whose sources and characteristics should have been more clearly explained. Concern was expressed that to speak of obligations at the present early stage, before State practice was clear, might cause confusion.¹⁶

9. The report of the Working Group, as the Special Rapporteur had already stated, was preliminary in character. In fact, the Working Group intended to complete its mandate during the forty-eighth session of the Commission and to work out a calendar of action after it had completed its consideration of all the issues at hand.¹⁷ The short “excursion” into the field of substantive problems had been useful in order to shed more light on a subject generally considered to be very complex and sensitive as well as to assess realistically the prospects of different approaches in addressing specific problems. The five meetings of the Working Group resulting in an eight-page report certainly did not amount to a “detailed substantive study” of the subject, as was argued by one delegation in the Sixth Committee.¹⁸ In formulating “principles” which were merely working hypotheses meriting further study,¹⁹ the Working Group had in fact defined and organized the main substantive issues to be examined in the future by the Commission. In this respect, the latter had thus fulfilled that part of its mandate dealing with the nationality of natural persons.

10. The Working Group did not examine the second part of the topic, i.e. the nationality of legal persons, which was regretted by some members of the Commission.²⁰ The reasons for this are obvious: the lack of specific input from the first report and the time constraints under which the Working Group operated. At the forty-eighth

¹⁶ Ibid., para. 204.

¹⁷ Ibid., p. 41, para. 220.

¹⁸ One representative was of the view that, by establishing a Working Group to consider the subject, the Commission seemed to be moving away from presenting the preliminary study requested by the General Assembly and to be embarking upon the preparation of a detailed substantive study, although the Special Rapporteur’s first report had supplied all the elements necessary to complete the requested study in a short period of time (A/CN.4/472/Add.1, para. 4).

¹⁹ *Yearbook ... 1995*, vol. II (Part Two), p. 42, para. 226.

²⁰ Ibid., vol. I, 2411th meeting, statements by Mr. Pellet and Mr. Vargas Carreño, p. 216.

session of the Commission, the Working Group should therefore devote some time to a similar “excursion” into the field of substantive issues concerning the problems of nationality of legal persons arising in the context of State succession.

11. The task of the Working Group at the forty-eighth session of the Commission should not consist in redrafting the above-mentioned “principles”, but merely in considering the most appropriate form the work on this topic should take as well as the working methods and the timetable to be followed in order to achieve the final goal of offering a balanced legal framework for a just and equitable resolution of nationality problems arising from State succession. The prevailing view in the Commission was that the Working Group should complete its task during the forty-eighth session.

D. Major substantive issues to be examined by the Commission in the future

12. There are a number of specific substantive issues which crystallized during the discussions on the first report, both in the Working Group and in the Sixth Committee. Most of them had already been identified in the first report, but the debate has led to a more precise definition of such issues and to a determination of their degree of urgency as well as to the realization of the problems the Commission could encounter when addressing this subject in terms of codification and progressive development of the law. These substantive issues can be divided into two major groups, corresponding to the dual character of the topic, namely, the problems relating to the nationality of natural persons and the problems relating to the nationality of legal persons. This report has been organized accordingly.²¹

²¹ Ibid., vol. II (Part Two), p. 42, para. 228. Upon conclusion of the consideration of this topic at the forty-seventh session of the Commission, the Special Rapporteur indicated that he intended to divide his second report into three sections: the first would deal with issues considered by the Working Group, in particular the nationality of natural persons, the second would address the issue of legal persons, and the third would deal with future work, including the form which the outcome of the work could take.

CHAPTER I

Nationality of natural persons

A. General issues

13. There was broad support in the Commission for the Special Rapporteur’s contention that, while nationality was essentially governed by internal law, international law imposed certain restrictions on the freedom of action of States.²² It was generally agreed that it was precisely

this limited role of international law in the specific context of State succession which was to be the focus of the Commission’s work.²³

1. PROTECTION OF HUMAN RIGHTS

14. Some members of the Commission pointed out that, in particular, it was the development of human rights

²² Ibid., vol. II (Part One), first report of the Special Rapporteur (footnote 2 above), pp. 168–189, paras. 57–66 and p. 172, paras. 85–89. See also volume II (Part Two), pp. 34–35, paras. 157–160.

²³ Ibid., vol. II (Part Two), p. 37, para. 183.

laws which imposed new restrictions on the discretionary power of States with respect to nationality.²⁴ As the Special Rapporteur had nevertheless pointed out, it was not always possible in the event of a collective change of nationality to apply automatically all the principles set forth in the human rights instruments in order to resolve individual cases.²⁵ There was also a view that the role played by international law, including human rights law, should not be overemphasized, since both the literature and jurisprudence had recognized the exclusive character of the competence of the State in determining which individuals were its nationals.²⁶

15. During the debate in the Sixth Committee, it was also generally recognized that, while nationality was essentially governed by internal law, certain restrictions on the freedom of action of States derived from international law, which therefore had a role to play in this area. The human rights aspect of the topic was particularly highlighted in this respect. It was strongly emphasized that the Commission's work on the topic should aim at the protection of the individual against any detrimental effects in the area of nationality resulting from State succession, especially statelessness.²⁷

16. The debate both in the Commission and in the Sixth Committee indicates general acceptance of the fact that the predecessor or successor State, as the case may be, cannot invoke the argument that nationality is primarily a matter of internal law as a justification for non-compliance with its relevant obligations under international law. In its future work, the Commission could envisage the formulation of a general principle to this effect.

(a) *The right to a nationality*

17. The Special Rapporteur's comments, in his first report, on the individual's right to a nationality²⁸ gave rise to a debate within the Commission. Several members regarded the right to a nationality as central to the work. Special emphasis was placed on article 15 of the Universal Declaration of Human Rights; at the same time it was noted that the International Covenant on Civil and Political Rights reflected a reluctance to recognize that right as a general rule.²⁹ As to the conclusions which the Commission should draw from the existence of the right to a nationality within the context of State succession, it was noted *inter alia* that the right implied a concomitant obligation on States to negotiate so that the persons concerned could acquire a nationality—an obligation the Commission should stress.³⁰

²⁴ Ibid., vol. I, statements by Messrs Crawford and Fomba (2388th meeting, pp. 60–61, paras. 36–48, and pp. 61–62, paras. 52–60, respectively), Al-Baharna (2389th meeting, p. 66, paras. 29–34), Kabatsi, Yamada and Kusuma-Atmadja (2390th meeting, p. 68, paras. 1–6, p. 72, paras. 27–37, and p. 73, paras. 38–46 respectively).

²⁵ Ibid., vol. II (Part Two), p. 38, para. 193.

²⁶ Ibid., p. 37, para. 184.

²⁷ A/CN.4/472/Add.1, paras. 5–6.

²⁸ Para. 87 of the report (see footnote 2 above).

²⁹ Ibid., vol. I, 2387th and 2389th meetings, statements by Mr. Tomuschat and Mr. Al-Baharna respectively, p. 54, paras. 11–17, and p. 67, paras. 29–34.

³⁰ Ibid., 2387th meeting, statement by Mr. Bowett, p. 53, paras. 4–10.

18. The Working Group based its discussion on the premise that, in situations resulting from State succession, every person whose nationality might be affected by the change in the international status of the territory had the right to a nationality and that States had the obligation to prevent statelessness.³¹ It was subsequently noted in the Commission that the principle of the individual's right to a nationality would undoubtedly come to be incorporated in many national legislations.³²

19. The right to a nationality is a central element of a conceptual approach to the topic, which, as emphasized in the Sixth Committee, should aim at the protection of the individual against any detrimental effects resulting from State succession.³³ While the concept of the right to a nationality and its usefulness in situations of State succession was generally accepted, it would nevertheless be unwise to draw any substantive conclusions therefrom, having in mind the very preliminary stage of the discussion on this issue. It would be even more unwise to presume the existence of a consensus on the question as to whether this concept or some of its elements belong to the realm of *lex lata*.³⁴ It would nonetheless be difficult to object to the view that the right to a nationality embodied in article 15 of the Universal Declaration of Human Rights “must be understood to provide at least a moral guidance” for the legislation on citizenship when new States are created or old ones resume their sovereignty.³⁵

20. It is not the intention of the Special Rapporteur to engage the Commission, at this stage, in an in-depth study of this problem. No doubt, as in the case of any other aspect of the question of the nationality of natural persons, the first task of the Commission is to determine whether the application of the concept of the right to a nationality in the context of State succession presents certain specificities. But once the Commission begins, in the next stage of its work on the topic, the analysis of these specificities, it must ascertain whether a general right to a nationality exists. For only after it has clarified the existing rules of law and indicated where such law was found to be inadequate can the Commission pave the way for the progressive development of the law consistent with realistic expectations.³⁶ The point made in the Sixth Committee that the Commission should clearly distinguish between the *lex lata* and the *lex ferenda*³⁷ is indeed well taken.

21. In the context of State succession, the question of the right to a nationality is of a limited and “manageable” scope, clearly defined *ratione personae* as well as *ratione*

³¹ Ibid., vol. II (Part Two), annex, para. 4.

³² Ibid., vol. I, 2411th meeting, statement by Mr. Lukashuk, p. 218, para. 52.

³³ A/CN.4/472/Add.1, para. 6.

³⁴ During the debate in the Commission on this question, it was also noted that article 24, paragraph 3, of the International Covenant on Civil and Political Rights guaranteed every child the right to acquire a nationality, which raises the question of whether there is not a distinction between the rights of adults and those of children in the matter. See the statement by Mr. Tomuschat (*Yearbook ... 1995*, vol. I, 2387th meeting, p. 54, para. 14).

³⁵ Eide, “Citizenship and international law: the challenge of ethno-nationalism”, p. 9.

³⁶ See the view expressed in the Commission during the discussion of the report of the Working Group, *Yearbook ... 1995*, vol. II (Part Two), p. 39, para. 204.

³⁷ See A/CN.4/472/Add.1, para. 3.

temporis,³⁸ as is also the case with the obligation not to create statelessness.

22. The right to a nationality, as a human right, is conceivable as a right of an individual vis-à-vis a certain State, deriving, under certain conditions, from international law. As the case may be, it is the right to be granted the nationality of the successor State or not to be deprived of the nationality of the predecessor State. The obligation of the State not to create statelessness, however, is a State-to-State *erga omnes* obligation, conceivable either as a corollary of the above right to a nationality or as an autonomous obligation existing in the sphere of inter-State relations only and having no direct legal consequences in the relationship between States and individuals. Accordingly, while on the one hand the determination of the existence of a positive rule establishing the right to a nationality in the case of State succession implies the existence of a positive rule prohibiting, at least to the same extent, the creation of statelessness, on the other hand the determination of the existence of a positive rule prohibiting, under conditions specific to State succession, the creation of statelessness does not inevitably imply the existence of a right to a nationality as a right of an individual vis-à-vis the State concerned.

23. These questions, however, already relate to a substantive study of the problem and should therefore be left to a later stage of the work of the Commission on this topic.

(b) *The obligation to prevent statelessness*

24. The seriousness of the problem of statelessness in situations of State succession has generally been recognized by the Commission.³⁹ The solution of this problem should therefore have priority over the consideration of other problems of conflicts of nationality.⁴⁰ The obligation to prevent statelessness and the right to a nationality have therefore been accepted by the Working Group as fundamental premises for the formulation of guidelines to be taken into account by the States concerned in their negotiations to resolve questions of nationality by mutual agreement.⁴¹

25. In this respect, during the Commission's consideration of the report of the Working Group, it was said that if the basic principle that States, including new States, were under an obligation to avoid statelessness in situations of State succession was not at present a rule of international law, it should be the aim of the Commission to make it one.⁴²

26. In the Sixth Committee, statelessness has been generally recognized as a serious problem deserving the

primary attention of the Commission,⁴³ while the importance of the prevention or reduction of dual nationality was considered to be a real problem to a somewhat lesser extent.⁴⁴ No delegation challenged the Working Group's premise regarding the obligation not to create statelessness as a result of State succession.

2. THE PRINCIPLE OF EFFECTIVE NATIONALITY

27. While the main function of the rules of international law concerning the protection of human rights in the context of State succession is to prevent the detrimental effects of the unjustified withdrawal by the predecessor State of its nationality from certain categories of persons, or the unjustified refusal of the successor State to grant its nationality to certain individuals, the function of the principle of effective nationality is to control the abusive exercise of the discretionary power of the State to grant its nationality by depriving such nationality of its effects vis-à-vis third States.⁴⁵

28. According to one view expressed during the Commission's debate on this question, outside the framework of diplomatic protection, the principle of effective nationality lost its pertinence and scope.⁴⁶ Reference was made, in this respect, to the arbitral award in the *Flegenheimer* case⁴⁷ and to the judgment of the Court of Justice of the European Communities in the *Micheletti* case.⁴⁸ However, several other members highlighted the importance of the principle of effective nationality and, in particular, the concept of a genuine link, which the Commission, in their view, should help pinpoint better than ICJ had done in the *Nottebohm* case.⁴⁹ They proposed that the criteria for establishing a genuine link for each different category of State succession should be studied. In that context, an individual's emotional attachment to a particular State was an element that should not be overlooked.⁵⁰

29. In the Sixth Committee, the need to determine whether the application of the concept of genuine link presented certain specificities in the context of State succession was further highlighted.⁵¹

⁴³ A/CN.4/472/Add.1, para. 6.

⁴⁴ See *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 20–24th meetings, statements by Morocco (A/C.6/50/SR.20, para. 63), Brazil (A/C.6/50/SR.21, para. 79), China (A/C.6/50/SR.22, para. 28), Austria (A/C.6/50/SR.23, para. 32) and Guinea (A/C.6/50/SR.24, para. 79).

⁴⁵ For a discussion of the principle of effective nationality, see the first report of the Special Rapporteur (footnote 2 above), pp. 170–171, paras. 76–84.

⁴⁶ *Yearbook ... 1995*, vol. II (Part Two), p. 38, para. 187.

⁴⁷ Decision of 20 September 1958, UNRIAA, vol. XIV (Sales No. 65.V.4), pp. 327 et seq.

⁴⁸ *Reports of Cases before the Court of Justice and the Court of First Instance of the European Communities, 1992–7*, case C–369/90, judgment of 7 July 1992, *Mario Vicente Micheletti and Others. v. Delegación del Gobierno en Cantabria*.

⁴⁹ *Second Phase, Judgment, I.C.J. Reports 1955*, pp. 4 et seq., at p. 23.

⁵⁰ *Yearbook ... 1995*, vol. II (Part Two), pp. 37–38, para. 186.

⁵¹ A/CN.4/472/Add.1, para. 8. Some authors have argued that a successor State in whose territory an individual habitually or permanently resides, depending on the adopted classification, would presumably have much less difficulty meeting the test of genuine link. See Pejic, "Citizenship and statelessness in the former Yugoslavia: the legal framework".

³⁸ *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/467, pp. 174–175, paras. 97–102 and 111.

³⁹ *Ibid.*, vol. II (Part Two), p. 38, para. 189.

⁴⁰ The Special Rapporteur had highlighted in his first report the problems of positive conflict of nationalities (dual nationality, multiple nationality) and negative conflict of nationalities (statelessness) arising from State succession (*ibid.*, vol. II (Part One), document A/CN.4/467, para. 106). See also volume II (Part Two), p. 40, para. 206.

⁴¹ *Yearbook ... 1995*, vol. II (Part Two), annex, p. 113, para. 4.

⁴² *Ibid.*, vol. I, 2413th meeting, statement by Mr. Crawford, p. 230.

30. This concept also appeared to be behind the concern expressed by one representative regarding the adoption, by successor States, of nationality laws under which they artificially extended their nationality to nationals of another independent State and which could be misused for purposes of partial or complete absorption of the population of such other State.⁵² However, as one author pointed out, the major problem arising to date from the dissolution of the former Yugoslavia was not that the successor states had been competing to confer their nationality on individuals residing outside their borders. On the contrary, it was that some of them had, “by means of various legal devices, attempted to exclude from their nationality ... persons who have been residing in their territories for considerable lengths of time”.⁵³ This observation in fact seems to apply also to cases of State succession other than that of the former Yugoslavia.

31. The view was also expressed in the Sixth Committee that the Commission should study the relationship between the requirement of genuine link and the principle of non-discrimination.⁵⁴

32. Moreover, according to another view expressed in the Sixth Committee, the concept of genuine link should also be taken into consideration in the application of the right of option between the nationalities of the various successor States in the case of dissolution.⁵⁵

33. The discussion both in the Commission and in the Sixth Committee leads to the conclusion that, even if the primary context for the application of the principle of effective nationality is the law of diplomatic protection, the underlying notion of genuine link also has some role to play in the determination of the principles applicable to the withdrawal or granting of nationality in situations of State succession. If a right to nationality was recognized there was still a need for a genuine link to be established between the person and the State of his nationality;⁵⁶ moreover, the concept of the individual's rights to a nationality could be better pinpointed within the context of State succession through a study of the effect of the application of the criterion of genuine link.

B. Specific issues

34. As the Special Rapporteur stated when presenting the report of the Working Group to the Commission, the “principles” listed in that report were in fact working hypotheses which in the future would require verification, specification or amendment in the light of an analysis of the practice and doctrine, rather than some sort of final conclusions. This technique was chosen in order to draw, as a first step, a very general outline of a conceptual approach which seems to have been favourably received by the majority in the Commission.⁵⁷ That outline was

⁵² A/CN.4/472/Add.1, para. 10.

⁵³ Pejic, loc. cit., p. 2.

⁵⁴ A/CN.4/472/Add.1, para. 8.

⁵⁵ Ibid., para. 23.

⁵⁶ See footnote 50 above.

⁵⁷ Those voicing criticisms suggesting that, although the report of the Working Group was a good starting point for further work on the topic, the Group should have first examined the applicable rules of positive international law and relevant State practice before proceeding

considered by the members of the Working Group to be helpful for the subsequent discussion on the possible outcome of the work as well as on the working methods and timetable.

1. THE OBLIGATION TO NEGOTIATE IN ORDER TO RESOLVE BY AGREEMENT PROBLEMS OF NATIONALITY RESULTING FROM STATE SUCCESSION

35. The first conclusion formulated by the Working Group in its preliminary report was that States concerned should have the obligation to consult in order to determine whether State succession had any undesirable consequences with respect to nationality; if so, they should have the obligation to negotiate in order to resolve such problems by agreement.⁵⁸ It is assumed that this “obligation” is among those of which the underlying sources, according to some members, should have been further clarified⁵⁹ in order for such obligation to be apprehended in a realistic manner. It must therefore be recalled that this obligation was considered to be a corollary of the right of every individual to a nationality or of the obligation of States concerned to prevent statelessness.⁶⁰ It has, moreover, been argued that such obligation could be based on the general principle of the law of State succession providing for the settlement of certain questions relating to succession by agreement between States concerned, and embodied in the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.⁶¹

36. During the debate in the Sixth Committee, satisfaction was especially expressed with the Working Group's position that negotiations should be aimed, in particular, at the prevention of statelessness.⁶²

37. Doubts were, however, raised as to whether the simple obligation to negotiate was sufficient to ensure that the relevant problems would actually be resolved. It was observed in this regard that the obligation to negotiate did not entail the duty to reach an agreement or to pursue the process at length if it were evident that it could not bear fruit.⁶³

38. But the main problem seems to be the source of said obligation and its legal nature. Thus, some delegations expressed the view that, however desirable this obligation might be, it did not appear to be incumbent upon States concerned under positive general international law. It was argued, in particular, that such obligation could not be deduced from the general duty to negotiate for the resolution of disputes.⁶⁴

39. If the Commission arrives at the conclusion that, in situations of State succession, the right to a nationality, or

to the formulation of recommendations (A/CN.4/472/Add.1, para. 4), are therefore missing the purpose that the Working Group pursued by this technique.

⁵⁸ *Yearbook ... 1995*, vol. II (Part Two), annex, p. 113, paras. 5–7.

⁵⁹ Ibid., p. 39, para. 204.

⁶⁰ Ibid., p. 38, paras. 190 and 193–194.

⁶¹ Ibid., para. 193.

⁶² A/CN.4/472/Add.1, para. 16.

⁶³ Ibid.

⁶⁴ Ibid.

at least some of its elements, belong to the realm of *lex lata*, it should examine the question whether the above-mentioned obligation to negotiate can indeed be considered to be a corollary of such right and whether it can be deduced from the general principles applicable to State succession. Finally, if the Commission finds that such obligation does not yet exist as a matter of positive law, it could consider appropriate means to establish such obligation for the States concerned, or to further the development of this principle under general international law.

40. The Working Group did not confine itself to highlighting the obligation of States concerned to negotiate; it also formulated a number of principles to be retained as *guidelines for the negotiation between States concerned*. They relate to questions of the withdrawal and granting of nationality, the right of option, and the criteria applicable to the withdrawal and granting of nationality in various types of State succession, and should not be interpreted outside the specific context of the succession of States. Although not all those principles are necessarily *lex lata*, they should not all be regarded as principles of a merely supplementary character from which the States concerned are free to derogate by mutual agreement.⁶⁵

41. It is not without interest to note that the European Commission for Democracy through Law of the Council of Europe has also opted for the elaboration of guidelines which, contrary to those envisaged by the Working Group, are also meant to be followed directly by all States concerned when enacting legislation in the field of nationality.

42. The Working Group's suggestion to extend the scope of the negotiations that States concerned have the duty to undertake, to such questions as dual nationality, the separation of families, military obligations, pensions and other social security benefits, and the right of residence, has generally met with the approval of the members of the Commission. Moreover, concrete examples of arrangements regarding the resolution of such problems in past cases of State succession were provided.⁶⁶ Relevant agreements are also to be found in recent practice.⁶⁷ However, according to another view, the above-mentioned issues had no direct bearing on legal provisions regarding

⁶⁵ *Yearbook ... 1995*, vol. II (Part Two), p. 41, para. 221. By way of example, the Special Rapporteur mentioned the obligation to prevent statelessness and, reflecting the views of the Working Group, said that it was unacceptable to impose on States an obligation to negotiate while allowing them to leave millions of persons stateless as a result of those negotiations.

⁶⁶ *Ibid.*, vol. I, 2411th meeting, statement by Mr. Kusuma-Atmadja, p. 218, paras. 45–51.

⁶⁷ Thus, the Czech Republic and Slovakia, for example, concluded several agreements resolving these issues, such as the Treaty on interim entitlement of natural and legal persons to profit-related activities on the territory of the other Republic, the Treaty on mutual employment of nationals, the Treaty on the transfer of rights and obligations from labour contracts of persons employed in organs and institutions of the Czech and Slovak Federal Republic, the Treaty on the transfer of rights and obligations of policemen serving in the Federal Police and members of armed forces of the Ministry of the Interior and the Treaty on social security and the administrative arrangement to that Treaty, the Treaty on public health services, the Treaty on personal documents, travel documents, drivers' licences and car registrations, the Treaty on the recognition of documents attesting education and academic titles, the Agreement on the protection of investment and a number of other agreements concerning financial issues, questions of taxation, mutual legal assistance, cooperation in administrative matters, etc.

nationality and should not therefore be among the issues which States were supposed to negotiate between themselves.⁶⁸

2. GRANTING OF THE NATIONALITY OF THE SUCCESSOR STATE

43. Bearing in mind, *inter alia*, article 15 of the Universal Declaration of Human Rights and articles 8 and 9 of the 1961 Convention on the Reduction of Statelessness, the Special Rapporteur suggested that the Commission could study the question of whether an obligation of the successor State to grant its nationality to the inhabitants of territories lost by the predecessor State could be deduced from the principles set out in the relevant conventions.⁶⁹

44. The Working Group reached several preliminary conclusions on this point, which vary according to the type of State succession in question. Thus, in the case of secession and transfer of part of a territory, the Working Group considered that the obligation of the successor State to grant its nationality to certain categories of persons should be the corollary of the right of the predecessor State to withdraw its nationality from those persons.⁷⁰ In the case of unification, including absorption, in which the loss of the predecessor State's nationality was an inevitable result of the disappearance of that State, the Working Group concluded on a preliminary basis that the successor State should have the obligation to grant its nationality to former nationals of a predecessor State residing in the successor State and to those residing in a third State, unless they also had the nationality of a third State.⁷¹ In the case of dissolution, where the loss of nationality of the predecessor State was also an automatic consequence of the disappearance of that State, the Working Group's preliminary conclusions were much more varied: the categories of persons to which the successor State had an obligation to grant its nationality were established in the light of various elements, including the question of the delimitation of powers between the successor States.⁷²

45. The legal grounds for the conclusions of the Working Group differ not only in respect of each case of State succession but also in respect of the various categories of persons involved. There is, moreover, a need to balance the determination of the existence of an obligation of successor States to grant their nationality to certain categories of persons with the requirement to delimit their competence to do so. Obviously, there is a risk that statelessness or dual—or even multiple—nationality could occur. While the legal grounds for the obligation of the successor State to grant its nationality are presumably to be found among the rules concerning the protection of human rights, the rules regarding the delimitation of competences between the different successor States are of a rather different order. This is still an unexplored area which should be examined by the Commission in its future work on the topic.

46. The fundamental assumption that the successor State is under an obligation to grant its nationality to a core

⁶⁸ *Yearbook ... 1995*, vol. II (Part Two), p. 40, para. 208.

⁶⁹ *Ibid.*, p. 35, para. 160.

⁷⁰ *Ibid.*, annex, p. 114, para. 13.

⁷¹ *Ibid.*, p. 115, para. 17.

⁷² *Ibid.*, paras. 19–20.

body of its population has been supported both explicitly and implicitly by some representatives in the Sixth Committee.⁷³ This obligation was considered to be a logical consequence of the fact that every entity claiming statehood must have a population.⁷⁴

47. It has not been easy for the Special Rapporteur to draw more specific conclusions from the preliminary comments of representatives in the Sixth Committee on this issue. The observation that the transfer of sovereignty to the successor State entailed an automatic and collective change in nationality for persons residing in its territory and possessing the nationality of the predecessor State⁷⁵ seems to address the issue of the legislative technique used by the State concerned. The remark that such automatic change in nationality could not occur in the absence of relevant domestic legislation is in consonance with the Special Rapporteur's thesis concerning the exclusively domestic character of the legal basis of nationality.⁷⁶ Nevertheless, the comments of delegations were inconclusive as to the existence of an international obligation binding upon the successor State regarding the granting of its nationality following State succession.

48. In the view of one representative, it would be desirable, for the purpose of preventing statelessness in situations of State succession, for the successor State to grant its nationality to permanent residents of what became the territory of the successor State who on the date of succession were or became stateless, and even to persons born in such territory who resided outside that territory and, on the date of State succession, were or became stateless. Another representative, nevertheless, wondered why a person who had been stateless under the regime of the predecessor State and who resided in the territory of the successor State should acquire the nationality of the latter merely as a consequence of State succession.⁷⁷

49. The successor State certainly has a discretionary power to grant its nationality to such stateless persons. But the problem would be qualitatively different if it were envisaged that that State had an obligation to do so.

50. In State practice, one can find a number of examples of "collective naturalization", both past and recent, which should be analysed by the Commission in its future work on this topic.

51. Thus, article VIII of the 1848 Treaty of Peace, Friendship, Limits and Settlement between Mexico and the United States of America provided for the right of option of Mexican nationals established in territories which earlier belonged to Mexico and were transferred to the United States, as well as for their right to move to Mexico. Nevertheless, the said article provided that:

⁷³ A/CN.4/472/Add.1, para. 17.

⁷⁴ See the statement by Austria, *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 23rd meeting (A/C.6/50/SR.23, para. 31).

⁷⁵ See the statement by Greece, *ibid.*, 22nd meeting (A/C.6/50/SR.22, paras. 60–61).

⁷⁶ See the statements by Austria (A/C.6/50/SR.23, para. 31) and Finland (A/C.6/50/SR.24, para. 64), *ibid.*, 23rd and 24th meetings, respectively.

⁷⁷ A/CN.4/472/Add.1, para. 18.

... those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.⁷⁸

52. The acquisition of Italian nationality following the cession of Venetia and Mantua by Austria to the Kingdom of Italy was explained in a circular from the Austrian Minister for Foreign Affairs to the Italian consuls abroad in the following terms:

The citizens of the Provinces ceded by Austria under the Treaty of 3 October [1866] cease *pleno jure* to be Austrian subjects and become Italian citizens. The Royal Consuls are therefore responsible for providing them with legal papers showing their new nationality ...⁷⁹

53. Article V of the 1882 Treaty between Mexico and Guatemala for fixing the Boundaries between the respective States established a similar right of option for nationals "of either of the two Contracting Parties who, in virtue of the stipulations of this Treaty, in future remain in the territories of the other", stating, at the same time, that:

... those who remain in the said territories after the lapse of one year, without having declared their intention of retaining their former nationality, shall be considered as natives of the other Contracting Party.⁸⁰

54. When in 1914 Cyprus became a British colony, according to the Cyprus (Annexation) Order in Council, 1914, all Ottoman citizens who were ordinarily resident in Cyprus on that date became British citizens. By virtue of other Orders of the Governor, Ottoman subjects of Cypriot origin who were on the date of annexation temporarily absent from Cyprus also acquired British nationality.⁸¹

55. The 1919 Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) contains a whole series of provisions on the acquisition of the nationality of the successor State and the consequent loss of German nationality in connection with the cession by Germany of numerous territories to neighbouring States. Thus, in relation to the renunciation by Germany

⁷⁸ *Treaties and Conventions concluded between the United States of America and Other Powers*, rev. ed. (Washington, D.C., United States Government Printing Office, 1873), p. 562. See also *The Consolidated Treaty Series* (Dobbs Ferry, N.Y., Oceana Publications, 1969), vol. 102, p. 29.

⁷⁹ United Nations, *Materials on Succession of States in Respect of Matters Other than Treaties* (ST/LEG/SER.B/17) (Sales No. E/F.77.V.9), pp. 7–8. When a question arose as to whether article XIV of the Peace Treaty of 3 October 1866 with Austria, governing the nationality of the inhabitants of the provinces ceded to Italy, applied not only in the case of persons originating from these provinces, as was specifically provided, but also in cases where only the family as such originated therefrom, the Minister for Foreign Affairs, in a dispatch to the Italian Consul General at Trieste, stated that he did not consider the restrictive view taken by Austria unfounded and commented as follows:

"Where there is cession of territory between two States, one of these States as a rule relinquishes to the other only what happens to be in that part of the territory which it renounces; nor has the new owner the right to lay claim to that which lies outside that same territory.

"It therefore follows that the mere fact of giving persons originating from the ceded territory, who are living outside that territory, the right to keep the nationality of their country of origin in itself constitutes an actual concession."

⁸⁰ *British and Foreign State Papers, 1881–1882*, vol. LXXIII, p. 273.

⁸¹ *Ibid.*, 1914 (Part II), vol. CVIII (London, HM Stationery Office, 1918), pp. 165–166.

of rights and title over Moresnet, Eupen and Malmédy in favour of Belgium, article 36 of the Treaty provided:

When the transfer of the sovereignty over the territories referred to above has become definitive, German nationals habitually resident in the territories will definitively acquire Belgian nationality *ipso facto*, and will lose their German nationality.

Nevertheless, German nationals who became resident in the territories after August 1, 1914, shall not obtain Belgian nationality without a permit from the Belgian Government.

56. Regarding the restoration of Alsace-Lorraine to France, paragraph 1 of the annex relating to article 54 of the Treaty of Versailles provided that:

As from November 11, 1918, the following persons are *ipso facto* reinstated in French nationality:

(1) Persons who lost French nationality by the application of the Franco-German Treaty of May 10, 1871, and who have not since that date acquired any nationality other than German;

(2) The legitimate or natural descendants of the persons referred to in the immediately preceding paragraph, with the exception of those whose ascendants in the paternal line include a German who migrated into Alsace-Lorraine after July 15, 1870;

(3) All persons born in Alsace-Lorraine of unknown parents, or whose nationality is unknown.⁸²

57. With respect to the recognition of the independence of the Czecho-Slovak State and its frontiers, article 84 of the Treaty of Versailles provided 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* and lose their German nationality.

58. In relation to the recognition of the independence of Poland and the cession of certain territories by Germany to Poland, article 91 of the Treaty of Versailles similarly provided that:

German nationals habitually resident in territories recognised as forming part of Poland will acquire Polish nationality *ipso facto* and will lose their German nationality.

German nationals, however, or their descendants who became resident in these territories after January 1, 1908, will not acquire Polish nationality without a special authorisation from the Polish State.

59. Article 112 of the Treaty of Versailles, concerning nationality issues arising in connection with the restora-

⁸² Paragraph 2 of the annex enumerated categories of other persons who could claim French nationality on the basis of a procedure determined by the French Government, which nevertheless reserved to itself the right to reject the claim in individual cases, except in the cases of claims by the husband or wife of a person whose French nationality had been restored under relevant provisions of the Treaty. All remaining Germans born or domiciled in Alsace-Lorraine did not acquire French nationality by reason of the restoration of Alsace-Lorraine to France, even though they might have had the status of citizens of that territory. According to paragraph 3 of the annex, such persons could acquire French nationality only by naturalization, on condition of having been domiciled in Alsace-Lorraine from a date previous to 3 August 1914 and of submitting proof of unbroken residence within the restored territory for a period of three years from 11 November 1918.

tion of Schleswig to Denmark, was also drafted along these lines.⁸³

60. Finally, with regard to the establishment of the Free City of Danzig, which constituted a *sui generis* type of territorial change, different from the territorial transfers mentioned above, article 105 of the Treaty of Versailles provided that:

On the coming into force of the present Treaty German nationals ordinarily resident in the territory described in Article 100 will *ipso facto* lose their German nationality, in order to become nationals of the Free City of Danzig.

61. The effects of the dismemberment of the Austro-Hungarian Monarchy on nationality were regulated in a relatively uniform manner by the provisions of the 1919 Treaty of Peace between the Allied and Associated Powers and Austria (Peace Treaty of Saint-Germain-en-Laye). According to article 70 of the Peace Treaty:

Every person possessing rights of citizenship (*pertinenz*) in territory which formed part of the territories of the former Austro-Hungarian Monarchy shall obtain *ipso facto* to the exclusion of Austrian nationality the nationality of the State exercising sovereignty over such territory.⁸⁴

62. The 1919 Treaty of Peace between the Allied and Associated Powers and Bulgaria (Treaty of Neuilly-sur-Seine) also contained provisions on the acquisition of the nationality of the successor State. They concerned the renunciation by Bulgaria of rights and title over certain territories in favour of the Serb-Croat-Slovene State⁸⁵ and Greece. Article 39 of section I provided that:

Bulgarian nationals habitually resident in the territories assigned to the Serb-Croat-Slovene State will acquire Serb-Croat-Slovene nationality *ipso facto* and will lose their Bulgarian nationality. Bulgarian nationals, however, who became resident in these territories after

⁸³ It read:

“All the inhabitants of the territory which is returned to Denmark will acquire Danish nationality *ipso facto*, and will lose their German nationality.

“Persons, however, who had become habitually resident in this territory after October 1, 1918, will not be able to acquire Danish nationality without permission from the Danish Government.”

⁸⁴ Nevertheless, the situation differed in the case of territory transferred to Italy, where the *ipso facto* scenario did not apply vis-à-vis persons possessing rights of citizenship in such territory who were not born there and persons who acquired their rights of citizenship in such territory after 24 May 1915 or who acquired them only by reason of their official position (art. 71). Such persons, as well as those who formerly possessed rights of citizenship in the territories transferred to Italy, or whose father, or mother if the father was unknown, possessed rights of citizenship in such territories, or those who had served in the Italian Army during the war and their descendants, could claim Italian nationality subject to the conditions prescribed for the right of option (art. 72). Italian authorities were entitled to refuse such claims in individual cases (art. 73). In that event, or when no such claim was made, the persons concerned obtained *ipso facto* the nationality of the State exercising sovereignty over the territory in which they possessed rights of citizenship before acquiring such rights in the territory transferred to Italy (art. 74). Moreover, according to article 76, persons who acquired *pertinenz* in territories transferred to the Serb-Croat-Slovene State or to the Czecho-Slovak State could not acquire the nationality of those States without a permit. If the permit was refused, or not applied for, such persons obtained *ipso facto* the nationality of the State exercising sovereignty over the territory in which they previously possessed rights of citizenship (arts. 76–77).

⁸⁵ Formed after the First World War by Serbia, Montenegro and some territories of the former Austro-Hungarian Monarchy; named Yugoslavia in 1929.

1st January, 1913, will not acquire Serb-Croat-Slovene nationality without a permit from the Serb-Croat-Slovene State.

63. A similar provision was to be found in article 44 of section II, concerning territories ceded to Greece.⁸⁶

64. Article 9 of the 1920 Treaty of Peace between Finland and the Soviet Government of Russia (Treaty of Tartu), by which Russia ceded to Finland the area of Petsamo (Petschenga), provided that "Russian citizens domiciled in the territory of Petschenga shall, without any further formality, become Finnish citizens". Nevertheless, the inhabitants of this area were given, on the basis of the same article, the right of option, as discussed below.

65. The 1923 Treaty of Peace between the British Empire, France, Italy, Japan, Greece, Roumania and the Serb-Croat-Slovene State and Turkey (Treaty of Lausanne) contained two types of provisions concerning the acquisition of nationality. In accordance with article 21:

Turkish nationals ordinarily resident in Cyprus on the 5th November, 1914, will acquire British nationality subject to the conditions laid down in the local law, and will thereupon lose their Turkish nationality.

It is understood that the Government of Cyprus will be entitled to refuse British nationality to inhabitants of the island who, being Turkish nationals, had formerly acquired another nationality without the consent of the Turkish Government.

With regard to the other territories detached from Turkey under that Treaty, article 30 stipulates that:

Turkish subjects habitually resident in territory which in accordance with the provisions of the present Treaty is detached from Turkey will become *ipso facto*, in the conditions laid down by the local law, nationals of the State to which such territory is transferred.

66. As regards cases of State succession after the Second World War, the 1947 Treaty of Peace with Italy contained provisions on acquisition of nationality in connection with the cession of certain territories by Italy to France, Yugoslavia and Greece. According to paragraph 1 of article 19 of the Treaty:

Italian citizens who were domiciled on June 10, 1940, in territory transferred by Italy to another State under the present Treaty, and their children born after that date, shall, except as provided in the following paragraph [with respect to the right of option⁸⁷], become citizens with full civil and political rights of the State to which the territory is transferred, in accordance with legislation to that effect to be introduced by that State within three months from the coming into force of the present Treaty. Upon becoming citizens of the State concerned they shall lose their Italian citizenship.

67. Other examples of provisions on acquisition of nationality can be found in two treaties on the cession to India of French territories and establishments in India. Article II of the 1951 Treaty of cession of the territory of the Free Town of Chandernagore between India and France,⁸⁸ provided that:

French subjects and citizens of the French Union domiciled in the territory of the Free Town of Chandernagore on the day on which the present Treaty comes into force shall become, subject to the provisions [regarding the right of such persons to opt for the retention of their nationality] ..., nationals and citizens of India.

The 1956 Treaty of Cession of the French Establishments of Pondicherry, Karikal, Mahe and Yanam, between India and France, contains similar provisions. According to article 4:

French Nationals born in the territory of the Establishments and domiciled therein at the date of the entry into force of the Treaty of Cession shall become nationals and citizens of the Indian Union, with the exceptions enumerated under Article 5 hereafter.

Article 6 further stipulated that:

French nationals born in the territory of the Establishments and domiciled in the territory of the Indian Union on the date of the entry into force of the Treaty of Cession shall become nationals and citizens of the Indian Union.⁸⁹

68. Article 2 of the Provisional Constitution of the United Arab Republic of 5 March 1958 provided that:

Nationality of the United Arab Republic is enjoyed by all bearers of the Syrian or Egyptian nationalities; or who are entitled to it by laws or statutes in force in Syria or Egypt at the time this Constitution takes effect.⁹⁰

69. State practice during the period of decolonization presents many common characteristics. Thus, according to the Constitution of Barbados,⁹¹ two types of acquisition of citizenship were envisaged in relation to accession to independence. Section 2 enumerates the categories of persons who automatically became citizens of Barbados on the day of its independence, 30 November 1966. It reads:

(1) Every person who, having been born in Barbados, is on 29th November 1966 a citizen of the United Kingdom and Colonies shall become a citizen of Barbados on 30th November 1966.

(2) Every person who, having been born outside Barbados, is on 29th November 1966 a citizen of the United Kingdom and Colonies shall, if his father becomes or would but for his death have become a citizen of Barbados in accordance with the provisions of subsection (1), become a citizen of Barbados on 30th November 1966.

(3) Any person who on 29th November 1966 is a citizen of the United Kingdom and Colonies

(a) having become such a citizen under the British Nationality Act 1948 by virtue of his having been naturalised in Barbados as a British subject before that Act came into force; or

(b) having become such a citizen by virtue of his having been naturalised or registered in Barbados under that Act,

shall become a citizen of Barbados on 30th November 1966.

⁸⁶ It read:

"Bulgarian nationals resident in the territories assigned to Greece will obtain Greek nationality *ipso facto* and will lose their Bulgarian nationality.

"Bulgarian nationals, however, who became resident in these territories after the 1st January, 1913, will not acquire Greek nationality without a permit from Greece."

⁸⁷ See footnote 180 below.

⁸⁸ United Nations, *Treaty Series*, vol. 203, p. 155.

⁸⁹ United Nations, *Materials on Succession of States* ... (see footnote 79 above), p. 87. Article 5 and the second part of article 6 provided for the right of opting out, i.e. retaining French nationality.

⁹⁰ Text reproduced in Cotran, "Some legal aspects of the formation of the United Arab Republic and the United Arab States", p. 374; see also page 372.

⁹¹ United Nations, *Materials on Succession of States* ... (see footnote 79 above), p. 124.

Section 3 enumerates the categories of persons entitled to be registered as citizens upon making application.⁹²

70. Similar provisions can be found in the constitutions of a number of other States which acceded to independence after the Second World War, such as Botswana,⁹³ Guyana,⁹⁴

⁹² *Ibid.*, pp. 124–125. It reads:

“(1) Any woman who on 29th November 1966 is or has been married to a person

“(a) who becomes a citizen of Barbados by virtue of section 2; or

“(b) who, having died before 30th November 1966, would but for his death have become a citizen of Barbados by virtue of that section,

shall be entitled, upon making application, and, if she is a British protected person or an alien, upon taking the oath of allegiance, to be registered as a citizen of Barbados.

“(2) Any person who is a Commonwealth citizen (otherwise than by virtue of being a citizen of Barbados) and who

“(a) has been ordinarily resident in Barbados continuously for a period of seven years or more at any time before 30th November 1966; and

“(b) has not, since such period of residence in Barbados and before that date, been ordinarily resident outside Barbados continuously for a period of seven years or more,

shall be entitled, upon making application, to be registered as a citizen of Barbados:

...

“(3) Any woman who on 29th November 1966 is or has been married to a person who subsequently becomes a citizen of Barbados by registration under subsection (2) shall be entitled, upon making application, and, if she is a British protected person or an alien, upon taking the oath of allegiance, to be registered as a citizen of Barbados.”

The right to be registered as a citizen according to provisions of subsections (2) and (3) was, nevertheless, subject to such exceptions or qualifications as might “be prescribed in the interests of national security or public policy”.

⁹³ *Ibid.*, pp. 137–139. Section 20 of the Constitution of Botswana contains provisions essentially similar to those of section 2 (1) and (2) of the Constitution of Barbados concerning the automatic acquisition of citizenship. Section 23 contains provisions concerning the acquisition of the citizenship of Botswana by certain categories of persons who, upon making application, were entitled to be registered as citizens by virtue of connection with Bechuanaland. Section 25 provides for the acquisition, upon application, of the citizenship of Botswana by Commonwealth citizens and citizens of certain other African countries ordinarily resident in Botswana, including the former Protectorate of Bechuanaland, for a period of at least five years prior to the application.

⁹⁴ *Ibid.*, pp. 203–204. Section 21 of the Constitution of Guyana contains provisions essentially similar to those of section 2 (1) and (2) of the Constitution of Barbados on automatic acquisition of citizenship. Section 22 (1), (2) and (3) provides that the following persons are entitled to be registered as citizens upon application: any woman married to a person who automatically became or would, but for his death, have become a citizen of Guyana; citizens of the United Kingdom and Colonies having become such citizens by naturalization or registration in the former Colony of British Guiana; or other Commonwealth citizens ordinarily resident in Guyana for at least five years prior to independence. Section 22 (3) is basically similar to section 3 (3) of the Constitution of Barbados.

Jamaica,⁹⁵ Kenya,⁹⁶ Lesotho,⁹⁷ Mauritius,⁹⁸ Sierra Leone,⁹⁹ Trinidad and Tobago¹⁰⁰ and Zambia.¹⁰¹

71. Section 1 of the Constitution of Malawi provided for automatic acquisition of citizenship following accession to independence as follows:

Every person who, having been born in the former Nyasaland Protectorate, is on 5th July 1964 a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Malawi on 6th July 1964:

Provided that a person shall not become a citizen of Malawi by virtue of this subsection if neither of his parents was born in the former Nyasaland Protectorate.¹⁰²

In section 2, subsections (1) and (2), the Constitution further provided for the acquisition of the citizenship of Malawi, upon application before 6 July 1965, by any person who was on 31 December 1963 a citizen of the former Federation of Rhodesia and Nyasaland and who had a substantial Malawi connection.¹⁰³ It contained also

⁹⁵ *Ibid.*, p. 246. The provisions of sections 3 and 4 of the Constitution of Jamaica are basically similar to those of sections 2 (1) and (2) and 3 (1) and (3) of the Constitution of Barbados.

⁹⁶ *Ibid.*, pp. 254–255. The provisions of section 1 of the Constitution of Kenya are basically similar to those of section 2 (1) and (2) of the Constitution of Barbados. In addition, section 2 of the Constitution of Kenya provides that persons who, as citizens of the United Kingdom and Colonies or of the Republic of Ireland were, on the date of independence, ordinarily and lawfully resident in Kenya were entitled to be registered as citizens, upon making application within a two-year period.

⁹⁷ *Ibid.*, p. 282. The provisions of section 23 of the Constitution of Lesotho are basically similar to those of section 2 of the Constitution of Barbados.

⁹⁸ *Ibid.*, p. 353. The provisions of section 20 (1), (2) and (3) of the Constitution of Mauritius are basically similar to those of section 2 (1), (2) and (3) of the Constitution of Barbados. In addition, section 21 provides for the acquisition of the citizenship of Mauritius, upon application, by any woman married to a person who automatically became or would, but for his death, have become a citizen of Mauritius upon independence.

⁹⁹ *Ibid.*, pp. 389–390. The provisions of section 1 of the Constitution of Sierra Leone concerning automatic acquisition of citizenship are basically similar to those of section 2 of the Constitution of Barbados. Section 2 contains provisions on the acquisition of citizenship, upon application within a two-year period after the date of independence, by a woman who was, on that date, a citizen of the United Kingdom and Colonies or a British protected person, and married to a person who automatically became or would, but for his death, have become a citizen of Sierra Leone.

¹⁰⁰ *Ibid.*, p. 429. The provisions of section 9 of the Constitution of Trinidad and Tobago are basically similar to those of section 2 of the Constitution of Barbados. Section 10 provides for the acquisition of the citizenship of Trinidad and Tobago, upon application, by any citizen of the United Kingdom and Colonies or a British protected person ordinarily resident in Trinidad and Tobago on the date of independence (subsect. (1)) and by any woman married to such a person, but whose marriage had been terminated by death or dissolution (subsect. (4)); subsections (2) and (3) of section 10 are basically similar to those of subsections (1) and (3) of section 3 of the Constitution of Barbados.

¹⁰¹ *Ibid.*, p. 472. Section 3 of the Constitution of Zambia is similar to section 2 (1) and (2) of the Constitution of Barbados with the only difference that the former applies to “a British protected person” instead of “a citizen of the United Kingdom and Colonies”, as does the latter. In addition, section 8 provides for the acquisition of the citizenship of Zambia, upon application, by a Commonwealth citizen, a citizen of the Republic of Ireland or a citizen of any country in Africa who has been ordinarily resident in Zambia, including in the former Protectorate of Northern Rhodesia, for a period of four years prior to the application.

¹⁰² *Ibid.*, p. 307.

¹⁰³ *Ibid.*, pp. 307–308. According to subsection 2, a person had a substantial Malawi connection if he or his father was born in the former Nyasaland Protectorate; if he or his father, at the time of that person’s

detailed provisions on the acquisition of the citizenship of Malawi, upon application, by any woman married to, or a widow of, a person who became or would, but for his death, have become a citizen of Malawi (sects. 2 (4) and 3), and any person who on the date of Malawi's independence was a citizen of the United Kingdom and Colonies by virtue of naturalization or registration in the former Nyasaland Protectorate under the British Nationality Act, 1948 (sect. 3 (5)).

72. According to section 2 of annex D to the Treaty concerning the Establishment of the Republic of Cyprus of 16 August 1960:

1. Any citizen of the United Kingdom and Colonies who on the date of this Treaty possesses any of the qualifications specified in paragraph 2 of this Section shall on that date become a citizen of the Republic of Cyprus if he was ordinarily resident in the Island of Cyprus at any time in the period of five years immediately before the date of this Treaty.

2. The qualifications referred to in paragraph 1 of this Section are that the person concerned is

(a) a person who became a British subject under the provisions of the Cyprus (Annexation) Orders in Council, 1914 to 1943; or

(b) a person who was born in the Island of Cyprus on or after the 5th of November, 1914; or

(c) a person descended in the male line from such a person as is referred to in subparagraph (a) or (b) of this paragraph.

3. Any citizen of the United Kingdom and Colonies born between the date of this Treaty and the agreed date [16 February 1961] shall become a citizen of the Republic of Cyprus at the date of his birth if his father becomes such a citizen under this Section or would but for his death have done so.¹⁰⁴

73. Under article 3 of the Convention on Nationality between France and Viet Nam, signed in Saigon on 16 August 1955:

birth, were citizens of the United Kingdom and Colonies by virtue of registration or naturalization in the former Protectorate under the British Nationality Act, 1948; were registered or naturalized as citizens of the former Federation of Rhodesia and Nyasaland, having been ordinarily resident in the former Protectorate; were, as minor children, registered as citizens of the former Federation by the responsible parent; were adopted by a citizen of the former Federation who was resident in the former Protectorate; were registered as citizens of the former Federation by virtue of the possession of associations with the former Protectorate under the Citizenship of Rhodesia and Nyasaland and British Nationality Act, 1957 and 1959; or were listed in the list of general voters registered in the former Protectorate by virtue of the Electoral Act, 1958.

¹⁰⁴ United Nations, *Treaty Series*, vol. 382, p. 119. In addition to the provisions on automatic acquisition of Cypriot citizenship, annex D provided for the acquisition of citizenship, upon application, by persons who, before the date of the Treaty, were citizens of the United Kingdom and Colonies and possessed any of the qualifications specified in paragraph 2 of section 2, but were not ordinarily resident in the Island of Cyprus; persons of Cypriot origin who were not citizens of the United Kingdom and Colonies; women who were married to persons entitled under different provisions to make an application for the citizenship of the Republic of Cyprus; and persons born between the date of the Treaty and the agreed date of 16 February 1961 (sect. 4). Annex D further provided for the acquisition of Cypriot citizenship, upon application, by citizens of the United Kingdom and Colonies ordinarily resident in the Island at any time in the period of five years immediately before the date of the Treaty who were either naturalized or registered as citizens of the United Kingdom and Colonies by the Governor of Cyprus or were descendants in the male line of such persons (sect. 5); and by women who were citizens of the United Kingdom and Colonies whose husbands became or would have become citizens of the Republic of Cyprus (sect. 6).

The following shall have Vietnamese nationality wherever they were on 8 March 1949: former French subjects whose place of origin is South Viet Nam (Cochin China) or the former concessions of Hanoi, Haiphong or Tourane.¹⁰⁵

74. The solution of nationality problems sometimes occurred in a rather complex framework of consecutive changes, as was the case with Singapore, which acceded to independence through a transient merger with the already independent Federation of Malaya. Thus, on 16 September 1963, the Federation of Malaysia was constituted, comprising the States of the former Federation, the Borneo States, namely Sabah and Sarawak, and the State of Singapore. There was a division of legislative power among the Federation and its component units. Under the Constitution of Malaysia, separate citizenship for these units was maintained and, in addition, a Federal citizenship was established. There were separate provisions in the Malaysian Constitution governing the acquisition of Federal citizenship by persons of the States of Malaya who were not Singapore citizens,¹⁰⁶ by persons of the Borneo States who were not Singapore citizens,¹⁰⁷ and by persons who were Singapore citizens or were residents of Singapore.¹⁰⁸ A person who was a citizen of Singapore acquired the additional status of citizen of the Federation by operation of the law, and Federal citizenship was not severable from Singapore citizenship. If any person who was both a Singapore citizen and a Federal citizen lost either status, he also lost the other.¹⁰⁹ When, on 9 August 1965, Singapore seceded from the Federation of Malaysia to become an independent State, Singapore citizens ceased to be citizens of the Federation of Malaysia and their Singapore citizenship became the only one of relevance. Its acquisition and loss were governed by the Singapore Constitution and the provisions of the Malaysian Constitution which continued to apply to Singapore by virtue of the Republic of Singapore Independence Act, 1965.¹¹⁰

75. In recent cases of State succession in Eastern and Central Europe, the nationality laws of successor States resulting from the dissolution of federal States, i.e. Yugoslavia and Czechoslovakia, provided that individuals who, on the date of State succession had, according to the laws of the predecessor State, "the secondary nationality" of the territorial unit which acceded to independence would automatically acquire the nationality of the latter. Thus, article 39 of the Law on the Republic of Slovenia Citizenship provides that "[a]ny person who held citizenship of the Republic of Slovenia and of the Socialist Federative Republic of Yugoslavia according to existing valid regulations is considered to be a citizen of the Republic of Slovenia".¹¹¹ In addition to automatic acquisition, other

¹⁰⁵ *Ibid.*, *Materials on Succession of States ...* (see footnote 79 above), p. 447.

¹⁰⁶ *Constitutions of Asian Countries* (Bombay, N. M. Tripathi Private Ltd., 1968), p. 622. See also articles 15, 16 and 19, pp. 628–633.

¹⁰⁷ *Ibid.*, p. 630, art. 16A.

¹⁰⁸ *Ibid.*, pp. 631–632, art. 19.

¹⁰⁹ *Ibid.*, p. 628, art. 14 (3).

¹¹⁰ Goh Phai Cheng, *Citizenship Laws of Singapore*, pp. 7–9.

¹¹¹ Citizenship Act of Slovenia of 5 June 1991, *Uradni list Republike Slovenije* (Official Gazette of the Republic of Slovenia), No. 1/1991 (English translation in *Central and Eastern European Legal Materials*, V. Pechota, ed. (Ardsey-on-Hudson, N.Y., Transnational Juris, 1997), binder 5A).

means of acquiring Slovenian citizenship were envisaged for certain categories of persons.¹¹²

76. The Law on Croatian Citizenship is also based on the concept of the continuity of Croat nationality which, in the Socialist Federal Republic of Yugoslavia, existed alongside Yugoslav federal nationality. With regard to citizens of the former Federation who did not at the same time hold Croat nationality, article 30, paragraph 2, of the Law provides that any member of the Croatian nation who did not hold Croat nationality on the day of the entry into force of the Law but who can prove that he/she had been legally resident in the Republic of Croatia for at least 10 years, shall be considered to be a Croat citizen if he/she supplies a written declaration that he/she regards himself/herself as a Croat citizen.¹¹³

77. Article 1, paragraph 1, of the Law on the acquisition and loss of citizenship of the Czech Republic provides that:

Natural persons who were citizens of the Czech Republic as of December 31, 1992, and simultaneously citizens of the Czech and Slovak Federal Republic, shall be citizens of the Czech Republic as of January 1, 1993.¹¹⁴

In addition to the provisions on *ipso facto* acquisition of nationality, the Law contains provisions on the acquisition of nationality on the basis of a declaration. This possibility was open to individuals who, on 31 December 1992, were citizens of Czechoslovakia but not citizens of the Czech or the Slovak Republic, and, under certain conditions, to individuals who, after the dissolution of Czechoslovakia, acquired the nationality of Slovakia, provided that they had been permanent residents of the Czech Republic for at least two years or they were permanent residents in a third country but had their last permanent residence be-

fore leaving Czechoslovakia in the territory of the Czech Republic.¹¹⁵

78. Section 2 of the Law on State Citizenship in the Slovak Republic, of 19 January 1993, contains provisions on *ipso facto* acquisition of nationality similar to those of the relevant legislation of the Czech Republic:

A person, who was up to 31st December 1992 a citizen of the Slovak Republic under the law of the Slovak National Council No. 206/1968 of the Code regarding the gain and loss of citizenship of the Slovak Socialist Republic according to the law No. 88/1990 of the collection of laws, is a citizen of the Slovak Republic under this law.¹¹⁶

The Law furthermore provides for the optional acquisition of Slovak nationality by other former Czechoslovak nationals, irrespective of their permanent residence.¹¹⁷

79. When Ukraine became independent, after the disintegration of the Union of Soviet Socialist Republics, the acquisition of its citizenship by persons affected by the succession was regulated by the Law on Ukrainian Citizenship of 8 October 1991, article 2 of which reads:

The citizens of Ukraine are:

(1) The persons who at the moment of enactment of this Law reside in Ukraine, irrespective of their origin, social and property status, racial and national belonging, sex, education, language, political views, religious confession, sort and nature of activities, if they are not citizens of other States and if they do not decline to acquire the citizenship of Ukraine;

(2) The persons who are civil servants, who are conscripted to a military service, who study abroad or who lawfully left for abroad and are permanent residents in another country provided they were born in Ukraine or have proved that before leaving for abroad, they had permanently resided in Ukraine, who are not citizens of other States and not later than five years after enactment of this Law express their desire to become citizens of Ukraine ...¹¹⁸

80. In the case of the three Baltic republics, i.e. Estonia, Latvia and Lithuania, which regained their independence in 1991, the issue of citizenship was resolved on the basis of the retroactive application of the principles embodied in nationality laws in force prior to 1940. Thus, the Law on Citizenship of Estonia of 1938, and the Law on Citizenship of Latvia of 1919 have been re-enacted in order to determine the aggregate body of citizens of these republics.¹¹⁹ Similarly, articles 17 and 18 of the Law on Citizenship of Lithuania of 5 December 1991 provide for the retention or restoration of the rights to citizenship of Lithuania with reference to the law in force before 15 June 1940.¹²⁰ Other persons permanently residing in these re-

¹¹² Ibid. Thus article 40 of the Law on the Republic of Slovenia Citizenship Act provides that:

“A citizen of another republic [of the Yugoslav Federation] that had permanent residence in the Republic of Slovenia on the day of the Plebiscite of the independence and autonomy of the Republic of Slovenia on the 23rd of December 1990 and is actually living here, can acquire citizenship of the Republic of Slovenia on condition that such a person files an application with the administrative organ competent for internal affairs of the community where they reside.”

Article 41 of the same Law envisages that those persons who were previously deprived of the citizenship of the People's Republic of Slovenia and the Socialist Federal Republic of Yugoslavia, as well as officers of the ex-Yugoslav army who did not want to return to their homeland, emigrants who had lost their citizenship as a result of their stay abroad and some other categories of persons may acquire the citizenship of Slovenia on the basis of an application within a one-year period.

¹¹³ Law on Croatian Citizenship of 26 June 1991, enacted in parallel to the proclamation of the independence of Croatia (see *Narodne Novine: Sluzbeni list Republike Hrvatske* (People's News: Official Gazette of the Republic of Croatia), No. 53/1991 (8 October 1991), p. 1466. See also *Central and Eastern European ...* (footnote 111 above), binder 5–5A.

¹¹⁴ Law No. 40/1993 of 29 December 1992 on the acquisition and loss of citizenship of the Czech Republic, *Report of the experts of the Council of Europe on the citizenship laws of the Czech Republic and Slovakia and their implementation* (Council of Europe (Strasbourg, 2 April 1996), document DIR/JUR (96) 4), appendix IV. Article 1, paragraph 2, provides that:

“To determine whether a natural person is citizen of the Czech Republic, or was citizen of the Czech and Slovak Federal Republic as of December 31, 1992, regulations shall apply which were in force at the time when the person concerned gained or lost citizenship.”

¹¹⁵ Ibid., arts. 6 and 18. For other conditions regarding the optional acquisition of Czech nationality, see paragraph 123 below.

¹¹⁶ *Sbierka zákonov Slovenskej republiky* (Collection of laws of the Slovak Republic), law No. 40/1993. See also *Report of the experts of the Council of Europe ...* (footnote 114 above), appendix V.

¹¹⁷ *Sbierka zákonov ...* (footnote 116 above), sect. 3. For more details see paragraph 122 below.

¹¹⁸ Published in *Pravda Ukrainy*, 14 November 1991.

¹¹⁹ See the Resolution of the Supreme Council of the Republic of Estonia of 26 February 1992, reintroducing, with retroactive effect, the 1938 Law on Citizenship; and the Resolution on the Renewal of Republic of Latvia Citizens' Rights and Fundamental Principles of Naturalization, of 15 October 1991, *Central and Eastern European ...* (footnote 111 above), binder 6.

¹²⁰ Ibid., binder 6A.

publics could acquire citizenship upon request, upon fulfilling other requirements spelled out in the law.¹²¹

81. The nationality of Eritrea, an independent State since 27 April 1993, has been regulated by the Eritrean

¹²¹ Article 6 of the Law on Citizenship of Estonia provides as follows:

“Foreigners wishing to acquire Estonian citizenship by naturalization must fulfil the following requirements:

“(1) He or she must have attained the age of 18 years, or have obtained the consent of his or her parents or guardians for acquiring Estonian citizenship;

“(2) He or she must have permanently resided in Estonia at least two years prior to and one year after the date of application for Estonian citizenship;

“(3) He or she must know the Estonian language.”

According to paragraph 5 of the Supreme Council resolution on the Application of the Law on Citizenship of 26 February 1992, the duration of permanent residency in Estonia, as stipulated in article 6, paragraph 2, above, was considered to begin as of 30 March 1990.

Subsection 3/4/ of the Resolution of the Renewal of Republic of Latvia Citizens' Rights and Fundamental Principles of Naturalization of 15 October 1991 provides that persons who were permanent residents in Latvia on the date of adoption of the resolution can be granted the citizenship of Latvia if they:

“(1) have learned the Latvian language at a conversational level ...;

“(2) submit an application renouncing their previous citizenship and have received permission of expatriation from that country, if such is required by that country's law;

“(3) at the moment this resolution takes effect, have lived and have been permanently-registered residents of Latvia for no less than 16 years;

“(4) know the fundamental principles of the Republic of Latvia Constitution; and

“(5) Have sworn a citizens's oath to the Republic of Latvia.”

Subsection 3/5/ enumerates the categories of persons to whom citizenship would not be granted (*ibid.*, binder 6A).

Article 12 of the Law on Citizenship of the Republic of Lithuania of 5 December 1991 sets out the conditions for granting citizenship:

“A person, upon his or her request, may be granted citizenship of the Republic of Lithuania provided he or she agrees to take the oath to the Republic and meets the following conditions of citizenship:

“(1) Has passed the examination in the Lithuanian language (can speak and read Lithuanian);

“(2) For the last ten years has had a permanent place of residence on the territory of the Republic of Lithuania;

“(3) Has a permanent place of employment or a constant legal source of support on the territory of the Republic of Lithuania;

“(4) Has passed the examination in the basic provisions of the Constitution of the Republic of Lithuania; and

“(5) Is a person without citizenship, or is a citizen of a State under the laws of which he or she loses citizenship of said State upon acquiring citizenship of the Republic of Lithuania, or if the person notifies in writing of his or her decision to refuse citizenship of another State upon being granted citizenship of the Republic of Lithuania.

“Persons meeting the conditions specified in this article shall be granted citizenship of the Republic of Lithuania taking into consideration the interests of the Republic of Lithuania.”

Article 13 enumerates the reasons precluding the granting of citizenship of the Republic of Lithuania (*ibid.*, binder 6A).

Nationality Proclamation No. 21/1992.¹²² The provisions on acquisition of Eritrean nationality on the date of independence make a distinction between persons who are of Eritrean origin, persons naturalized *ex lege* as a result of their residence in Eritrea between 1934 and 1951, persons naturalized upon request and persons born to such categories of individuals. According to article 2, paragraph 2, of the Proclamation: “A person who has ‘Eritrean origin’ is any person who was resident in Eritrea in 1933.” Article 3, paragraph 1, provides for *ex lege* naturalization:

Eritrean nationality is hereby granted to any person who is not of Eritrean origin and who entered, and resided in, Eritrea between the beginning of 1934 and the end of 1951, provided that he has not committed anti-people acts during the liberation struggle of the Eritrean people ...

Article 4, paragraph 1, envisages the acquisition of Eritrean nationality upon application: “Any person who is not of Eritrean origin and has entered, and resided in, Eritrea in 1952 or after shall apply for Eritrean nationality to the Secretary of Internal Affairs.”¹²³ Finally, the Proclamation automatically confers Eritrean nationality on any person born to a father or a mother of Eritrean origin in Eritrea or abroad (art. 2, para. 1) and any person born to a person naturalized *ex lege* (art. 3, para. 2). It further confers Eritrean nationality on any person born to an Eritrean national naturalized upon application after such naturalization (art. 4, para. 6).

3. WITHDRAWAL OR LOSS OF THE NATIONALITY OF THE PREDECESSOR STATE

82. With regard to the general consideration of the limitations on the freedom of States in the area of nationality, in particular those resulting from some obligations in the field of human rights, the Special Rapporteur has suggested that the Commission should study the precise limits of the discretionary power of the predecessor State to deprive of its nationality the inhabitants of the territory it has lost¹²⁴ in cases of State succession in which

¹²² *The United Nations and the Independence of Eritrea* (United Nations publication, Sales No. E.96.I.10), pp. 156–158.

¹²³ According to paragraph 2 of the same article:

“The Secretary of Internal Affairs shall grant Nationality by Naturalization to the person mentioned in sub-article 1 of this Article provided that the person:

“a. has entered Eritrea legally and has been domiciled in Eritrea for a period of ten (10) years before 1974 or has been domiciled in Eritrea for a period of twenty (20) years while making periodic visits abroad;

“b. possesses high integrity and has not been convicted of any crime;

“c. understands and speaks one of the languages of Eritrea;

“d. is free of any of the mental or physical handicaps mentioned in Article 339–340 of the Transitory Civil Code of Eritrea, will not become a burden to Eritrean society and can provide for his own and his family's needs;

“e. has renounced the nationality of another country, pursuant to the legislation of that country;

“f. has decided to be permanently domiciled in Eritrea upon the granting of his Eritrean nationality;

“g. has not committed anti-people acts during the liberation struggle of the Eritrean people.”

¹²⁴ See *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/467, p. 175, para. 106, and vol. II (Part Two), p. 35, para. 160.

the predecessor State continues to exist after the territorial change, such as secession and transfer of part of a territory. Thus, the Working Group on State succession and its impact on the nationality of natural and legal persons concluded, on a preliminary basis, that the nationality of a number of the categories of individuals defined in its report should not be affected by State succession and that, in principle, the predecessor State should have the obligation not to withdraw its nationality from those categories of persons.¹²⁵

83. This preliminary conclusion of the Working Group was also supported by some representatives in the Sixth Committee.¹²⁶

84. At this preliminary stage, the Commission has not yet analysed the conditions for the application of this prohibition and the sources of international law from which it can be derived. It also remains to be determined whether such prohibition is only the counterpart of the obligation not to create statelessness, or whether it has a broader application—for instance, in terms of the prohibition of arbitrary deprivation of nationality. Only when it engages in a substantive study of the topic will the Commission also be able to address the question of the most appropriate way to strengthen and develop this obligation.

85. The Working Group also defined, on a preliminary basis, the categories of persons from whom the predecessor State should be entitled to withdraw its nationality, provided that such withdrawal of nationality does not result in statelessness.¹²⁷ This involves, in particular, cases in which the genuine link between the individual and the predecessor State has disappeared. However, the balance to be maintained between the consequences of the application of the principle of effective nationality, namely the right of the predecessor State to withdraw its nationality from persons who, following an instance of State succession, have lost their genuine link with that State, and the requirements deriving from the principle of the prohibition of statelessness, is a question which requires further study. In this respect, the Working Group formulated the hypothesis that the right of the predecessor State to withdraw its nationality from the categories of persons mentioned in paragraph 12 of its report could not be exercised until a person had acquired the nationality of the successor State. But is this “primacy” of the principle of the prohibition of statelessness absolute or merely temporary?

86. No comments were made, during the debate in the Sixth Committee, on the right of the predecessor State to withdraw its nationality from certain categories of persons and the conditions in which this withdrawal should be made. One can find, however, a number of instances in State practice where there was withdrawal or loss of the nationality of the predecessor State. These should be analysed by the Commission at a future stage.

87. Thus, in the case of the cession of Venetia and Mantua by Austria to the Kingdom of Italy, the automatic loss of Austrian nationality was considered to be a logi-

cal counterpart of the acquisition of Italian nationality.¹²⁸ The peace treaties after the First World War also provided for the automatic loss of the nationality of the predecessor State upon acquisition of the nationality of the successor State. The relevant provisions of the Treaty of Versailles concerning *ipso facto* loss of German nationality and the acquisition of the nationality of the successor State by persons habitually resident in territories ceded by Germany to Belgium, Denmark and the Free City of Danzig and in the territories forming part of the newly recognized Czecho-Slovak State and Poland, have already been quoted in paragraphs 55-60 above.¹²⁹ As regards Alsace-Lorraine, article 54 on *ipso facto* reinstatement of French nationality¹³⁰ is to be read in conjunction with article 53, according to which:

... Germany undertakes as from the present date to recognise and accept the regulations laid down in the Annex hereto regarding the nationality of the inhabitants or natives of the said territories, not to claim at any time or in any place whatsoever as German nationals those who shall have been declared on any ground to be French [and] to receive all others in her territory ...

88. The concept of *ipso facto* loss of the predecessor's nationality upon the acquisition of the nationality of the successor State was also embodied in article 70 of the Peace Treaty of Saint Germain-en-Laye¹³¹ and articles 39 and 44 of the Treaty of Neuilly-sur-Seine.¹³² It was applied explicitly in article 21 and implicitly in article 30 of the Treaty of Lausanne.¹³³ It is also to be found in paragraph 1 of article 19 of the 1947 Treaty of Peace with Italy.¹³⁴

89. As a result of the 1944 Armistice Agreement and the 1947 Treaty of Peace with Finland, Finland ceded part of its territory to the Soviet Union. The loss of Finnish citizenship by the population concerned was at the time regulated by the internal law of that State, i.e. the Act of 9 May 1941 concerning the acquisition and loss of Finnish citizenship, which did not contain specific provisions regarding territorial changes. In other words, the loss of Finnish citizenship was essentially regulated by the standard provisions of the Act, which read:

A Finnish citizen who becomes a citizen of another country otherwise than upon his application shall lose his Finnish citizenship if his actual residence and domicile are outside Finland; if he resides in Finland he shall lose his Finnish citizenship on removing his residence from Finland.¹³⁵

90. According to article II of the Treaty of cession of the territory of the Free Town of Chandernagore, the automatic loss of French citizenship or of the citizenship of the French Union, as the case might be, upon *ipso facto* acquisition of the citizenship of India by French subjects and citizens of the French Union domiciled in that territory was subject to the right of those persons to opt for

¹²⁸ See paragraph 52 above.

¹²⁹ Arts. 36, 112, 105, 84 and 91.

¹³⁰ See paragraph 56 above.

¹³¹ See paragraph 61 above.

¹³² See paragraphs 62-63 above.

¹³³ See paragraph 65 above.

¹³⁴ See paragraph 66 above.

¹³⁵ See United Nations, Legislative Series, *Laws concerning Nationality* (ST/LEG/SER.B/4) (United Nations publication, Sales No. 1954.V.1), art. 10, p. 151.

¹²⁵ *Ibid.*, vol. II (Part Two), annex, p. 114, para. 11.

¹²⁶ A/CN.4/472/Add.1, para. 21.

¹²⁷ *Yearbook ... 1995*, vol. II (Part Two), annex, p. 114, para. 12.

the retention of their nationality.¹³⁶ The automatic loss of French nationality resulting from the acquisition of Indian nationality by virtue of article 4 of the Treaty of Cession of the French Establishments of Pondicherry, Karikal, Mahe and Yanam, between India and France,¹³⁷ was also subject to the right of the persons concerned to opt for the retention of French nationality. Moreover, article 7 of the Treaty explicitly provided that:

French nationals born in the territory of the Establishments and domiciled in a country other than the territory of the Indian Union or the territory of the said Establishments on the date of entry into force of the Treaty of Cession shall retain their French nationality, with the exceptions enumerated in Article 8 hereafter.¹³⁸

91. There are a number of provisions in documents dating from the period of decolonization which define the conditions which have to be met in order to lose the nationality of the predecessor State, or to retain the nationality of the predecessor State despite the acquisition of the nationality of the successor State.

92. Paragraph 1 of the First Schedule to the Burma Independence Act, 1947, enumerates two categories of persons who, being British subjects immediately before independence day, ceased to be British subjects:

(a) persons who were born in Burma or whose father or paternal grandfather was born in Burma, not being persons excepted by paragraph 2 of this Schedule from the operation of this sub-paragraph; and

(b) women who were aliens at birth and became British subjects by reason only of their marriage to any such person as is specified in sub-paragraph (a) of this paragraph.

According to paragraph 2:

(1) A person shall be deemed to be excepted from the operation of sub-paragraph (a) of paragraph 1 of this Schedule if he or his father or his paternal grandfather was born outside Burma in a place which, at the time of the birth, [was under British jurisdiction]

(2) A person shall also be deemed to be excepted from the operation of the said sub-paragraph (a) if he or his father or his paternal grandfather became a British subject by naturalisation or by annexation of any territory which is outside Burma.¹³⁹

93. The British Nationality (Cyprus) Order, 1960, contained detailed provisions on the loss of the citizenship of the United Kingdom and Colonies in connection with the accession of Cyprus to independence. It provided, in principle, that:

... any person who, immediately before the sixteenth day of February, 1961, is a citizen of the United Kingdom and Colonies shall cease to be such a citizen on that day if he possesses any of the qualifications specified in paragraph 2 of Section 2 of Annex D to the Treaty concerning the Establishment of the Republic of Cyprus ...¹⁴⁰

Provided that if any person would, on ceasing to be a citizen of the United Kingdom and Colonies under this paragraph, become stateless,

¹³⁶ United Nations, *Treaty Series* (see footnote 88 above), art. III of the Treaty.

¹³⁷ See paragraph 67 above.

¹³⁸ United Nations, *Materials on Succession of States* ... (footnote 79 above), p. 87. Article 8 provided for the right to choose to acquire Indian nationality by means of a written declaration.

¹³⁹ *Ibid.*, p. 148.

¹⁴⁰ *Ibid.*, p. 171, art. 1, para. (1). For the qualifications for *ipso facto* acquisition of the citizenship of the Republic of Cyprus, see paragraph 72 above.

he shall not cease to be such a citizen thereunder until the sixteenth day of August, 1961.¹⁴¹

According to article 2 of the Order:

... any citizen of the United Kingdom and Colonies who is granted citizenship of the Republic of Cyprus in pursuance of an application such as is referred to in Section 4, 5 or 6 of Annex D shall thereupon cease to be a citizen of the United Kingdom and Colonies.¹⁴²

94. Section 2 (2) of the Fiji Independence Act 1970, read as follows:

Except as provided by section 3 of this Act, any person who immediately before ... [10 October 1970] is a citizen of the United Kingdom and Colonies shall on that day cease to be such a citizen if he becomes on that day a citizen of Fiji.¹⁴³

Similar provisions can be found in the Botswana Independence Act 1966,¹⁴⁴ the Gambia Independence Act 1964,¹⁴⁵ the Jamaica Independence Act 1962,¹⁴⁶ the Kenya Independence Act 1963,¹⁴⁷ the Sierra Leone Independence Act 1961,¹⁴⁸ and the Swaziland Independence Act 1968.¹⁴⁹

95. Certain acts did not provide for the loss of the citizenship of the predecessor State, but rather for the loss of the status of "protected person". Thus, for instance, the Ghana Independence Act, 1957 stipulated that:

a person who, immediately before the appointed day, was for the purposes of the [British Nationality Act, 1948] ... and Order in Council a British protected person by virtue of his connection with either of the territories mentioned in paragraph (b) of this section shall not cease to be such a British protected person for any of those purposes by reason of anything contained in the foregoing provisions of this Act, but shall so cease upon his becoming a citizen of Ghana under any law of the Parliament of Ghana making provision for such citizenship.¹⁵⁰

Similar provisions are contained in the Tanzania Act, 1969.¹⁵¹

¹⁴¹ *Ibid.*, pp. 171–172. Article 1, para. (2), provided that persons possessing any of the qualifications specified in paragraph 2 of section 3 of annex D were exempted from the rule concerning the loss of the nationality of the United Kingdom and Colonies.

¹⁴² *Ibid.*, p. 172. See also footnote 104 above.

¹⁴³ *Ibid.*, p. 179. Section 3 (1) stipulated that the above provisions on automatic loss of citizenship of the United Kingdom and Colonies did not apply to a person if he, his father or his father's father:

"(a) was born in the United Kingdom or in a colony or an associated state; or

"(b) is or was a person naturalised in the United Kingdom and Colonies; or

"(c) was registered as a citizen of the United Kingdom and Colonies; or

"(d) became a British subject by reason of the annexation of any territory included in a colony."

and section 3 (2) stipulated that a person did not cease to be a citizen of the United Kingdom and Colonies if:

"(a) he was born in a protectorate or protected state, or

"(b) his father or his father's father was so born and is or at any time was a British subject."

¹⁴⁴ *Ibid.*, p. 129.

¹⁴⁵ *Ibid.*, p. 189.

¹⁴⁶ *Ibid.*, p. 239.

¹⁴⁷ *Ibid.*, p. 248.

¹⁴⁸ *Ibid.*, p. 386.

¹⁴⁹ *Ibid.*, p. 404.

¹⁵⁰ *Ibid.*, p. 194.

¹⁵¹ *Ibid.*, p. 523.

96. Former French subjects from South Viet Nam and the former concessions of Hanoi, Haiphong and Tourane who acquired Vietnamese nationality under article 3 of the Convention on Nationality between France and Viet Nam of 16 August 1955 simultaneously lost their French nationality. Article 2, however, provides that:

The following shall retain French nationality: French citizens not of Viet Nam origin domiciled in South Viet Nam (Cochin China) and in the former concessions of Hanoi, Haiphong and Tourane at the date when these territories were attached to Viet Nam, even where they have not effectively established their domicile outside Viet Nam.¹⁵²

97. The loss of the nationality of the predecessor State is an obvious consequence of territorial changes resulting in the disappearance of the international legal personality of the predecessor State. Among recent examples, reference can be made to the extinction of the German Democratic Republic by integration into the Federal Republic of Germany in 1990, and the dissolution of Czechoslovakia in 1993. However, in the case of the disintegration of a State which used to be organized on a federal basis, the loss of the nationality of the Federal State seems to be accepted, regardless of the fact that one of the States concerned claims that its international legal personality is identical to that of the former Federation.

4. THE RIGHT OF OPTION

98. There was broad agreement regarding the Special Rapporteur's recommendation that the concept of the right of option under contemporary international law should be further clarified on the basis of State practice. While some members felt that the Commission should endeavour to strengthen that right, others drew attention to another aspect of the problem, stressing that there could be no unrestricted free choice of nationality and that the factors which would indicate that a choice was bona fide should be identified and the State must respect and give effect to them by granting its nationality.¹⁵³

99. The Working Group, when it studied this problem, agreed that, at the current preliminary stage of study of the subject, the term "right of option" was used in a very broad sense, covering both the possibility of making a positive choice and that of renouncing a nationality acquired *ex lege*. In the view of the Working Group, since the expression of the will of the individual was a consideration which, with the development of human rights law, had become paramount, States should not be able, as in the past, to attribute their nationality, even by agreement *inter se*, against an individual's will.¹⁵⁴ Of course, these conclusions by the Working Group apply only to certain categories of persons whose nationality is affected by a succession of States, as defined in its report.¹⁵⁵ In theory, individuals for whom the right of option has been envisaged belong, on the one hand, to a "grey area" in which there is an overlap of the categories from whom, in the case of secession and transfer of part of a territory, the predecessor State has an obligation not to withdraw its nationality and the categories to whom the successor State

has an obligation to grant its nationality and, on the other hand, the categories to whom, in cases of the dissolution of a State, no successor State in particular is required to grant its nationality.¹⁵⁶

100. The Working Group also stressed that the right of option should be an effective right and that the States concerned should therefore have the obligation to provide individuals concerned with all relevant information on the consequences of the exercise of a particular option—including in areas relating to the right of residence and social security benefits—so that those persons would be able to make an informed choice.¹⁵⁷ Within the Commission, the view was expressed that a reasonable time limit should be envisaged for the exercise of the right of option.¹⁵⁸

101. As to the legal basis of a right of option, some members of the Commission felt that, while the granting of such a right was desirable, the notion did not necessarily reflect *lex lata* and pertained to the progressive development of international law.¹⁵⁹

102. The debate in the Sixth Committee revealed a considerable uncertainty about the existence, under general international law, of a right of option in the context of State succession. While in the view of some representatives, contemporary international law recognized such a right,¹⁶⁰ according to others, the concept pertained to the realm of progressive development of international law.¹⁶¹ Support was, however, expressed for the Working Group's preliminary conclusions as to the categories of persons who should be granted a right of option.¹⁶²

103. Several members of the Commission cautioned against an unduly broad approach to the right of option. Emphasis was also placed on the need not to reverse the roles: for, it was said, State succession was a matter for States and, notwithstanding legitimate human rights concerns, it was questionable whether the will of individuals could or should prevail in all cases over agreements between States as long as such agreements fulfilled a number of requirements.¹⁶³ Other members, however, took the view that the right of option was anchored in the structure of international law and should, in the context of State succession, be considered as a fundamental human right. It was also believed that the State should exercise its right to determine the nationality in the interest of nation-building judiciously, bearing in mind, for instance, the principle of the unity of the family.¹⁶⁴

¹⁵⁶ *Ibid.*, pp. 114–115, annex, paras. 14 and 21, for the definitions of the categories of individuals to which the States concerned have an obligation to grant a right of option.

¹⁵⁷ *Ibid.*, p. 115, annex, para. 24.

¹⁵⁸ *Ibid.*, p. 40, para. 212.

¹⁵⁹ *Ibid.*, pp. 40–41, para. 213.

¹⁶⁰ See the statement by the Republic of Korea, *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 24th meeting (A/C.6/50/SR.24, para. 90).

¹⁶¹ See the statement by the Islamic Republic of Iran, *ibid.*, 23rd meeting (A/C.6/50/SR.23, para. 51).

¹⁶² A/CN.4/472/Add.1, para. 23.

¹⁶³ *Yearbook ... 1995*, vol. II (Part Two), p. 41, para. 214.

¹⁶⁴ *Ibid.*, para. 215.

¹⁵² *Ibid.*, p. 447.

¹⁵³ See *Yearbook ... 1995*, vol. II (Part Two), p. 38, para. 192.

¹⁵⁴ *Ibid.*, p. 115, annex, para. 23.

¹⁵⁵ *Ibid.*, p. 42, para. 224.

104. Within the scope of the issue of the right of option, one must also address the question raised by one representative in the Sixth Committee: whether persons who had been granted the nationality of the successor State had the right to refuse or renounce such nationality and what the consequences of such refusal entailed.¹⁶⁵ As the Working Group indicated in its report, it was using the term “option” in a broad sense, including the possibility of “opting out”, i.e. renouncing a nationality acquired *ex lege*.¹⁶⁶ Thus, the problem has already been included in the scope of the study.

105. There are a number of examples from State practice where the right of option was granted in situations of State succession. The precedent of the Evian Declaration¹⁶⁷ has already been referred to in the first report.¹⁶⁸ But many other examples can be provided. Indeed, numerous treaties regulating questions of nationality in connection with State succession as well as relevant national laws have provided for the right of option or for a similar procedure enabling individuals concerned to establish their nationality by choosing either between the nationality of the predecessor and that of the successor States or between the nationalities of two or more successor States.

106. The acquisition of Belgian nationality *ipso facto* and the subsequent loss of German nationality by persons habitually resident in the ceded territories provided for under article 36 of the Treaty of Versailles¹⁶⁹ could have been reversed by the exercise of the right of option. According to article 37 of the Treaty:

Within the two years following the definitive transfer of the sovereignty over the territories assigned to Belgium under the present Treaty, German nationals over 18 years of age habitually resident in those territories will be entitled to opt for German nationality.

Option by a husband will cover his wife, and option by parents will cover their children under 18 years of age.

Persons who have exercised the above right to opt must, within the ensuing twelve months, transfer their place of residence to Germany. ...

107. In relation to Alsace-Lorraine, paragraph 2 of the annex relating to article 79 of the Treaty of Versailles enumerated several categories of persons entitled to claim French nationality, in particular, persons not restored to French nationality under other provisions of the annex whose ascendants included a Frenchman or Frenchwoman, persons born or domiciled in Alsace-Lorraine, including Germans, or foreigners who acquired the status of citizens of Alsace-Lorraine. It reserved, at the same time, the right for French authorities, in individual cases, to reject the claim to French nationality. Accordingly, the procedure did not exactly correspond to the traditional notion of the right of option.

¹⁶⁵ See the statement by Japan, *Official Records of the General Assembly, Fiftieth Session, Sixth Committee, 22nd meeting (A/C.6/50/SR.22, para. 36)*.

¹⁶⁶ *Yearbook ... 1995*, vol. II (Part Two), p. 115, annex, para. 23.

¹⁶⁷ 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.

¹⁶⁸ *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/467, p. 175, para. 107.

¹⁶⁹ See paragraph 55 above.

108. Article 85 of the Treaty of Versailles provided for the right of option for a wider range of persons than only German nationals habitually resident in the ceded territories¹⁷⁰ or in any other territories forming part of the Czecho-Slovak State.¹⁷¹ It read:

Within a period of two years from the coming into force of the present Treaty, German nationals over eighteen years of age habitually resident in any of the territories recognised as forming part of the Czecho-Slovak State will be entitled to opt for German nationality. Czecho-Slovaks who are German nationals and are habitually resident in Germany will have a similar right to opt for Czecho-Slovak nationality.

...

Persons who have exercised the above right to opt must, within the succeeding twelve months, transfer their place of residence to the State for which they have opted.

...

Within the same period Czecho-Slovaks who are German nationals and are in a foreign country will be entitled, in the absence of any provisions to the contrary in the foreign law, and if they have not acquired the foreign nationality, to obtain Czecho-Slovak nationality and lose their German nationality by complying with the requirements laid down by the Czecho-Slovak State.

109. Article 91 of the Treaty of Versailles contains essentially similar provisions concerning the right of option for German nationals habitually resident in territories recognized as forming part of Poland who acquired Polish nationality *ipso facto* and for Poles who were German nationals habitually resident in Germany or in a third country.¹⁷²

110. Yet another scenario of option was provided for in article 113 of the Treaty of Versailles:

Within two years from the date on which the sovereignty over the whole or part of the territory of Schleswig subjected to the plebiscite is restored to Denmark:

Any person over 18 years of age, born in the territory restored to Denmark, not habitually resident in this region, and possessing German nationality, will be entitled to opt for Denmark;

Any person over 18 years of age habitually resident in the territory restored to Denmark will be entitled to opt for Germany.

Option by a husband will cover his wife and option by parents will cover their children less than 18 years of age.

Persons who have exercised the above right to opt must within the ensuing twelve months transfer their place of residence to the State in favour of which they have opted. ...

111. Moreover, according to article 106 of the Treaty of Versailles, relating to the Free City of Danzig, German nationals over 18 years of age ordinarily resident in the territory concerned, to whom the provisions of article 105 on automatic loss of German nationality and acquisition of the nationality of the Free City of Danzig applied,¹⁷³ had the right to opt, within a period of two years, for German nationality. After having exercised such right, they

¹⁷⁰ A portion of Silesian territory; see article 83 of the Treaty.

¹⁷¹ Such persons automatically acquired Czecho-Slovak nationality; see article 84 of the Treaty, para. 57 above.

¹⁷² See also paragraph 58 above.

¹⁷³ See paragraph 60 above.

were obliged, during the ensuing 12 months, to transfer their place of residence to Germany.

112. The Peace Treaty of Saint-Germain-en-Laye also contained several provisions on the right of option. Article 78 provided that:

Persons over 18 years of age losing their Austrian nationality and obtaining *ipso facto* a new nationality under Article 70 shall be entitled within a period of one year from the coming into force of the present Treaty to opt for the nationality of the State in which they possessed rights of citizenship before acquiring such rights in the territory transferred.¹⁷⁴

According to article 79 of the Treaty:

Persons entitled to vote in plebiscites provided for in the present Treaty shall within a period of six months after the definitive attribution of the area in which the plebiscite has taken place be entitled to opt for the nationality of the State to which the area is not assigned. The provisions of Article 78 relating to the right of option shall apply equally to the exercise of the right under this Article.

Finally, article 80 stipulated that:

Persons possessing rights of citizenship in territory forming part of the former Austro-Hungarian Monarchy, and differing in race and language from the majority of the population of such territory, shall within six months from the coming into force of the present Treaty severally be entitled to opt for Austria, Italy, Poland, Roumania, the Serb-Croat-Slovene State, or the Czecho-Slovak State, if the majority of the population of the State selected is of the same race and language as the person exercising the right to opt. The provisions of Article 78 as to the exercise of the right of option shall apply to the right of option given by this Article.

113. The Treaty of Neuilly-sur-Seine, the provisions of which on *ipso facto* acquisition and loss of nationality have already been mentioned above,¹⁷⁵ provided for the right of option in articles 40 and 45,¹⁷⁶ drafted along

¹⁷⁴ For the text of article 70, see paragraph 61 above.

¹⁷⁵ Arts. 39 and 44 of the Treaty; see paragraphs 62–63 above.

¹⁷⁶ Article 40 read:

“Within a period of two years from the coming into force of the present Treaty, Bulgarian nationals over 18 years of age and habitually resident in the territories which are assigned to the Serb-Croat-Slovene State in accordance with the present Treaty will be entitled to opt for their former nationality. Serb-Croat-Slovenes over 18 years of age who are Bulgarian nationals and habitually resident in Bulgaria will have a similar right to opt for Serb-Croat-Slovene nationality.

...

“Persons who have exercised the above right to opt must, within the succeeding twelve months, transfer their place of residence to the State for which they have opted.

...

“Within the same period Serb-Croat-Slovenes who are Bulgarian nationals and are in a foreign country will be entitled, in the absence of any provisions to the contrary in the foreign law, and if they have not acquired the foreign nationality, to obtain Serb-Croat-Slovene nationality and lose their Bulgarian nationality by complying with the requirements laid down by the Serb-Croat-Slovene State.”

Article 45 stipulated that:

“Within a period of two years from the coming into force of the present Treaty, Bulgarian nationals over 18 years of age and habitu-

ally resident in the territories assigned to Greece in accordance with the present Treaty will be entitled to opt for Bulgarian nationality.

...

“Persons who have exercised the above right to opt must within the succeeding twelve months transfer their place of residence to the State for which they have opted. ...”

¹⁷⁷ See paragraph 64 above.

¹⁷⁸ Articles 31 to 34 read as follows:

“Article 31.

“Persons over eighteen years of age, losing their Turkish nationality and obtaining *ipso facto* a new nationality under Article 30, shall be entitled within a period of two years from the coming into force of the present Treaty to opt for Turkish nationality.

“Article 32.

“Persons over eighteen years of age, habitually resident in territory detached from Turkey in accordance with the present Treaty, and differing in race from the majority of the population of such territory shall, within two years from the coming into force of the present Treaty, be entitled to opt for the nationality of one of the States in which the majority of the population is of the same race as the person exercising the right to opt, subject to the consent of that State.

“Article 33.

“Persons who have exercised the right to opt in accordance with the provisions of Articles 31 and 32 must, within the succeeding twelve months, transfer their place of residence to the State for which they have opted.

“They will be entitled to retain their immovable property in the territory of the other State where they had their place of residence before exercising their right to opt.

“They may carry with them their movable property of every description. No export or import duties may be imposed upon them in connection with the removal of such property.

“Article 34.

“Subject to any agreements which it may be necessary to conclude between the Governments exercising authority in the coun-

114. When the Soviet Government of Russia ceded to Finland the area of Petsamo (Petschenga), by the Treaty of Tartu of 14 October 1920, the inhabitants of that territory were granted the right of option. Article 9 of the Treaty, which stipulated that Russian citizens domiciled in the ceded territory would automatically become Finnish citizens,¹⁷⁷ also provided that:

... Nevertheless, those who have attained the age of 18 years may, during the year following the entry into force of the present Treaty, opt for Russian nationality. A husband shall opt on behalf of his wife unless otherwise decided by agreement between them, and parents shall opt on behalf of those of their children who have not attained 18 years of age.

All persons who opt in favour of Russia shall be free, within a time limit of one year reckoned from the date of option, to leave the territory, taking with them their movable property, free of customs and export duties. Such persons shall retain full rights over immovable property left by them in the territory of Petschenga.

115. The 1923 Treaty of Lausanne guaranteed the right of option for a period of two years from its entry into force to Turkish nationals habitually resident in the island of Cyprus; Turkey had declared that it recognized the annexation of Cyprus by the British Government. Individuals who opted for Turkish nationality were to leave Cyprus within 12 months of exercising the right of option (art. 21). The Treaty also included provisions on the right of option of Turkish subjects habitually resident in the territories detached from Turkey under that Treaty or natives of those territories who were habitually resident abroad.¹⁷⁸

116. The 1947 Treaty of Peace with Italy envisaged, in addition to the above-mentioned provisions on *ipso facto* acquisition and loss of nationality,¹⁷⁹ that persons domiciled in territory transferred by Italy to other States and whose customary language was Italian would have a right of option.¹⁸⁰

117. Articles III and IV of the Treaty of Cession of the Territory of the Free Town of Chandernagore between India and France provide yet another example of the “opting out” concept. Thus, French subjects and citizens of the French Union who were domiciled in the transferred territory and acquired *ipso facto* Indian nationality under the Treaty¹⁸¹ could, according to article III, by a written declaration made within six months following the coming into force of the Treaty, opt for the retention of their nationality.¹⁸² Article 4 of the Agreement between India and France for the settlement of the question of the future of the French Establishments in India, provided that: “Questions pertaining to citizenship shall be determined before *de jure* transfer takes place. Both the Governments agree that free choice of nationality shall be allowed.”¹⁸³ The Treaty of Cession of the French Establishments of Pon-

tries detached from Turkey and the Governments of the countries where the persons concerned are resident, Turkish nationals of over eighteen years of age who are natives of a territory detached from Turkey under the present Treaty, and who on its coming into force are habitually resident abroad, may opt for the nationality of the territory of which they are natives, if they belong by race to the majority of the population of that territory, and subject to the consent of the Government exercising authority therein. This right of option must be exercised within two years from the coming into force of the present Treaty.”

¹⁷⁹ See paragraph 66 above.

¹⁸⁰ Article 19 read as follows:

“...
“2. The Government of the State to which the territory is transferred shall, by appropriate legislation within three months from the coming into force of the present Treaty, provide that all [Italian citizens domiciled on 10 June 1949 in territory transferred by Italy to another State, and their children born after that date,] ... over the age of eighteen years (or [such married citizens] ... whether under or over that age) whose customary language is Italian, shall be entitled to opt for Italian citizenship within a period of one year from the coming into force of the present Treaty. Any person so opting shall retain Italian citizenship and shall not be considered to have acquired the citizenship of the State to which the territory is transferred. The option of the husband shall not constitute an option on the part of the wife. Option on the part of the father, or, if the father is not alive, on the part of the mother, shall, however, automatically include all unmarried children under the age of eighteen years.
“3. The State to which the territory is transferred may require those who take advantage of the option to move to Italy within a year from the date when the option was exercised.”

At the same time, article 20 provided that Italian citizens whose customary language was one of the Yugoslav languages and who were domiciled in Italy could acquire Yugoslav nationality upon request. This provision covered a category of persons whose nationality was not affected by State succession and is therefore outside the scope of the Commission’s study.

¹⁸¹ See article II of the Treaty, paragraph 67 above.

¹⁸² See footnote 88 above. Article IV of the Treaty read:

“Persons who will have opted for the retention of their nationality in accordance with the provisions of article III of this Treaty and who desire to permanently reside or establish themselves in any French territory outside the Free Town of Chandernagore shall, on application to the Government of the Republic of India, be permitted to transfer or remove such or all of their assets and property as they may desire and as may be standing in their names on the date of the coming into force of this Treaty.”

¹⁸³ United Nations, *Materials on State Succession ...* (footnote 79 above), p. 80.

dicherry, Karikal, Mahe and Yanam, between India and France, also contained provisions on the right of option for French nationals who were otherwise to acquire Indian nationality automatically by virtue of articles 4 and 6 of the Treaty as well as for French nationals who were otherwise, under article 7, to retain their French nationality.¹⁸⁴

118. While some of the documents concerning nationality issues in relation to decolonization contained provisions on the right of option, several did not. Thus, the Burma Independence Act, after having envisaged that the categories of persons specified in the First Schedule to that Act¹⁸⁵ automatically lost British nationality, also provided, in section 2, subsection (2), that any such person who was immediately before independence domiciled or ordinarily resident in any place outside Burma in which the British Monarch had jurisdiction over British subjects could, by a declaration made before the expiration of two years after independence, elect to remain a British subject. In that case, the provisions regarding loss of British nationality would be deemed never to have applied to or in relation to such person or, except so far as the declaration otherwise provided, any child of his who was under the age of 18 years at the date of the declaration.¹⁸⁶ The Act also provided for a right of option for the purpose of avoiding statelessness. Indeed, any person, other than a person mentioned in section 2, subsection (2), who ceased to be a British subject under the Act and upon independence neither became, nor became qualified to become, a citizen of the independent country of Burma had the like right of election as provided for by subsection (2) of section 2.¹⁸⁷

119. Several articles of the Convention on Nationality between France and Viet Nam establish the right of option.¹⁸⁸ Among these provisions, only some relate to the situation of State succession. Thus, in accordance with article 4:

Persons of Viet Nam origin aged more than eighteen at the date of coming into operation of the present Convention, and who have acquired French nationality prior to 8 March 1949 either by individual or collective administrative measure or by judicial decision shall retain

¹⁸⁴ *Ibid.*, p. 87. Article 5 of the Treaty provided that French nationals born in the territory of the Establishments and domiciled therein could, “by means of a written declaration drawn up within six months of the entry into force of the Treaty of Cession, choose to retain their nationality. Persons availing themselves of this right shall be deemed never to have acquired Indian nationality”.

Article 6 further provided that French nationals born in the territory of the Establishments and domiciled in the territory of the Indian Union “and their children shall be entitled to choose as indicated in Article 5 above. They shall make this choice under the conditions and in the manner prescribed in the aforesaid Article”.

Finally, article 8 provided that French nationals born in the territory of the Establishments and domiciled in a country other than the territory of the Indian Union that were otherwise to retain French nationality could, “by means of a written declaration signed in the presence of the competent Indian authorities within six months of the entry into force of the Treaty of Cession, choose to acquire Indian nationality. Persons availing themselves of this right shall be deemed to have lost French nationality as from the date of the entry into force of the Treaty of Cession”.

¹⁸⁵ See paragraph 92 above.

¹⁸⁶ United Nations, *Materials on State Succession ...* (footnote 79 above), pp. 145–146.

¹⁸⁷ *Ibid.*, p. 146, sect. 2, subsect. (3). For the remaining provisions of section 2 on the right of option and its consequences, see subsections (4) and (6).

¹⁸⁸ *Ibid.*, pp. 446–450.

French nationality with the right to opt for Viet Nam nationality under the provisions laid down by the present Convention.

The same provisions shall be applicable to persons of Viet Nam origin who, prior to the coming into operation of the present Convention have acquired French nationality in France under the rules of common law applicable to aliens.

Persons of Viet Nam origin above the age of eighteen at the date of coming into operation of the present Convention who have acquired French citizenship after 8 March 1949 by individual or collective administrative measure or by judicial decision shall acquire Viet Nam nationality with the right to opt for French nationality under the provisions laid down by the present Convention.

Other articles have established a right of option for other categories of persons. This right had to be exercised, in general, within six months after the date of the coming into operation of the Convention, except in the case of minor children, where the time limit began to run from the date on which the infant child attained the age of 18.¹⁸⁹

120. Article 3 of the Treaty between Spain and Morocco regarding Spain's retrocession to Morocco of the Territory of Sidi Ifni read as follows:

With the exception of those who have acquired Spanish nationality by one of the means of acquisition laid down in the Spanish Civil Code, who shall retain it in any case, all persons born in the territory who have had Spanish nationality up to the date of the cession may opt for that nationality by making a declaration of option to the competent Spanish authorities within three months from that date.¹⁹⁰

121. In recent cases of State succession in Eastern and Central Europe, where questions of nationality were not resolved by treaty but solely through the national legislation of the States concerned, the possibility of choice, to the extent permitted by internal law, has been in fact "established" simultaneously in the legal orders of at least two States. The prospect of acquiring nationality by optional declaration on the basis of the legislation of one of the States concerned can be realistically evaluated only in conjunction with the laws of the other relating to renunciation of nationality, release from the nationality bond or loss of nationality. The real impact of the legislation of a successor State regarding optional acquisition of its nationality may also largely depend upon the legislation of the States concerned regarding dual nationality.

122. The Law on State Citizenship in the Slovak Republic contains liberal provisions on the optional acquisition of nationality. According to section 3, paragraph 1, every individual who was on 31 December 1992 a citizen of the Czech and Slovak Federal Republic and did not acquire the citizenship of Slovakia *ipso facto*, had the right to opt for the citizenship of Slovakia. Paragraphs (2) and (3) of section 3 further stipulated that:

(2) An application for citizenship under section (1) can be lodged until 31st December 1993 by way of written statement to the district office on the territory of the Slovak Republic, abroad to the Diplomatic Mission or to the Consulate of the Slovak Republic, according to the place of residence. Husband and wife can lodge a common statement.

(3) In the statement referred to in paragraph (2) the following must be clearly stated:

(a) identity of the person lodging the statement;

(b) the fact that the person lodging the statement was up to 31st December 1992 a citizen of the Czech and Slovak Republic;

(c) place of birth and the residence as at 31st December 1992.

No other requirement, such as permanent residence in the territory of Slovakia, was imposed for the optional acquisition of the citizenship of Slovakia by former Czechoslovak citizens.¹⁹¹

123. The Law on the acquisition and loss of citizenship of the Czech Republic envisages, in addition to provisions on *ex lege* acquisition of Czech nationality, that such nationality may be acquired on the basis of a declaration. According to article 6:

(1) Natural persons who were citizens of the Czech and Slovak Federal Republic as of December 31, 1992, but had neither citizenship of the Czech Republic nor citizenship of the Slovak Republic, can choose citizenship of the Czech Republic by declaration.

(2) Such declaration can be made ... [before a competent authority], according to the place of permanent residence of the natural person making the declaration. Abroad, such declarations shall be made at diplomatic or consular offices of the Czech Republic.

(3) The appropriate office shall issue a certificate of declaration.¹⁹²

While article 6 was addressed to a relatively small number of individuals—there were very few Czechoslovak nationals who did not have at the same time either Czech or Slovak "secondary" nationality—article 18 was addressed to a much larger group and provided that:

(1) Citizens of the Slovak Republic may choose citizenship of the Czech Republic by declaration made by December 31, 1993, at the latest provided that they:

(a) have been residing continuously on the territory of the Czech Republic for at least two years;

(b) present document of release from state citizenship of the Slovak Republic, with the exception of cases when they prove that they have applied for release from citizenship of the Slovak Republic and that their application has not been granted within three months, and simultaneously declare at the district office that they relinquish citizenship of the Slovak Republic: this document is not required in the case that by choosing citizenship of the Czech Republic, citizenship of the Slovak Republic is lost;

(c) have not been sentenced in the past five years for a wilful punishable offence.

The possibility of option was also open to the citizens of Slovakia permanently residing in a third country, provided that their last permanent residence before leaving for

¹⁸⁹ *Ibid.*, p. 449, art. 15.

¹⁹⁰ Tratado por el que el Estado Español retrocede al Reino de Marruecos el territorio de Ifni (Fez, 4 January 1969), *Repertorio Cronológico de Legislación* (Pamplona, Aranzadi, 1969), pp. 1008–1011 and 1041.

¹⁹¹ *Sbierka zákonov ... and Report of the experts of the Council of Europe ...* (see footnote 116 above), appendix V. Although the Slovak Law did not subject the optional acquisition of the Slovak nationality to the requirement of the loss of the other nationality of the individual concerned, according to article 17 of Law No. 40/1993 on the acquisition and loss of citizenship of the Czech Republic (see footnote 114 above), Czech nationals who made an optional declaration pursuant to section 3 of the Slovak Law were deemed to have automatically lost their Czech nationality when they acquired Slovak nationality. (This may not be obvious from the wording of article 17 alone which attaches the loss of Czech nationality to the acquisition of the nationality of another State upon the individual's own request. Nevertheless, the Czech Constitutional Court in its decision of 8 November 1995 (Collection of Laws of the Czech Republic, No. 6/1996) interpreted the notion of "request" as covering also optional declarations.)

¹⁹² *Ibid.*, appendix IV, p. 68.

abroad was on the territory of the Czech Republic or that at least one of their parents was a citizen of the Czech Republic. In such case, the condition under (b) above also applied, but not the condition under (c).

124. Another recent case of State succession in relation to which the question of the free choice of nationality has been raised is the disintegration of the Socialist Federal Republic of Yugoslavia. In its opinion No. 2 of 11 January 1992, the Arbitration Commission of the International Conference on the Former Yugoslavia stated, among other things, that, by virtue of the right of self-determination:

[E]very individual may choose to belong to whatever ethnic, religious or language community he or she wishes. In the Commission's view, one possible consequence of this principle might be for the members of the Serbian population in Bosnia-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.¹⁹³

Although the Arbitration Commission might not necessarily have had in mind exactly the same issue as that of the "right of option" discussed in the first report of the Special Rapporteur and in the report of the Working Group, its opinion undoubtedly has some relevance for the question of nationality discussed by the International Law Commission.¹⁹⁴

5. CRITERIA USED FOR DETERMINING THE RELEVANT CATEGORIES OF PERSONS FOR THE PURPOSE OF GRANTING OR WITHDRAWING NATIONALITY OR FOR RECOGNIZING THE RIGHT OF OPTION

125. The examples from State practice extensively quoted above suggest that there is a broad spectrum of criteria used for determining the categories of persons to whom nationality is granted, those from whom nationality is withdrawn and those who are entitled to exercise the right of option. These criteria are often combined.

126. The mosaic of different criteria used by the Working Group for the purpose of determining the categories of persons whose nationality may be affected as a result of State succession and of formulating certain guidelines for negotiations concerning the acquisition of the nationality of the successor State, the withdrawal of the nationality of the predecessor State and the recognition of a right of option, gave rise to a number of comments both in the Commission and in the Sixth Committee. One representative in the Sixth Committee observed in this respect that too much attention had been given to categorization.¹⁹⁵

127. Some members of the Commission expressed concern that, in their view, the Working Group seemed to confer on *jus soli* the status of a kind of peremptory norm of general international law, whereas the principle

of *jus sanguinis* was much more convoluted. The Commission was therefore invited to start from the premise that individuals had the nationality of the predecessor State and to avoid drawing firm distinctions about the way nationality was acquired. With regard to the criticism relating to an alleged overemphasis on *jus soli*, the Special Rapporteur has already pointed out that the fact of birth had systematically been considered in the Working Group in conjunction with the criterion of the place of habitual residence. Furthermore, the Working Group's conclusions gave a more prominent place to the fact of national residence than to the fact of birth.¹⁹⁶

128. The concept of "secondary nationality" was queried by several members. In particular, the notion that there could be different degrees of nationality under international law and that nationality could refer to different concepts was viewed as questionable.¹⁹⁷ On the other hand, the view was expressed in the Sixth Committee that, in the case of a federal predecessor State composed of entities which attributed a secondary nationality, the application of the criterion of such secondary nationality could provide an option that recommended itself on account of its simplicity, convenience and reliability.¹⁹⁸

129. As to the other criteria considered by the Working Group, some representatives in the Sixth Committee, when commenting on the alleged obligation of the successor State to grant its nationality, underlined the importance of the criterion of habitual residence in the territory of the successor State. One representative, presumably supporting the criterion of habitual residence, expressed the view that the mode of acquisition of the nationality of the predecessor State—as long as it was recognized by international law—and the place of birth were questionable criteria for determining the categories of individuals to which the successor State had an obligation to grant its nationality.¹⁹⁹

130. The remark was further made that the criteria for determining which categories of persons acquired the nationality of the successor State both *ex lege* and through the exercise of the right of option should be established on the basis of existing legal instruments.²⁰⁰ Another representative, commenting on the scope of the right of option as envisaged in a preliminary manner by the Working Group, and making reference to the practice of his own country, expressed the view that the successor State had the duty to grant the right of option for the nationality of the predecessor State—he presumably envisaged the

¹⁹⁶ *Yearbook ... 1995*, vol. II (Part Two), pp. 40–42, paras. 210, 213 and 223.

¹⁹⁷ *Ibid.*, p. 40, para. 211. The objection was raised in particular that the criterion of secondary nationality should be given such importance as is the case in paragraph 11 (d) of the Working Group's report, dealing with the obligation of the predecessor State not to withdraw its nationality from persons having the secondary nationality of an entity that remained part of the predecessor State, irrespective of the place of their habitual residence. It was observed that there was no reason to prohibit the predecessor State from withdrawing its nationality from such persons, after a given period, if the latter resided in the successor State. The criterion of secondary nationality was also questioned in the context of the obligation to grant a right of option to certain categories of persons (para. 212).

¹⁹⁸ A/CN.4/472/Add.1, para. 29.

¹⁹⁹ *Ibid.*, paras. 17–18.

²⁰⁰ *Ibid.*, para. 18.

¹⁹³ ILM, vol. 31, No. 6 (1992), p. 1498. For comments on this aspect of opinion No. 2, see Pellet, "Note sur la Commission d'arbitrage de la Conférence européenne pour la paix en Yougoslavie", pp. 340–341.

¹⁹⁴ For different interpretations of opinion No. 2, see Mikulka, "Legal problems arising from the dissolution of States in relation to the refugee phenomenon", pp. 47–48, and Pellet, "Commentaires sur les problèmes découlant de la création et de la dissolution des États et les flux de réfugiés", pp. 56–57.

¹⁹⁵ See the statement by Brazil, *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 21st meeting (A/C.6/50/SR.21, para. 78).

“opting out” model—only to persons having ethnic, linguistic or religious ties to the latter.²⁰¹

131. In the next stage of its work, the Commission should analyse State practice also from the point of view of the criteria used by States to determine the relevant categories of persons for the purpose of granting or withdrawing nationality or for allowing the option. The use of different criteria by individual States concerned may lead to dual nationality or statelessness. Certain criteria may also be discriminatory. In formulating the principles to be observed by States in this regard, the Commission should resort to criteria and techniques which have been successfully used in practice.

6. NON-DISCRIMINATION

132. During the debate in the Commission, emphasis was placed on the obligation of non-discrimination which international law imposed on all States and which is also applicable to nationality.²⁰² The Working Group, for its part, agreed that, while withdrawal of, or refusal to grant a specific nationality in hypotheses of State succession should not rest on ethnic, linguistic, religious, cultural or other criteria, a successor State should be allowed to take such criteria into consideration, in addition to criteria envisaged by the Working Group in paragraphs 12 to 21 of its report, for enlarging the circle of individuals entitled to acquire its nationality.²⁰³ This position, however, was opposed by a member of the Commission who observed that allowing a successor State to take into consideration ethnic, linguistic, religious or other similar criteria for the purpose of allowing more categories of individuals to acquire its nationality might lead to improper use of those criteria and open the way to discrimination.²⁰⁴

133. The risk that the Working Group’s conclusions on the possibility of enlarging the circle of individuals entitled to acquire the nationality of the successor State based on certain additional criteria might eventually open the way to discrimination merited further study. In support of the Working Group’s conclusions, however, reference may be made to the jurisprudence of the Inter-American Court of Human Rights which, in the case concerning *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*,²⁰⁵ concluded that it was basically within the sovereignty of a State to give preferential treatment to aliens who, viewed objectively, would more easily and more rapidly assimilate within the national community and identify more readily with the traditional beliefs, values and institutions of that country,

²⁰¹ *Ibid.*, para. 23.

²⁰² See the statement by Mr. Crawford (*Yearbook ... 1995*, vol. I, 2388th meeting, pp. 60–61). Similarly, it has recently been stressed by one author that, in cases of State succession, “the habitual or permanent residents of the territory constitute an undifferentiated body in terms of legal link, as a result of which there are no ‘permissible’ grounds for distinguishing among them. A state must, simply, be held to the highest standards of international human rights regulation, both treaty based, where applicable, and of a customary law nature. Among them the principle of non-discrimination figures most prominently” (Pejić, *loc. cit.*, pp. 4–5).

²⁰³ *Yearbook ... 1995*, vol. II (Part Two), p. 39, para. 197.

²⁰⁴ *Ibid.*, p. 41, para. 219.

²⁰⁵ Advisory Opinion OC-4/84 of 19 January 1984, ILR (Cambridge), vol. 79 (1989), p. 283.

and accordingly held that preferential treatment in the acquisition of Costa Rican nationality through naturalization, which favoured Central Americans, Ibero-Americans and Spaniards over other aliens, did not constitute discrimination contrary to the American Convention on Human Rights.²⁰⁶

134. The representatives in the Sixth Committee who touched upon this problem expressed their agreement with the Working Group’s preliminary conclusion that States had the duty to refrain from applying discriminatory criteria, such as ethnicity, religion or language, in the granting or revoking of nationality in the context of State succession.²⁰⁷

7. CONSEQUENCES OF NON-COMPLIANCE BY STATES WITH THE PRINCIPLES APPLICABLE TO THE WITHDRAWAL OR THE GRANTING OF NATIONALITY

135. The problem of the consequences of non-compliance by States with the principles applicable to the withdrawal or the granting of nationality was not dealt with in the Special Rapporteur’s first report. It was addressed by the Working Group as a consequence of the approach adopted, that is to say, the elaboration of guiding principles for negotiations between the States concerned. The Working Group formulated, on a preliminary basis, a number of hypotheses which merit further study,²⁰⁸ one being that a third State should not have to give effect to the decisions of the predecessor or successor State regarding, respectively, the withdrawal of or refusal to grant its nationality in violation of the principles formulated by the Working Group. Thus, a third State would be entitled to accord to an individual the rights or status which he/she would enjoy in the territory of the third State by virtue of being a national of a predecessor or successor State, as the case may be. The question was also asked during the debate in the Commission whether, in cases of extreme gravity, it should not be possible under international law to claim that acts carried out at the national level were null and void, where the decision to divest certain natural persons of their nationality was an element in the persecution of an ethnic minority.²⁰⁹

136. Several members were of the view that the Working Group’s conclusions on the consequences of non-compliance by States with the principles applicable to the withdrawal or the grant of nationality called for further reflection, in particular with regard to the proposal to accord third States the right to judge actions of predecessor or successor States which had failed to comply with the principles applicable in this area. No principle of international law, it was stated, enabled a third State to interfere in problems which a priori concerned the predecessor and successor States alone.²¹⁰

137. Starting from the premise that at least some of the principles governing questions of the withdrawal or grant

²⁰⁶ See also Chan, “The right to a nationality as a human right: the current trend towards recognition”, p. 6.

²⁰⁷ A/CN.4/472/Add.1, para. 24.

²⁰⁸ *Yearbook ... 1995*, vol. II (Part Two), annex, p. 116, para. 29.

²⁰⁹ *Ibid.*, vol. I, 2387th meeting, statement by Mr. Tomuschat, p. 53.

²¹⁰ *Ibid.*, vol. II (Part Two), p. 41, para. 216.

of nationality in the context of State succession came under *lex lata*, particularly when such principles were incorporated in an international agreement concluded between the States concerned, the Working Group agreed that further study was necessary in order to clarify the question of the international responsibility of a predecessor or a successor State for its failure to comply with the above principles.²¹¹ In this regard, certain members of the Commission questioned whether the principles governing international responsibility would suffice, since they governed only inter-State relations. It was also observed that dispute settlement arrangements, including arbitration or, possibly, recourse to the Human Rights Committee, should be envisaged with a view to reaching a decision within a reasonable period of time.²¹²

²¹¹ *Ibid.*, annex, p. 116, para. 30.

²¹² *Ibid.*, p. 41, paras. 217 and 219.

138. According also to a view expressed in the Sixth Committee, this issue merited further consideration, in particular in order to determine whether any relevant principles could be invoked by individuals or whether the debate should concentrate solely on the question of State responsibility.²¹³

139. The consequences of non-compliance cannot be discussed in general and *in abstracto*. They depend mainly on whether a particular principle which has been violated includes at least some elements of *lex lata*. But even for principles reflecting considerations *de lege ferenda*, the consequences are different when such principles are incorporated into a legally binding instrument, such as a bilateral treaty, or when they remain merely at the level of recommendations.

²¹³ A/CN.4/472/Add.1, para. 25.

CHAPTER II

Nationality of legal persons

A. Scope of the problem of the nationality of legal persons and its characteristics

140. The first report addressed the question of the nationality of legal persons in a very preliminary manner.²¹⁴ Despite the analogy between the nationality of physical persons and that of legal persons, the latter has also many specificities which must always be borne in mind. The limits to such analogy have already been generally mentioned in the first report.²¹⁵ Some were also recalled during the debate in the Commission and in the Sixth Committee, while additional differences were put forward as well.

141. The study of this problem is further complicated by the fact that, contrary to natural persons, legal persons can assume various forms. For example, there are two types of commercial corporations: those which have been incorporated *intuitu personae* and which are deemed to be primarily associations of individuals (*sociétés de personnes*), and those which have been established *intuitu pecuniae* and for which capital is a significant consideration (*sociétés de capitaux*); the latter have a more distinct legal personality than the former.²¹⁶ From another perspective, a distinction can be drawn between private corporations and State-owned corporations. Transnational corporations constitute yet another category.²¹⁷ Lastly, the problem of the nationality of legal persons is further complicated by the fact that, unlike physical persons, legal persons do

²¹⁴ *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/467, pp. 166–167, paras. 46–50.

²¹⁵ *Ibid.*, para. 48, quoting *Oppenheim's International Law*, Jennings and Watts, eds.

²¹⁶ Cafilisch, "La nationalité des sociétés commerciales en droit international privé", p. 119, footnote 1. According to this author, the term "commercial corporations" means groups of persons incorporated in accordance with the law who have a profit-making goal and aim to carry out commercial or industrial activity under private law.

²¹⁷ See Seidl-Hohenveldern, *Corporations in and under International Law*.

not necessarily have the same nationality in all their legal relations.²¹⁸

142. At the outset, it can be useful to summarize briefly the purposes for which the determination of the nationality of legal persons may be needed. Generally speaking, the problem of the nationality of legal persons arises mainly:

- (a) In the area of conflicts of laws;
- (b) In the context of the law on aliens;
- (c) In the context of diplomatic protection;
- (d) In relation to State responsibility.

This issue therefore concerns both private international law and public international law.

1. THE NATIONALITY OF LEGAL PERSONS IN THE AREA OF CONFLICTS OF LAWS

143. Under private international law, when the activities of a legal person extend beyond the borders of any one State, the question arises of how to determine which rules regulate its legal status, or how to decide whether a given entity comes under the legal order of one State rather than another. There are a number of rules under private international law to connect such an entity to one legal order rather than another.²¹⁹ The nationality of the legal person is one such point of attachment. In the view of one author:

²¹⁸ *Yearbook ... 1995*, vol. I, 2387th meeting, statement by Mr. Tomuschat, p. 53.

²¹⁹ Apart from the provisions regarding conflict of laws, whose function is simply to indicate to which legal order one should refer in order to settle the problem in question, private international law also contains rules which provide a practical solution to the legal question which arises with regard to a foreign physical or legal person, for example, the rules governing *cautio judicatum solvi*.

... each State legal order is free to choose the point or points of attachment (domicile, nationality, etc.) it deems appropriate; however, once nationality has been chosen as a point of attachment, there is an obligation to determine the nationality of each individual on the basis of the criteria established by *lex causae*, that is to say by the law of the State whose nationality is involved.²²⁰

144. The nationality of legal persons is normally established by reference to one or more elements such as actual place of management, incorporation or formation, centre of operations and, sometimes, control or dominant interest. While in some legislations of the European continent reference is made to incorporation—formation—and the actual place of management as alternative criteria for determining the nationality of a legal person, under Anglo-American law, the norms relating to the legal status of commercial corporations do not include nationality as a point of attachment, but go directly to incorporation or formation.²²¹

2. THE NATIONALITY OF LEGAL PERSONS IN THE INTERNATIONAL CONVENTIONS CONTAINING RULES OF INTERNATIONAL PRIVATE LAW

145. International conventions frequently refer to the nationality of commercial corporations without regulating how that nationality is to be determined. The criteria used most frequently, however, are those of incorporation—or formation—and actual place of management. These criteria are sometimes combined, particularly in many treaties on establishment and trade.²²²

3. THE NATIONALITY OF LEGAL PERSONS IN THE SPHERE OF THE LAW ON ALIENS

146. In the sphere of the law of aliens, the concept of the nationality of legal persons seems to be generally accepted.²²³ Under English law and American law, the nationality of legal persons is dependent on the criterion of incorporation or formation. French law determines it by reference to relevant criteria in the area of conflicts of laws—the actual place of management or sometimes incorporation or formation—while under German law it is generally determined on the basis of the registered office.²²⁴ Despite their common characteristics, the various legislations are far from uniform.

²²⁰ Cafilisch, loc. cit., pp. 123–124.

²²¹ Ibid., pp. 130 and 142.

²²² See, for example, the Treaty of Commerce and Navigation between Norway and Japan (Tokyo, 28 February 1957), United Nations, *Treaty Series*, vol. 280, p. 88; the Agreement on commercial and economic co-operation between the United Kingdom of Great Britain and Northern Ireland and Cameroon (London, 29 July 1963), *ibid.*, vol. 478, p. 150; the Treaty of Trade and Navigation between Czechoslovakia and Bulgaria (Sofia, 8 March 1963), *ibid.*, vol. 495, p. 232; the German-Malagasy treaty concerning the encouragement of investments (21 September 1962), *Investment Promotion and Protection Treaties 1962*, vol. II (Dobbs Ferry, N.Y., Oceana Publications, 1992), p. 1; and the Agreement concerning economic co-operation and trade between Spain and Gabon (Libreville, 6 February 1976), United Nations, *Treaty Series*, vol. 1010, p. 98.

²²³ See, for example, Cauvy, “Sociétés en droit international”, pp. 465–467; Bastid and Luchaire, “La condition juridique internationale des sociétés constituées par les étrangers”, pp. 159–167; Loussouarn, *Les conflits de lois en matière de sociétés*, pp. 90–92; and Coulombel, *Le particularisme de la condition juridique des personnes morales de droit privé*, pp. 352 et seq.

²²⁴ Cafilisch, loc. cit., pp. 130, 133, 137 and 142.

147. Meanwhile, other criteria, such as that of control, have been used to categorize as “nationals” of enemy States corporations which are controlled by enemy nationals.²²⁵ In this case, the concept of nationality has a broader significance, in other words, it is a question not so much of determining nationality as of establishing the “enemy nature” of the corporation.²²⁶

4. THE NATIONALITY OF LEGAL PERSONS IN THE SPHERE OF DIPLOMATIC PROTECTION

148. Nationality is a prerequisite for the exercise, by a State, of diplomatic protection of an individual or of a legal person. As Seidl-Hohenveldern points out:

As corporations have rights and duties of their own, the corporation as such and not its members are in need of diplomatic protection. As international law grants to each State the right to proffer diplomatic protection to its nationals, a corporation, in order to obtain diplomatic protection would have to prove that it possessed the nationality of the State concerned.²²⁷

But once again the differences between natural and legal persons are to be kept in mind. As the same author adds:

Nationality is sometimes seen as a mutual bond of loyalty existing between a State and its citizens, and diplomatic protection as a product of this bond.

On this basis corporations seem unlikely contenders for diplomatic protection. However, a more modern view bases a State’s right to grant diplomatic protection on the fact that even when a State appears to be merely espousing the claim of one of its nationals, nonetheless it is also protecting its own rights and interests. ...²²⁸

Since a corporation is, by definition, the owner of its assets, it is difficult to see why a right to diplomatic protection based on this concept of property should not extend to property held by corporations.²²⁹

149. Consequently, according to one school of thought, the criterion of substantial interest or control, as a criterion for determining the nationality of a legal person, becomes much more relevant in the context of diplomatic protection than in private international law. Some authors, however, warn against the “lifting of the corporate veil” to which acceptance of the “control test” would lead and

²²⁵ See United States Executive Order No. 8389 of 10 April 1940, which provided:

“The term ‘national’ of Norway or Denmark shall include ... any partnership, association, or other organization, including any corporation organized under the laws of, or which on April 8, 1940, had its principal place of business in Norway or Denmark or which on or after such date has been controlled by, or a substantial part of the stock, shares, bonds, debentures, or other securities of which has been owned or controlled by, directly or indirectly, one or more persons, who have been, or who there is reasonable cause to believe have been, domiciled in, or the subjects, citizens or residents of Norway or Denmark at any time on or since April 8, 1940, and all persons acting or purporting to act directly or indirectly for the benefit or on behalf of the foregoing” (1940 *Federal Register*, vol. 5 (Government Printing Office), p. 1400).

²²⁶ See Dominicé, *La notion du caractère ennemi des biens privés dans la guerre sur terre*, pp. 55, 66–68, 83 and 98.

²²⁷ Seidl-Hohenveldern, *Corporations ...*, p. 7.

²²⁸ Seidl-Hohenveldern refers, in this respect, to the view expressed by several judges in the *Barcelona Traction* case. See the Separate Opinions of Judges Gros and Jessup and the Dissenting Opinion by Judge Riphagen, *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, respectively, at pp. 269, 196 and 336.

²²⁹ Seidl-Hohenveldern, *Corporations ...*, p. 8.

consider it quite inappropriate even in the area of diplomatic protection, recalling that:

In the *Barcelona Traction* case the International Court of Justice, while admitting that the corporate veil may be lifted under certain circumstances,²³⁰ refused to do so in the case before it. The Court would have accepted the *jus standi* of the shareholders' home State had the corporation ceased to exist. On the demise of a corporation its shareholders become the owners of its assets on a *pro rata* basis.²³¹

5. THE NATIONALITY OF LEGAL PERSONS IN THE SPHERE OF STATE RESPONSIBILITY

150. The criterion of control of the corporation or the notion of “*intérêt substantiel*”²³² can be of some significance in the field of the responsibility of States under international law for certain acts or activities of their nationals. The question arises, however, as to whether the determination of the “nationality” of a corporation is not superfluous or even useless for the resolution of the problem of responsibility.

6. THE IMPACT OF STATE SUCCESSION ON THE NATIONALITY OF LEGAL PERSONS

151. The impact of State succession on these criteria for attachment is *prima facie* obvious. The criterion of actual place of management can give rise to attachment to the successor State in the case of unification, to one of the successor States in the case of dissolution, or, in the case of partial succession, to either the successor State or the predecessor State.²³³ The criterion of incorporation, on the other hand, can produce much more varied results: in cases in which the predecessor State ceases to exist, such as cases of unification through absorption, the legal order of the predecessor State may simply disappear. In cases of dissolution, the regime may be taken over—maintained—by all the successor States. In cases of separation of part of a territory, the legal order of the predecessor State continues to exist in that State and may at the same time be taken over—maintained—by the successor State.

152. It is therefore obvious that as regards the nationality of legal persons, State succession can give rise to conflicts that are negative (statelessness) or positive (dual nationality or multiple nationality), and these problems are not merely academic.²³⁴

²³⁰ *I.C.J. Reports 1970* (footnote 228 above), pp. 38–39, paras. 56–58.

²³¹ Seidl-Hohenveldern, *Corporations* ..., p. 9.

²³² See Caflisch, *loc. cit.*, p. 125, footnote 22.

²³³ In the Sixth Committee, one delegation, commenting on what could be considered a substantive issue, expressed the view that those legal persons which had their headquarters in what became the territory of the successor State should automatically acquire that State's nationality on the date of succession. See the statement by Greece, *Official Records of the General Assembly, Fiftieth Session, Sixth Committee, 22nd meeting (A/C.6/50/SR.22, para. 63)*.

²³⁴ See Caflisch, *loc. cit.*, pp. 150–151. This author notes, on the one hand, that while cases of statelessness may arise, they are actually rare, and that, indeed, the examples of statelessness most frequently cited by authors derive from premises which seem to be erroneous. On the other hand, he concludes that the theory of international private law generally allows that a company can have two or more nationalities, and that in order to resolve positive conflicts of nationality, State courts will give preference, as in the case of individuals, to the nationality which is the most effective.

153. In order to resolve this type of problem, peace treaties concluded after the First World War contained special provisions in this respect. In accordance with article 54, paragraph 3, of the Treaty of Versailles:

Such juridical persons will also have the status of Alsace-Lorrainers as shall have been recognised as possessing this quality, whether by the French administrative authorities or by a judicial decision.²³⁵

154. As for article 75 of the Peace Treaty of Saint-Germain-en-Laye, it read:

Juridical persons established in the territories transferred to Italy shall be considered Italian if they are recognised as such either by the Italian administrative authorities or by an Italian judicial decision.

155. The article additional to article 11 of the Treaty of Peace between Russia and Estonia (Tartu, 2 February 1920), read as follows:

The Russian Government will hand over to the Estonian Government *inter alia* the shares of those joint-stock companies which had undertakings in Estonian territory, in so far as such shares may be at the disposal of the Russian Government as a result of the decree of the Central Executive Committee regarding the nationalization of the banks of December 14th, 1917 ... Similarly, the Russian Government agrees that the registered offices of the joint-stock companies above mentioned shall be regarded as transferred to Reval and that the Estonian authorities shall be entitled to amend the statutes of such companies in accordance with the rules to be laid down by those authorities. ... [T]he above-mentioned shares shall only confer on Estonia rights in respect of those undertakings of the joint-stock companies which may be situated in Estonian territory and in no case shall the rights of Estonia extend to undertakings of the same companies outside the confines of Estonia.²³⁶

156. Among other conventions which have regulated the question of the nationality of corporations during changes of territorial sovereignty, mention may also be made of the Convention relating to Manufacture and Transport Undertakings, forming Annex C to the Commercial Convention between Austria and Poland (25 September 1922),²³⁷ which granted Austrian companies which had undertakings in the territories ceded to Poland the right to transfer their seat of business and register their statutes in Poland; and the Agreement regarding Companies, namely Legal Persons, incorporated Commercial and other Associations, other than Banks and Insurance Companies concluded between Austria and Italy (16 July 1923),²³⁸ which granted Italy the right to request that companies engaged in production or transport in territory ceded to Italy should transfer their headquarters to the territory of Italy, register in Italy, and remove their names from the Austrian commercial registers.

157. Article 9, paragraph 2, of the Agreement between India and France for the settlement of the question of the

²³⁵ Moreover, article 75, paragraph 1, of the Treaty read:

“Notwithstanding the stipulations of Section V of Part X (Economic Clauses) of the present Treaty, all contracts made before the date of the promulgation in Alsace-Lorraine of the French decree of November 30, 1918, between Alsace-Lorrainers (whether individuals or juridical persons) or others resident in Alsace-Lorraine on the one part, and the German Empire or German States and their nationals resident in Germany on the other part, the execution of which has been suspended by the armistice or by subsequent French legislation, shall be maintained.”

²³⁶ *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, pp. 11–12. This provision gave rise to the dispute between Estonia and Lithuania regarding the Railway.

²³⁷ League of Nations, *Treaty Series*, vol. LIX, p. 307.

²³⁸ *Ibid.*, vol. XXVII, p. 383.

future of the French Establishments in India (21 October 1954), stipulated:

The Government of India agree to recognise as legal corporate bodies, with all due rights attached to such a qualification, the 'Conseils de fabrique' and the administration boards of the Missions.²³⁹

158. Since the determination of the nationality of legal persons for the purposes of diplomatic protection or of State responsibility may be governed by rules that are different from those applicable in private international law, the problem of the consequences of State succession for the nationality of a legal person is a separate issue. The nationality of the legal person, if determined on the basis of the criterion of control, may, in principle, change if there is a change in the nationality of the shareholders as a result of State succession. The solution therefore depends largely on the question of the nationality of physical persons. In the case of State-owned corporations, the solution is linked to the problem of the division of property between the predecessor State and the successor State or States, or among the successor States, as the case may be.

B. Consideration of the problem of the nationality of legal persons in the Commission and in the Sixth Committee

159. Two different positions emerged from the debate in the Commission: according to some members, this subject was important in practical terms and interesting from the legal standpoint and in much greater need of codification than was that of natural persons.²⁴⁰ The point was also made that, because the practice of States with regard to the nationality of legal persons presented many common elements, this issue offered more fertile ground for codification in the traditional sense than that of the nationality of natural persons. Other members, however, took the view that the question of legal persons was a separate and highly specific one, which should only be considered at a later stage. It was also believed that this question did not need to be dealt with by the Commission inasmuch as multinational corporations had the means to take care of their own interests.²⁴¹

160. Nevertheless, all members seemed to agree that the two parts of the topic should be separated since each had its specificities and required a different method of work. Views were divided as far as the urgency of the question of the nationality of legal persons was concerned. Those who considered that the question deserved prompt consideration by the Commission stressed that rules concerning the nationality of legal persons might be more common in State practice and customary law, thus lending themselves more easily to systematization, in contrast to the striking absence of specific provisions on the nationality of natural persons in the context of State succession in the legislation of the majority of States.

161. The reasons for which the Working Group did not examine the question of the nationality of legal persons

are explained in paragraph 10 above. The lack of progress on this part of the topic should not be interpreted as reflecting unawareness of the importance of the question on the part of the Working Group.²⁴²

C. Questions to be examined by the Working Group during the forty-eighth session of the Commission

162. As indicated above, in order to provide some guidance for the future work of the Commission on this part of the topic, the Working Group, during the forty-eighth session of the Commission, might devote some time to the consideration of the problems mentioned in section A above.

163. It should nevertheless be borne in mind that the Commission has not set itself the task of considering the problem of the nationality of legal persons in its entirety. Its duty is to concentrate on one aspect of the problem, namely the automatic change in the nationality of legal persons resulting from State succession. Such succession causes a change in the elements of fact which are used as criteria for determining the nationality of a legal person. Consequently, the Working Group could initially consider the kind of practical problems which State succession raises when applying the normal criteria to different ends and the possible interest that States may have in receiving guidance in this field.

164. However, as in the case of individuals, the main question which arises is whether the problem of the nationality of legal persons falls entirely within the scope of internal law and treaty law, as the case may be, or whether general international law has also some role to play in this respect. According to one point of view:

As with natural persons, international law imposes certain limits on the right of a State to bestow its nationality on a corporation. It may do so only if the corporation is either established under its law, or has its seat, centre of management or exploitation there, or is controlled by shareholders who are nationals of the State concerned.²⁴³

165. The Commission also noted during the debate at its forty-seventh session that although certain legal systems do not regulate the nationality of corporations, international law attributes a nationality to those legal persons for its own purposes, and that nationality can be affected by State succession.²⁴⁴

166. As the Working Group concluded and as several representatives in the Sixth Committee underlined, one of the reasons for the broader acceptance of the role of international law in resolving matters relating to the nationality of natural persons is the increasing interest of the international community in the protection of human rights. In this respect, it is pertinent to recall that, as was observed during the debate in the Sixth Committee, contrary to the situation of natural persons who could, through a change of nationality, be affected in the exercise of fundamental civil and political rights and, to a certain extent, of economic and social rights, State succession

²³⁹ United Nations, *Materials on Succession of States ...* (footnote 79 above), p. 81.

²⁴⁰ *Yearbook ... 1995*, vol. II (Part Two), pp. 39–40, para. 205.

²⁴¹ *Ibid.*, p. 37, para. 179, and pp. 39–40, para. 205.

²⁴² *Ibid.*, p. 39, para. 200, comments of the Special Rapporteur.

²⁴³ Seidl-Hohenveldern, *Corporations ...*, p. 8; see also the same author in *Völkerrecht*, p. 280.

²⁴⁴ *Yearbook ... 1995*, vol. I, 2388th meeting, statement by Mr. Crawford, pp. 60–61.

has mainly economic or administrative consequences for legal persons.²⁴⁵ Consequently, why and how can international law intervene in the area of the determination of the nationality of legal persons?

²⁴⁵ A/CN.4/472/Add.1, para. 12.

167. As in the case of the nationality of individuals, the Working Group should also consider the question of the possible outcome of the Commission's work on this part of the topic and the form it could take.

CHAPTER III

Recommendations concerning future work on this topic

168. Based on a study of the Commission's debate on the first report of the Special Rapporteur and the report of the Working Group and of the Sixth Committee's debate on chapter III of the report of the Commission, and after contrasting the hypotheses which the Working Group outlined in its report with the national legislation at its disposal on the topic of nationality,²⁴⁶ and also taking account of the various nationality-related problems in relation to State succession identified by different international forums (*inter alia*, the Commission and the Sixth Committee), the Special Rapporteur herewith submits several proposals which the Commission, and particularly its Working Group, could consider with a view to completing its preliminary study of the topic and making appropriate recommendations concerning future work.

A. Division of the topic into two parts

169. In his first report, the Special Rapporteur raised the question of the possible division of the topic into two parts, i.e. the nationality of natural persons and the nationality of legal persons, and proposed that the former be considered first.²⁴⁷ Several members of the Commission agreed with this suggestion. It was observed in this connection that natural persons, i.e. the population, constituted one of the essential elements on which the very existence of a State depended and that natural persons were more likely than legal persons to suffer in the event of a succession of States.²⁴⁸ The point was made, however, that the problem of the nationality of legal persons was perhaps not so different from that of the nationality of natural persons and that, consequently, the Commission should, from the very beginning, seek to determine whether there were common principles applicable to the nationality of both legal and natural persons.²⁴⁹

170. Several representatives in the Sixth Committee also agreed with the recommendation that the Commission should deal separately with the nationality of natural persons and the nationality of legal persons and give priority to the former, which was considered more urgent. To justify such separate treatment it was argued, in particular, that:

(a) Natural persons constitute an essential element of statehood;

(b) It is difficult to establish, under general international law, a duty to grant nationality to certain legal persons, as might be the case for natural persons;

(c) Conventions on the reduction of statelessness and on nationality usually refer to natural persons;

(d) Human rights norms are not applicable to legal persons;

(e) The regime governing legal persons in cases of State succession depends mainly on the continued application of the civil law of the predecessor State (reception of the municipal law).²⁵⁰

No delegation saw any advantage in the joint consideration of the two aspects of the topic.

171. The Special Rapporteur therefore suggests that the Commission take the decision to separate the subject under consideration into two parts, namely "Succession of States and its impact on the nationality of natural persons" and "Succession of States and its impact on the nationality of legal persons", and that the former be studied first. In the light of the progress achieved on the first part of the topic and any decision concerning the inclusion of new items in its programme of work, the Commission can decide at a later stage whether the study of the second part should be delayed until completion of the work on the first part or whether it should be resumed earlier, in parallel with the consideration of the first part of the subject.

172. This division does not mean in any way that the Commission should ignore certain links existing between both parts of the topic. As was stated, for instance, in the Sixth Committee, the change of the nationality of legal persons might affect the property rights of natural persons.²⁵¹ Similarly, the change of the nationality of individual shareholders controlling the legal person as a result of State succession can have far-reaching consequences on the status of that legal person.

B. Non-consideration of the problem of continuity of nationality

173. Chapter VII of the initial report of the Special Rapporteur concerning the problem of continuity of nation-

²⁴⁶ The idea that the preliminary study should be informed by practice and not simply be an academic exercise has been expressed both in the Commission and in the Sixth Committee.

²⁴⁷ *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/467, p. 167, para. 50.

²⁴⁸ *Ibid.*, vol. I, 2388th meeting, statements by Mr. Pambou-Tchivounda and Mr. Crawford, pp. 55 et seq.

²⁴⁹ *Ibid.*, vol. II (Part Two), p. 37, para. 178.

²⁵⁰ A/CN.4/472/Add.1, para. 11.

²⁵¹ See the statement by Slovenia, *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 22nd meeting (A/C.6/50/SR.22, para. 56).

ality²⁵² drew two kinds of comments from the members of the Commission. First, several members agreed that the implications of State succession for the law of diplomatic protection were worth examining. Some members even expressed preliminary views on the problem itself, pointing out that it would be appropriate to make the rule of continuity apply only to situations where a change of nationality came about through the free choice of an individual and not as a result of a change in the status of a territory.²⁵³ In its consideration of the issue, the Working Group reached a similar preliminary conclusion. The Working Group agreed that the rule of continuity of nationality should not apply when the change of nationality was the result of State succession, and stressed that the purpose of that rule was to prevent the abuse of diplomatic protection by individuals who acquired a new nationality in the hope of thereby strengthening their claim to such protection.²⁵⁴

174. Secondly, it was asked whether it was appropriate to deal with that particular problem in the context of the topic under consideration.²⁵⁵

175. During the debate in the Sixth Committee, some representatives expressed agreement with the Working Group's conclusion that the rule of continuity of nationality should not apply when the change of nationality resulted from State succession. It was at the same time suggested that this question should be examined under the proposed topic of diplomatic protection, if such topic were to be included in the Commission's agenda.²⁵⁶

176. Taking into account paragraph 8 of General Assembly resolution 50/45, in which the Assembly noted the suggestions of the Commission to include in its agenda the topic "Diplomatic protection" and decided to invite Governments to submit comments on these suggestions through the Secretary-General for consideration by the Sixth Committee during the fifty-first session of the Assembly, the Special Rapporteur recommends leaving the question of the rule of the continuity of nationality for further consideration in the framework of the topic of diplomatic protection, should the latter be included in the Commission's programme of work.

C. Working method of the Commission in dealing with the topic

1. CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW ON THE SUBJECT

177. The Commission supported the Special Rapporteur's suggestion that it should adopt a flexible approach involving codification and development of international law.²⁵⁷ In the same vein, it was noted that the Commis-

²⁵² *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/467, p. 176, paras. 112–114.

²⁵³ *Ibid.*, vol. II (Part Two), p. 37, para. 180.

²⁵⁴ *Ibid.*, p. 116, annex, para. 32. For the discussion on the usefulness of distinguishing, in this context, between the different legal bases for a change of nationality, see pp. 41–42, paras. 218 and 227.

²⁵⁵ *Yearbook ... 1995*, vol. I, 2389th meeting, statement by Mr. Pellet, pp. 64–66.

²⁵⁶ A/CN.4/472/Add.1, paras. 26–27.

²⁵⁷ *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/467, pp. 161–162, paras. 20–21, and vol. II (Part Two), pp. 33–34, para. 151.

sion could base its approach partly on *lex lata* and partly on *lex ferenda*.²⁵⁸ The outcome of the Working Group's efforts was considered, in that regard, to involve both codification (inasmuch as fundamental human rights were involved) and progressive development (as far as matters of succession of States were concerned).²⁵⁹

178. As for future work, although a mixed approach was preferable, it would nevertheless be necessary to clarify the sources and rules of law underlying any obligations incumbent on predecessor and successor States which the Commission might identify. The Commission should also indicate the areas in which international law seemed inadequate and which, consequently, lent themselves to progressive development. It should also ensure that any progressive development of law which it might propose was consistent with realistic expectations.²⁶⁰ During the discussion, emphasis was placed, in that regard, on the importance of examining State practice, essentially in order to give specific illustrations and to focus on the advantages and drawbacks of the solutions actually adopted, though the Commission would not set itself up as a court of State practice in the area of nationality.²⁶¹ A detailed study of national laws and of State practice was considered all the more necessary in that nationality comprised economic, social, cultural and political aspects.²⁶²

179. However, there was some disagreement as to how much weight should be given to recent practice: while some members thought that the latter should be taken as a starting point,²⁶³ others felt that the Working Group's report had placed undue emphasis on the experience of the Eastern European States and that too little attention had been paid to the experience of former colonial States, from which useful lessons could be drawn.²⁶⁴

180. During the debate in the Sixth Committee, it was also emphasized that the Commission should carefully examine State practice.²⁶⁵

2. TERMINOLOGY USED

181. The Special Rapporteur's suggestions on the terminology used²⁶⁶ were generally approved by the Commission and were not specifically commented upon in the Sixth Committee.

3. CATEGORIES OF STATE SUCCESSION

182. The classification of cases of State succession proposed by the Working Group which was based on the suggestions contained in the first report of the Spe-

²⁵⁸ *Ibid.*, vol. I, 2389th meeting, statement by Mr. Villagrán Kramer, p. 64.

²⁵⁹ *Ibid.*, vol. II (Part Two), p. 39, para. 203.

²⁶⁰ *Ibid.*, para. 204.

²⁶¹ *Ibid.*, p. 36, para. 167.

²⁶² *Ibid.*, vol. I, 2413th meeting, statement by Mr. Sreenivasa Rao, p. 230.

²⁶³ *Ibid.*, vol. II (Part Two), p. 36, para. 167.

²⁶⁴ *Ibid.*, vol. I, 2411th meeting, statement by Mr. Kusuma-Atmadja, p. 218.

²⁶⁵ A/CN.4/472/Add.1, para. 3.

²⁶⁶ *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/467, pp. 162–163, paras. 26–28.

cial Rapporteur²⁶⁷ was considered by representatives in the Sixth Committee to be a practical analytical tool for the consideration of the rights and obligations of the predecessor and successor States in respect of nationality. Attention was drawn to the fact that some situations involving a change of sovereignty were very complex and did not fit exactly into any of the categories considered by the Working Group.²⁶⁸ The decision of the Commission to deal exclusively with cases of succession considered lawful under international law also received support in the Sixth Committee.²⁶⁹

4. SCOPE OF THE PROBLEM UNDER CONSIDERATION

183. The scope of the study as circumscribed in the first report of the Special Rapporteur²⁷⁰ encompasses all questions raised during the debate in the Sixth Committee.²⁷¹

184. The Special Rapporteur's comments on the scope of the problem *ratione temporis*²⁷² seem to have been supported by the members of the Commission. In fact, it was considered necessary to provide for a transitional status to be applied while legislation on nationality was being prepared in a successor State or while an agreement was being negotiated on the conferral of nationality following State succession, and even while the individual concerned was exercising his right of option.²⁷³

185. One representative in the Sixth Committee mentioned, as an issue calling for further consideration, the problem of the length of the transition period before successor States adopted their nationality laws.²⁷⁴ This observation also supports the conclusions as to the scope *ratione temporis* of the study contained in the first report of the Special Rapporteur.²⁷⁵

D. Form which the outcome of the work on this topic might take

186. Paragraph 7 of General Assembly resolution 48/31 and paragraph 6 of General Assembly resolution 49/51, by which the Assembly endorsed the intention of the

Commission to include the present topic in its agenda of work, provide that that decision was adopted on the understanding that the final form to be given to the work on that topic would be decided after a preliminary study was presented to the Assembly.

187. The first report of the Special Rapporteur left open the question of the possible outcome of the work on the topic and the form it might take. However, during the debate in the Commission, several members made preliminary remarks on the issue. Some felt that the Commission should present the General Assembly with a number of options and possible solutions.²⁷⁶ It was also held that the elaboration of a treaty was a lengthy process which could not respond to the current pressing need of certain States for criteria that should guide their conduct in the area under consideration. Moreover, the need was stressed for the utmost prudence before embarking on the elaboration of new instruments.²⁷⁷

188. A distinction was further drawn between the two parts of the topic, and it was stated that, while the issue of the nationality of legal persons offered more fertile ground for codification, the issue of the nationality of natural persons, which owing to the wide variety and sensitivity of individual situations required a case-by-case approach, would be more appropriately dealt with in the framework of a study.²⁷⁸

189. The following options were suggested:

(a) Elaboration of a list of principles to be laid down in agreements concluded between States on the subject;

(b) Consideration of general factors or criteria which States would be free to adapt to specific cases;

(c) Consideration of a series of presumptions, such as the presumption that every person has the right to a nationality, that every person has, in fact, a nationality, that no person should become stateless as a result of State succession, that a nationality acquired as a result of State succession is effective from the date of succession, and that the nationality of a person is that of the strongest attachment.²⁷⁹

190. In summing up the discussion on his first report, the Special Rapporteur stressed that, if the Commission wished to lay down general principles for submission to States, a declaration would be the appropriate instrument, whereas if it concentrated on a specific area, such as statelessness, it could contemplate a more ambitious instrument, such as an amendment or optional protocol to the Convention on the Reduction of Statelessness.²⁸⁰

191. The question of the possible outcome of the Commission's work on the topic was also addressed by some representatives in the Sixth Committee. The following options were proposed:

(a) Drafting of guidelines;

²⁶⁷ Ibid., pp. 173–174, paras. 90–95.

²⁶⁸ A/CN.4/472/Add.1, para. 28.

²⁶⁹ See the statement by Greece, *Official Records of the General Assembly, Fiftieth Session, Sixth Committee, 22nd meeting (A/C.6/50/SR.22, para. 63)*.

²⁷⁰ *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/467, pp. 174–175, paras. 96–111.

²⁷¹ The question nevertheless arises whether the proposal made by one representative in the Sixth Committee to address the issue of the conferral of the nationality of the successor State upon certain categories of persons on an individual basis and upon request (see A/CN.4/472/Add.1, para. 18) falls within the scope *ratione materiae* envisaged for the study of the topic. Although the answer seems to be in the negative, in practice some successor States have substituted the procedure of conferral of nationality upon request for the procedure of option and the Commission might therefore show some flexibility and take the above suggestion into consideration.

²⁷² *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/467, p. 175, para. 111.

²⁷³ Ibid., vol. I, 2387th meeting, statement by Mr. Bowett, p. 53.

²⁷⁴ See the statement by Finland, *Official Records of the General Assembly, Fiftieth Session, Sixth Committee, 24th meeting (A/C.6/50/SR.24, para. 65)*.

²⁷⁵ See footnote 272 above.

²⁷⁶ *Yearbook ... 1995*, vol. II (Part Two), p. 36, para. 168.

²⁷⁷ Ibid., para. 169.

²⁷⁸ Ibid., p. 37, para. 179.

²⁷⁹ Ibid., p. 36, para. 170.

²⁸⁰ Ibid., p. 38, para. 193.

- (b) Drafting of model clauses;
- (c) Drafting of a declaration setting forth general principles;
- (d) Drafting of a convention covering a specific aspect of the topic;
- (e) Drafting of a comprehensive convention on the matter.²⁸¹

²⁸¹ A/CN.4/472/Add.1, paras. 13–15. The last proposal was made only by one delegation and met with the opposition of several others. One representative, without specifying the form of the instrument she

192. In view of the fact that the Working Group suggested the elaboration of a set of guidelines for States concerned to implement the obligation to resolve by agreement possible problems concerning the nationality of natural persons, the most appropriate outcome of the Commission's work seems to be an instrument of a declaratory nature, drafted in the form of articles accompanied by commentaries.

had in mind, cautioned against the adoption of an instrument which would contain standards stricter than those of existing norms on the subject and would not reflect current practice.

CHECKLIST OF DOCUMENTS OF THE FORTY-EIGHTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/472 and Add.1	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fiftieth session of the General Assembly	Mimeographed.
A/CN.4/473	Provisional agenda	Mimeographed. For agenda as adopted, see <i>Yearbook ... 1996</i> , vol. II (Part Two), p. 12, para. 12.
A/CN.4/474 [and Corr.1]	Second report on State succession and its impact on the nationality of natural and legal persons, by Mr. Václav Mikulka, Special Rapporteur	Reproduced in the present volume.
A/CN.4/475 [and Corr.1] and Add.1 [and Corr.1]	Twelfth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur	<i>Idem.</i>
A/CN.4/476 [and Corr.1] and Add.1	Eighth report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur	<i>Idem.</i>
A/CN.4/477 [and Corr.2] and Add.1 [and Corr.1 and 3]	Second report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	<i>Idem.</i>
A/CN.4/478	<i>Idem</i> , annex I: Bibliography	<i>Idem.</i>
A/CN.4/L.522 [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 at the forty-seventh and forty-eighth sessions	Text reproduced in <i>Yearbook ... 1996</i> , vol. I, summary record of the 2437th meeting (pp. 32 et seq., para. 7).
A/CN.4/L.523		[Symbol not used.]
A/CN.4/L.524 [and Corr.2]	State responsibility. Part one of the draft articles adopted by the Commission on first reading at its thirty-second session in 1980 and titles and texts of parts two and three of the draft articles as provisionally adopted by the Drafting Committee on first reading at the forty-eighth session in 1996	Text reproduced in <i>Yearbook ... 1996</i> , vol. I, summary record of the 2452nd meeting (pp. 133 et seq., para. 5).
A/CN.4/L.525 and Add.1	Draft report of the International Law Commission on the work of its forty-eighth session: chapter IV (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, Fifty-first session, Supplement No. 10 (A/51/10)</i> . The final text appears in <i>Yearbook ... 1996</i> , vol. II (Part Two).
A/CN.4/L.526	<i>Idem</i> : chapter I (Organization of the session)	<i>Idem.</i>
A/CN.4/L.527 and Add.1 [and Add.1/Corr.1], Add.2-5, Add.6/Rev.1, Add.7-9, Add.10 [and Corr.1] and Add.11	<i>Idem</i> : chapter II (Draft Code of Crimes against the Peace and Security of Mankind)	<i>Idem.</i>
A/CN.4/L.528 [and Corr.1] and Add.1-3 [and Add.3/Corr.1]	<i>Idem</i> : chapter III (State responsibility)	<i>Idem.</i>
A/CN.4/L.529	<i>Idem</i> : chapter V (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem.</i>
A/CN.4/L.530	<i>Idem</i> : chapter VI (The law and practice relating to reservations to treaties)	<i>Idem.</i>
A/CN.4/L.531 [and Corr.1 and 2] and Add.1/Rev. 1	<i>Idem</i> : chapter VII (Other decisions and conclusions of the Commission)	<i>Idem.</i>

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.531/Add.2-4		[Symbol not used.]
A/CN.4/L.531/Add.5-6	Draft report of the International Law Commission on the work of its forty-eighth session: chapter VII (Other decisions and conclusions of the Commission)	Mimeographed. For the adopted text see <i>Official Records of the General Assembly, Fifty-first session, Supplement No. 10 (A/51/10)</i> . The final text appears in <i>Yearbook ... 1996</i> , vol. II (Part Two).
A/CN.4/L.532 [and Corr. 1 and 3]	Draft Code of Crimes against the Peace and Security of Mankind. Titles and texts of articles adopted by the Commission at its forty-eighth session	Reproduced in <i>Yearbook ... 1996</i> , vol. II (Part Two).
A/CN.4/L.533 and Add. 1	International liability for injurious consequences arising out of acts not prohibited by international law. Report of the Working Group	Mimeographed. For the text see <i>Official Records of the General Assembly, Fifty-first session, Supplement No. 10 (A/51/10)</i> . The final text appears in <i>Yearbook ... 1996</i> , vol. II (Part Two), annex I.
A/CN.4/L.534	Draft report of the International Law Commission on the work of its forty-eighth session: report of the Working Group on the long-term programme of work	<i>Idem</i> , annex II.
A/CN.4/SR.2426- A/CN.4/SR.2473	Provisional summary records of the 2426th to 2473rd meetings	Mimeographed. The final text appears in <i>Yearbook ... 1996</i> , vol. I.
ILC(XLVIII)/DC/CRD.3	Draft Code of Crimes against the Peace and Security of Mankind. Document by Mr. Christian Tomuschat, member of the Commission	Reproduced in the present volume.