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DRAFT ARTICLES ON STATE RESPONSIBILITY: COMMENTS OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Introduction and summary

The Government of the United States of America welcomes the opportunity to provide comments on the full draft articles on State responsibility prepared by the International Law Commission.<sup>1</sup>

The United States agrees with the Commission that a statement of the law of State responsibility must provide guidance to States with respect to the following questions: When does an act of a State entail international responsibility? What actions are attributable to the State? What consequences flow from a State's violation of its international responsibility? Customary international law provides answers to these questions, but the Commission has in many instances not codified such norms but rather proposed new substantive rules. In particular, the sections on countermeasures, crimes, dispute settlement, and State injury contain provisions that are not supported by customary international law.

Therefore, these comments first address the following areas of the draft, which, in the United States view, contain the most serious difficulties:

- \* **Countermeasures:** While we welcome the recognition that countermeasures play an important role in the regime of State responsibility, we believe that the draft articles contain unsupported restrictions on their use.
- \* **International crimes:** The United States strongly opposes the inclusion of distinctions between delicts and so-called "State crimes", for which there is no support under customary international law and which undermine the effectiveness of the State responsibility regime as a whole.
- \* **Reparation:** While many of the points in the section on reparation reflect customary international law, other provisions contain qualifications that undermine the well-established principle of "full reparation".
- \* **Dispute settlement:** Because of certain flaws in the dispute settlement procedure, we urge that Part Three be made optional.
- \* **Standing and injury:** Important elements of article 40's definition of an injured State lack support under customary international law and would lead to undesirable consequences.

The above-mentioned comments are followed by a discussion of other topics, including attribution of acts to a State; the relationship of the articles to the United Nations Charter; temporal aspects of breach; and assistance in the commission of a wrongful act by another State.

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<sup>1</sup> The text of the draft articles, provisionally adopted on first reading by the Commission, may be found in the ILC's report on its work during its forty-eighth session. See Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10 and Corr.1, pp. 125-151). The commentaries to the draft articles, frequently cited in these comments, were compiled by the Secretariat from the Commission's annual reports from 1973 to 1996. See Draft Articles on State Responsibility with Commentaries Thereto Adopted by the International Law Commission on First Reading (Text Consolidated by Secretariat, January 1997, Doc. 97-02583) [hereinafter Commentaries].

Because the articles would be used by States, tribunals and individuals, it is important that they be effective, practical, and sound, which certain elements of the current draft are not. We urge the Commission to focus on developing a clear set of legal principles well-anchored in customary international law and free from excessive detail and unsubstantiated concepts.

## I. Countermeasures

International law generally permits countermeasures in order to bring about the compliance of a wrongdoing State with its international obligations. The limits on countermeasures are far from clear, though there is general consensus that principles of proportionality and necessity apply. In this section, the United States recommends that the Commission (1) clarify the definition of countermeasures, (2) substantially revise the dispute settlement provisions pertaining to countermeasures, (3) recast the rule of proportionality, and (4) delete or substantially revise the prohibitions on countermeasures.

### 1. Draft article 30

We support draft article 30's reflection of the settled view that countermeasures "ha[ve] a place in any legal regime of State responsibility". See G. Arangio-Ruiz (Special Rapporteur), *Fifth Report on State Responsibility*, United Nations document A/CN.4/453 (12 May 1993), para. 36. The article acknowledges that an otherwise unlawful act loses its unlawful character when it "constitutes a measure legitimate under international law" in response to a prior unlawful act.<sup>2</sup> We agree that draft article 30 concerns only acts of a State that are otherwise "not in conformity with an obligation of that State towards another State". See Draft Article 30. Thus, the scope of draft article 30 does not extend to the entire range of responsive actions by States, such as measures of retortion, actions that might be termed "unfriendly" but that do not violate international obligations. See, e.g., O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* 44 (1988); D. Alland, "International Responsibility and Sanctions: Self-Defence and Countermeasures in the ILC Codification of Rules Governing International Responsibility", in M. Spinedi and B. Simma, *United Nations Codification of State Responsibility* 143, 150 (1987).

Similarly, we do not understand draft article 30 to alter or otherwise affect the rights and obligations of States under the Vienna Convention on the Law of Treaties and the customary international law of treaties. The International Court of Justice recently has drawn an even sharper distinction with respect to treaty law and State responsibility, stating that "these two branches of international law obviously have a scope that is distinct". *Case Concerning the Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), 25 September 1997, at para. 47 [hereinafter *Gabcikovo-Nagymaros Case*]. A State may have a range of alternatives available under the law of treaties in response to a breach by another State of a provision of a treaty in force between the two States. The treaty may provide for specific responses, such as dispute settlement procedures or other measures. A State may also be entitled to reciprocal measures, which are outside article 30's definition of countermeasures. Article 30 should not be read as precluding States from taking measures designed to maintain "the condition of reciprocity in the law of treaties". See, e.g., E. Zoller, *Peaceful Unilateral Remedies* 18 (1984).

In this connection, it bears noting that draft article 37 on *lex specialis* states that "the provisions of this Part [Two] do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act". The United States strongly supports the principle of draft article 37 and believes that it should also apply to Part I of the draft. For instance, two States could

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<sup>2</sup> The difference between measures that are not wrongful and measures that are legitimate is not entirely clear from the text of article 30. "[L]egitimate" seems to be intended to mean "within the limitations on countermeasures provided in Part Two". See Commentaries at 219. If so, the Commission might consider incorporating this definition directly in article 30.

devise an agreement where one of the circumstances precluding wrongfulness would not apply even where, in similar circumstances, the draft articles would indeed apply. Or parties could arrive at an agreement whereby each waives the rule of exhaustion of local remedies, even where that rule would normally apply under draft article 22.

## 2. Limitations on countermeasures

The United States agrees that under customary international law an injured State takes countermeasures "in order to induce [the wrongdoing State] to comply with its obligations". See Draft Article 47 (1). See also Case Concerning the Air Services Agreement of March 27, 1946 Between the United States of America and France, 18 R.I.A.A. 417, 443 (1978) [hereinafter Air Services Case] (stating that an injured State "is entitled ... to affirm its rights through 'countermeasures'"). In addition, we agree that countermeasures under customary international law are governed by principles of necessity and proportionality. Chapter III as a whole, however, unacceptably limits the use and purposes of countermeasures by imposing restrictions not supported under customary international law.

### a. Mandatory dispute settlement provisions

Under customary international law, a demand for cessation or reparation should precede the imposition of countermeasures. See, e.g., Gabcikovo-Nagymaros Case at para. 84 ("the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it"); Air Services Case at 420. Article 48, however, goes beyond customary international law in two significant respects.

#### (i) Prior negotiation

Article 48, in conjunction with draft article 54, requires an injured State to seek negotiations before taking countermeasures. However, customary international law does not require an injured State to seek negotiations prior to taking countermeasures, nor does it prohibit the taking of countermeasures during negotiations. The Air Services Case Tribunal, for instance, noted that it "does not believe that it is possible, in the present state of international relations, to lay down a rule prohibiting the use of counter-measures during negotiations ..." Air Services Case at 445. The requirement for prior negotiations may prejudice an injured State's position by enabling a wrongdoing State to compel negotiations that delay the imposition of countermeasures and permit it to avoid its international responsibility.

The draft treats this problem by providing an exception from the prior-negotiation requirement for "interim measures of protection which are necessary to preserve [the injured State's] rights". Draft Article 48 (1). This exception is vague and may lead to contradictory conclusions by States seeking to apply it. In particular, the draft does not indicate whether interim measures of protection would, like countermeasures, be unlawful absent the precipitating wrongful act. If not, then it would be unnecessary to enunciate a principle of interim measures. However, if interim measures fall within the definition of draft article 30 but short of "full-scale countermeasures", Commentaries at 311, it is unclear how in concrete circumstances the term might be applied.<sup>3</sup>

Rather than opening the section on countermeasures to disputes over the meaning of interim measures, the draft should reflect the fundamental customary rule that countermeasures are permissible prior to and during negotiations. We would therefore urge the Commission to clarify draft article 48 by stating that countermeasures are permissible as a means to induce such compliance prior to and during negotiations.<sup>4</sup>

<sup>3</sup> The Commentaries cite measures such as freezing assets to preclude capital flight and measures that "have to be taken immediately or they are likely to be impossible to take at all". Commentaries at 312. Such examples are useful illustrations but provide limited guidance.

<sup>4</sup> The Commentaries might note that an injured State should, where possible, seek to obtain a wrongdoing State's compliance with its international obligations by negotiations.

(ii) Compulsory arbitration

Article 48 (2) contains two flaws with respect to the draft's system of arbitration. First, it states that "an injured State taking countermeasures shall fulfil the obligations in relation to dispute settlement arising under Part III ..." This refers to draft article 58 (2), which states that where the dispute involves the taking of countermeasures by the injured State, "the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal" constituted under the articles. Compulsory arbitration of this sort is not supported by customary international law, would be unworkable in practice, and would establish a novel system whereby an injured State may be compelled to arbitrate a dispute. There is no basis in international law or policy for subjecting the injured State to such a requirement when it pursues countermeasures in response to a wrongful act of another State. Indeed, this compulsory system is in contrast to draft article 58 (1), which states that the parties may submit other disputes under the articles to arbitration "by agreement". We think that this creates a serious imbalance in the treatment of injured and wrongdoing States. In addition to extending the period during which a wrongdoing State may remain in breach of its obligations, this system imposes on the injured State the high cost of arbitrating the dispute. Draft article 60 exacerbates the problem of delay by providing for ICJ review. We believe that this system of compulsory arbitration would impose an unacceptable cost on injured States that must resort to countermeasures.

In addition, draft article 48 (2) states that "an injured State taking countermeasures shall fulfil" the obligations under article 58 (2) "or any other binding dispute settlement procedure in force" for the parties. We understand that article 48 (2) merely seeks to preserve other existing mechanisms in force between the parties. See Commentaries at 312-13. However, to the extent that article 48 (2) may be read as imposing additional requirements, the article lacks support under customary international law. For instance, article 48 (2) should not be misinterpreted as constituting consent to resort to dispute settlement procedures where the existing procedure requires mutual consent. Such an outcome would be unacceptable. Further, draft article 48 (3)'s requirement that countermeasures be suspended while dispute settlement mechanisms are "being implemented in good faith" is vague and may lead to further delay and abuse by the wrongdoing State.

Article 48 as a whole should, at the least, be placed in an optional dispute settlement protocol. As a mandatory system of conditions, it is without foundation under customary international law and undermines the ability of States to affirm their rights by countermeasures.

b. The rule of proportionality

The United States agrees with the Commission that under customary international law a rule of proportionality applies to the exercise of countermeasures. See, e.g., Memorial and Reply of the United States in the Air Services Case, excerpted in M. Nash, 1978 Digest of U.S. Practice in International Law 768, 776. International law does not, however, provide clear guidance with respect to how States and tribunals should measure proportionality. One school states that the countermeasure must be related to the degree of inducement necessary to satisfy the original debt, R. Phillimore, 3 Commentaries upon International Law 16 (1885), or "the amount of compulsion necessary to get reparation", H. Lauterpacht, 2 Oppenheim's International Law 141 (1952). See Commentaries at 316-17, footnotes 130 and 132. Elsewhere, it is stated that the countermeasure must be compared "to the act motivating them", Naulilaa Case, 2 R.I.A.A. 1011, 1028 (Portugal v. Germany) (1928). See also Air Services Case at 443 (the countermeasure requires "some degree of equivalence with the alleged breach"). We agree that, in some circumstances, the countermeasure must be related to the principle implicated by the international wrong.<sup>5</sup> Similarly, the wrongful act may illustrate what kind of measure might be effective to bring the wrongdoing State into compliance with its obligations.

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<sup>5</sup> The Air Services Tribunal stated, "The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the countermeasures; it will

Draft article 49 evaluates the proportionality of a countermeasure by accounting for "the degree of gravity of the internationally wrongful act and the effects thereof on the injured State".<sup>6</sup> We believe that this formulation gives undue emphasis to the "gravity" of the antecedent violation as the measure of proportionality. In the United States view, draft article 49 should reflect both trends identified above with respect to proportionality. Proportionality means principally that countermeasures should be tailored to induce the wrongdoer to meet its obligations under international law, and that steps taken towards that end should not escalate but rather serve to resolve the dispute. A conception of proportionality that focuses on a vague concept of "gravity" of the wrongful act reflects only one aspect of customary international law. As Professor Zoller has written, proportionality is not confined to relating the breach to the countermeasure but rather to "put into relationship the purpose aimed at, return of the status quo ante, and the devices resorted to in order to bring about that return". Zoller at 135. *See also* Elagab at 45. Cf. Commentaries at 319.<sup>7</sup> Because countermeasures are principally exercised to bring a return to the status quo ante, a rule of proportionality should weigh the aims served by the countermeasure in addition to the importance of the principle implicated by the antecedent wrongful act.

In addition, the Commentaries explain article 49's formulation, "shall not be out of proportion", by stating that "a countermeasure which is disproportionate, no matter what the extent, should be prohibited to avoid giving the injured State a degree of leeway that might lead to abuse". Commentaries at 319 (emphasis added). The United States believes that this interpretation does not accord with customary practice. *See, e.g., Naulilaa Case* at 1028 (countermeasures are "excessive" where they "are out of all proportion to the act motivating them"); *Air Services Case* at 444 (measures taken by the United States "d[id] not appear to be clearly disproportionate"). Proportionality is a matter of approximation, not precision, and requires neither identity nor exact equivalency in judging the lawfulness of a countermeasure. Customary law recognizes that, in some circumstances, a degree of response greater than the precipitating wrong may be appropriate to bring the wrongdoing State into compliance with its obligations.<sup>8</sup> The United States believes this

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also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France". *Air Services Case* at 443-444. Such an examination of the State responsibility violation differs from that suggested by the use of the term "gravity" in draft article 49.

<sup>6</sup> The draft's concept of effects on an injured state is not entirely clear and thus requires elucidation. It does not, for example, appear to match the ICJ's recent enunciation of an effects measurement, which related the effects of the countermeasure to the injury. *See Hungary/Slovakia case* at para. 85 ("an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question"). Draft article 49, by contrast, relates the countermeasure to the effects of the wrongful act on the injured State. *See* Commentaries at 321. The Court did not elucidate this "effects" consideration, and its analysis does not clearly indicate which trend in the law it intended to follow.

<sup>7</sup> Relating the countermeasure to the aims to be achieved, whether cessation or reparation, differs from the requirement of draft article 47 (1) that the countermeasure be necessary. The requirement of necessity aims at the initial decision to resort to countermeasures; it asks, is the resort to countermeasures necessary? *See* Commentaries at 307. By contrast, the rule of proportionality asks whether the precise measure chosen by the injured State is necessary to induce the wrongdoing State to meet its obligations.

<sup>8</sup> As one writer has put it, the cases and practice of States suggests that the appropriate measure is, roughly speaking, whether the countermeasure is "too severe". *See* Alland, *supra* page 3, at 184.

interpretation should be reflected in the text of draft article 49.

c. Prohibited countermeasures

The United States believes that article 50's prohibitions on the resort to countermeasures do not in all cases reflect customary international law and may serve to magnify rather than resolve disputes. First, article 50 would prohibit categories of countermeasures without regard to the precipitating wrongful act. However, article 49's rule of proportionality generally would limit the range of permissible countermeasures and would, in most circumstances, preclude resort to the measures enumerated in article 50. To that extent, draft article 50 is unnecessary. Second, draft article 50 may add layers of substantive rules to existing regimes without clarifying either the specific rules or the law of State responsibility. Thus, the duplication of rules in areas such as diplomatic and consular relations and human rights may complicate disputes rather than facilitate their resolution.<sup>9</sup>

Third, the section relies on vague language that would amplify the areas of dispute. For instance, draft article 50 (b) disallows the use of "extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act". What is "extreme"? What measures fall under the rubric of "economic or political coercion"? What kinds of economic or political measures would "endanger the territorial integrity or political independence" of a State? Cf. Elagab at 191-196. These are subjectively adduced criteria for which no supporting State practice is cited.<sup>10</sup> Similarly, draft article 50 (d) refers to "any conduct which derogates from basic human rights", without defining derogation or "basic" human rights. The language of article 50 (d) provides only limited guidance, for there are very few areas of consensus, if any, as to what constitutes "basic human rights". Article 50 (e) similarly does not provide useful guidance in determining whether a countermeasure would be permissible. Just as there is little agreement with respect to "basic" human rights and political and economic "coercion", the content of peremptory norms is difficult to determine outside the areas of genocide, slavery, and torture.

## II. International crimes

Since the introduction of the distinction in draft article 19 between "international crimes and international delicts" in 1976, many States, members of the Commission, and prominent lawyers and scholars have voiced serious objections. On prior occasions, the United States identified to the Commission the serious difficulties inherent in the attempt to insert a regime of criminal responsibility into the law of State responsibility. See, e.g., Report of the International Law Commission on the Work of its Thirtieth Session, Sixth Committee, 40th Meeting, Agenda Item 114, at 2, United Nations document A/C.6/33/SR.40 (1978). Still, the basic distinction pervades the draft, undermining the focus of the law of State responsibility.<sup>11</sup> The concept of international crimes of State bears no support under the customary

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<sup>9</sup> For instance, the rules of diplomatic and consular relations set forth in the two Vienna Conventions, Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, 18 April 1961, 500 U.N.T.S. 95, T.I.A.S. No. 7,502; Vienna Convention on Consular Relations and Optional Protocol on Disputes, 24 April 1963, 596 U.N.T.S. 261, T.I.A.S. No. 6,820, establish a system of reciprocity, under which a State that violates its provisions legitimately may be subject to a proportionate denial of reciprocal rights. While we strongly support the principle of inviolability, draft article 50 (c) should not be misinterpreted to preclude actions taken on the basis of reciprocity. See Vienna Convention on Diplomatic Relations, art. 47 (2); Vienna Convention on Consular Relations, art. 72 (2).

<sup>10</sup> Indeed, of the cases that are cited, the economic measures would seem to be lawful even in the absence of the precipitating wrongful act. See Commentaries at 330.

<sup>11</sup> Article 19 (3) enumerates four categories of crimes, under the general headings of peace and security, self-determination, "safeguarding the human being", and "preservation of the human environment". Draft article 40 (3)

international law of State responsibility, would not be a progressive development, and would be unworkable in practice.

State responsibility, as Professor Brownlie has pointed out, is "a form of civil responsibility". I. Brownlie, 1 System of the Law of Nations: State Responsibility 23 (1983) (emphasis added). See also 8 M. Whiteman, Digest of International Law 1215 (1967). Where a State imposes injuries on another, it bears responsibility to make reparation, the "essential principle" of which is that it must, "as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if the act had not been committed". Chorzow Factory Case, (Poland v. Germany) 1928 P.C.I.J. (ser. A) No. 17, at 47 [hereinafter Chorzow Factory Case].

The notion that a State might additionally be subject to criminal responsibility for some delicts but not for others is foreign to the law of State responsibility. Indeed, the Commentaries adduce no international precedent to support the concept. Whether such breaches are called "crimes" or "exceptionally serious wrongful act[s]", they belong outside the framework of State responsibility. The United States continues to oppose the inclusion of a concept of State crimes in the draft articles and would highlight the following difficulties:

Institutional redundancy: Existing international institutions and regimes already contain a system of law for responding to violations of international obligations which the Commission might term "crimes". Indeed, serious violations of humanitarian law, for instance, should be addressed through a coherent body of law applied by appropriate institutions. The Security Council has taken important steps in this direction through the creation of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.<sup>12</sup> Intensive international efforts are now under way to establish a permanent international criminal court. Avenues such as these clarify and strengthen the rule of law. By contrast, the enunciation of a category of "State crimes" would not strengthen the rule of law but could add unnecessary confusion.

Abstract and vague language: Draft article 19 (2) applies to "international obligation[s] so essential for the protection of fundamental interests of the international community" that they are to be considered crimes. As noted, specific regimes of international law already govern particular violations referred to in article 19 (3), so it is not clear how their enumeration in the draft articles adds anything to the law. These topics are enumerated with references that cloud rather than clarify meaning. To what specific rules, for instance, do the phrases "massive pollution of the atmosphere or the seas" or "safeguarding the human being" refer? Highly subjective terms are used to qualify the topics; specific categories of crimes are encumbered with subjective qualifications ("of essential importance", "serious", "on a widespread scale", "massive") susceptible to any number of interpretations. As a result, a decision-making body would

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defines "injured State" to include all States in the context of a State crime. Draft articles 51, 52 and 53 treat the consequences of crimes, including modifications of the law of reparation and obligations on States in response to an international crime.

<sup>12</sup> Moreover, the Security Council has acted in areas defined as "crimes" by the draft articles. For instance, the act of aggression (draft article 19 (3) (a)) by Iraq against Kuwait was countered by the Security Council's series of resolutions in 1990 and 1991 under Chapter VII. See, e.g., Security Council resolutions 660 of 2 August 1990, 678 of 29 November 1990, 686 of 2 March 1991, 687 of 3 April 1991. The Security Council took a number of steps relative to genocide (draft article 19 (3) (c)) with respect to the Former Yugoslavia and Rwanda. See, e.g., Security Council resolutions 770 of 13 August 1992, 808 of 22 February 1993, 827 of 25 May 1993 (Former Yugoslavia); Security Council resolutions 918 of 17 May 1994, 955 of 8 November 1994 (Rwanda). Further, as notions of international security increasingly assimilate the idea of environmental protection against severe degradation, the Security Council may act against aggressive State actions effecting "massive pollution" - much as it did against Iraq's wanton destruction of Kuwaiti oil fields in 1991. See Security Council resolution 687, para. 16 (reaffirming Iraq's responsibility for "damage - including environmental damage and the depletion of natural resources").

lack objective rules that could be applied coherently in specific cases.

As a practical matter, the establishment of a separate category of State crimes in the draft articles risks diminishing the import of and the attention paid to other violations of State responsibility (i.e., "delicts"). An injured State may well argue that the particular act at issue amounts to a "crime" simply to increase its claim for reparation for the delict.

The principle of individual responsibility: "Crimes against international law", the Nuremberg Tribunal stated, "are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced". 22 Trial of the Major War Criminals Before the Int'l Mil. Trib. Nuremberg 466 (1948). The Commission early on echoed Nuremberg, saying "any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment". Report of the International Law Commission to the General Assembly, 2 Y.B. Int'l L. Comm'n 374 (1950). The principle of individual responsibility also has been embodied in international conventions on the prevention of genocide, apartheid, and slavery, three of the subjects that the draft includes under the category of "safeguarding the human being". The principle has been codified in numerous international instruments and put into practice in such landmark institutions as the International War Crimes Tribunals following the Second World War and the International Criminal Tribunals for the Former Yugoslavia and Rwanda today.

To be sure, the existence of a category of crimes against humanity for which individuals are responsible attests to the "exceptional importance now attached by the international community to the fulfilment of obligations having a certain subject matter". Commentaries at 114. Yet it is one thing to recognize the responsibility of individuals and quite another to establish a criminal regime punishing States for such violations. Practically, two regimes of responsibility - one for individuals and one for States - could help insulate the individual criminal from international sanction. Although some observers have found that State and individual criminal responsibility may coexist, an individual criminal may be emboldened to attempt to shift a degree of responsibility away from himself and to the State by resort to a provision for State crimes. To that extent, respect for the principles of war crimes tribunals at Nuremberg and the International Criminal Tribunals for the Former Yugoslavia and Rwanda will be undermined.

Crimes and injury: Draft article 43 (3) provides that all States may be considered injured "if the internationally wrongful act constitutes an international crime". There is a wide variety of legal norms in which many or all States (or the international community "as a whole") have an interest. But specific regimes distinguish between "interest" and "standing", which the concept of criminal injury elides. State X may have a generalized interest in the adherence by other States to particular norms of international law, out of a concern for precedent or because the norm itself is an important matter of policy for the State. Given such an interest, State X may have the right to demand a cessation of unlawful conduct. Thus, draft article 41, by focusing on the obligation of a wrongdoing State to cease wrongful conduct rather than the remedies available to an injured State, suggests that injury is not a prerequisite to a demand for cessation. Nonetheless, State X may not have the *ius standi* in a particular case to pursue the remedies provided under articles 42 through 45. Standing depends upon the primary rules applicable in a particular case, according to which a State might be able to assert that it has been "given a right of action". South West Africa (Second Phase), Judgment of 18 July 1966, 1966 I.C.J. 388 (Diss. Op. Jessup).<sup>13</sup>

Draft article 40 (3)'s definition of an injured State provides, however, that all States have standing to assert injury with respect to a crime, a situation that could lead to disruptive results. Cf. B. Simma, "International Crimes: Injury and Countermeasures", in Weiler, Cassese, Spinedi, eds., International Crimes of State 283, 285 (1989) (discussing concept of "community interest"). While the concept of an injured community bears logical and jurisprudential weight, and is reflected in the responsibility of the United Nations Security Council to maintain international peace and security, it is

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<sup>13</sup> As Judge Jessup noted, this may be true under certain "accepted and established situations" even where the State does not show "individual prejudice or individual substantive interest as distinguished from the general interest". South West Africa Case at 388.



unclear how a State may claim standing in the absence of a substantive rule of law granting it. Further, draft article 40 (3)'s notion that all States, individually rather than collectively, are injured by criminal violations, raises particular concerns with respect to the responsibility of reparation. In particular, the draft's "construction might lead to a juridical 'overkill' by turning loose a sort of international vigilantism". *Id.* at 299. In fact, it would appear that an individual State would have available the panoply of rights to reparation even where it cannot identify a substantive rule upon which it bases its claim. See Draft Articles 51-52. Thus, multiple claims for reparation could result in inadequate compensation for those States that can indeed identify injury.

Under several substantive rules of law, particularly in the area of humanitarian law, all State parties have the ability to call for the cessation of unlawful conduct and for reparation to be provided to the injured State. At the same time, a wrongful act might principally affect one State, but widespread injuries might be suffered by a number of States (e.g., the Iraqi invasion of Kuwait principally injured Kuwait, yet a number of other States and their nationals suffered injury in the course of such invasion). To the extent that a wrongful act inflicts widespread injuries upon a number of States, the determination of damages should take account of the consequences of the wrongful act, rather than its abstract gravity.<sup>14</sup> But the circle of States considered to have standing to claim reparation should be limited to those that identify a particular provision of law (outside the draft articles) granting them such a right.

In sum, the draft articles concerned with international "State crimes" are unacceptable and risk undermining the entire project of codification of the law of State responsibility.

### III. Reparation and compensation

While the draft articles restate the customary obligation to provide reparation, they also create several significant loopholes that might be exploited by wrongdoing States to avoid the requirement of "full reparation" identified in draft article 42 (1).

#### 1. The principle of reparation

Draft article 42 (1) appears to state correctly that a wrongdoing State is under an obligation to provide "full reparation" to an injured State, in addition to ceasing unlawful conduct as required by customary law and set forth in draft article 41. Nonetheless, the Commission has provided two potentially significant exceptions from the general principle of full reparation.

First, subparagraph two of article 42 provides vaguely for an "account[ing]" of "the negligence or the wilful act or omission" of the injured State or national "which contributed to the damage". It is unclear whether this subsection intends to impose a concept of contributory negligence, which under a common law approach might completely negate the responsibility of the wrongdoer, *see, e.g., Dobbs, Torts and Compensation: Personal Accountability and Social Responsibility for Injury* 256 (2d ed. 1993), or whether it foresees some partial deviation from the "full reparation" standard. Draft article 42 (2) could be read as incorporating a contributory fault standard, allowing a wrongdoing State to avoid its obligation to provide reparation simply by positing the negligence of the injured State. Such a standard, we suspect, would be unacceptable to most States, as it is to the United States.

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<sup>14</sup> Moreover, the draft articles already implicitly distinguish among the seriousness of violations. Under customary law, the consequences of violations depend on the nature of the violation. Draft article 44 (1) provides that an injured State is entitled to compensation "for the damage caused by the act", which is measured by the pecuniary value of returning the injured party to the status quo ante. As a result, it becomes unclear just what the concept of State crimes adds to the question of reparation for a violation of an international obligation.

The commentary to paragraph 2 suggests that the drafters may have intended to express a comparative fault principle. See Commentaries at 278 ("to hold the author State liable for reparation of all of the injury would be neither equitable nor in conformity with the proper application of the causal link theory"). The United States appreciates the difficulties posed by the circumstance where an injured State or national bears some responsibility for the extent of his damages.<sup>15</sup> However, the concept of comparative fault is neither established in the international law of State responsibility nor clearly explicated in article 42 (2). Cf. *id.* footnote 160. More important, comparative fault introduces an imprecise concept susceptible to abuse by wrongdoing States who might argue that the principle of comparative fault should be applied to relieve them of responsibility to provide reparation.

The second loophole is created by article 42 (3). It states, without support in customary international law, that reparation shall never "result in depriving the population of a State of its own means of subsistence". Draft article 42 (3). While there may arise extreme cases where a claim for prompt reparation could lead to serious social instability, the language of article 42 (3) could provide a legal and rhetorical basis for a wrongdoing State to seek to avoid any duty to provide reparation even where it has the means to do so. The draft article provides too subjective a formula, opening too many avenues for abuse. The Commentaries suggest that "[s]ome members disagreed with the inclusion of paragraph 3". See Commentaries at 279. The United States agrees with the objectors; the inclusion of article 42 (3) in the draft articles is unacceptable.

## 2. Restitution in kind

Restitution in kind has long been an important remedy in international law and plays a singular role in the cases where a wrongdoing State has illegally seized territory or historically or culturally valuable property. See, e.g., Chorzow Factory Case at 47; Case Concerning Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 6, 36-37. Still, compensation appears to be the preferred and practical form of reparation in State practice and international case law. See, e.g., Brownlie at 211 ("it is also clear that in practice specific restitution is exceptional") (emphasis in original).

Draft article 43 nonetheless provides two exceptions which the Commission might usefully clarify. Article 43 (c) provides that restitution in kind may "not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation". This exception may enable States to avoid the duty to provide restitution in kind in appropriate circumstances. To the extent that the phrase "a burden out of all proportion" is left undefined, this exception would undermine the useful principle that restitution is preferred in some circumstances.

Article 43 (d) precludes restitution where it would "seriously jeopardize the political independence or economic stability" of the wrongdoing State. Such broad terms, left undefined and without an established basis in international practice, provide nothing to injured States but give hope to wrongdoing States seeking to avoid providing an appropriate remedy. In particular, the draft does not explain just what "serious" jeopardy might include. While subsection (d) may have relatively limited practical effect given the priority of compensation over restitution in practice, the inclusion of broad concepts providing for the avoidance of responsibility is likely to have effects beyond the narrow provision of article 43. The United States urges the Commission to delete the provision.

## 3. Compensation

Draft article 44 states the long-established principle reflected in customary international law and innumerable bilateral

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<sup>15</sup> For instance, an injured State might in some circumstances be under a duty to mitigate its damages, analogous to the rules of contract law. See, e.g., 1 M. Whiteman, Damages in International Law 199-216 (1937); G. Aldrich, The Jurisprudence of the Iran-United States Claims Tribunal 300-03 (1996).

and multilateral agreements that a wrongdoing State must provide compensation to the extent that restitution in integrum is not provided. The principle was stated clearly by the Permanent Court of International Justice in the Chorzow Factory Case, where it noted that the appropriate remedy is "[r]estitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear". See Chorzow Factory Case at 47. See also cases cited in F. V. Garcia Amador (Special Rapporteur) Fourth Report on International Responsibility, United Nations document A/CN.4/119 (26 February 1959), at 46-54; F. A. Mann, Studies in International Law 475-76 (1973). The principle has been applied to wrongful death cases as well. See Lusitania Cases (United States v. Germany), Mixed Claims Commission, Administrative Decisions and Opinions of a General Nature, at 14, 19-20 (1923) (holding that compensation would include, *inter alia*, "the amounts (a) which the decedent, had he not been killed, would probably have contributed to the claimant ... [and] (b) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision" - the third element of moral damages is discussed below, at III.4).<sup>16</sup>

Nonetheless, paragraph two of draft article 44 provides an unacceptable qualification to the requirement of "any economically assessable damage" by stating that interest "may" be covered. The Special Rapporteur recognized that both State practice and the literature "seem[] to be in support of awarding interest in addition to the principal amount of compensation". G. Arangio-Ruiz (Special Rapporteur), Second Report on State Responsibility, United Nations document A/CN.4/425, at 57-59 (9 June 1989). The suggestion of the draft article itself, however, is that interest is not required. This suggestion goes counter not only to the overwhelming majority of case law on the subject but also undermines the "full reparation" principle. Numerous instances of international practice support the provision of interest. See, e.g., S.S. Wimbledon Case, 1923 P.C.I.J. (ser. A) No. 1, at 15, 33; Chorzow Factory Case at 47; Illinois Central Railroad Co. v. United Mexican States, 4 R.I.A.A. 134, 137 (6 December 1926). The most significant and contemporary reflection of customary law concerning compensation may be found in the holdings of the Iran-United States Claims Tribunal, which has consistently awarded interest as "an integral part of the 'claim' which it has a duty to decide". See, e.g., Islamic Republic of Iran v. United States of America, Dec. No. 65-A19-FT (30 September 1987), 16 Iran-United States C.T.R. 285, 289-90 (also noting that "[i]t is customary for arbitral tribunals to award interest as part of an award for damages, notwithstanding the absence of any express reference to interest in the compromis"); McCullough & Company, Inc. v. The Ministry of Post, Telegraph and Telephone et al., Awd. No. 225-89-3 (22 April 1986), 11 Iran-United States C.T.R. 3, 34. Similarly, the United Nations Compensation Commission, responsible for assessing damage and distributing awards for claims arising out of Iraq's invasion of Kuwait, decided that "interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award". Awards of Interest, Decision taken by the Governing Council of the United Nations Compensation Commission at its 31st Meeting, held on 18 December 1992, United Nations document S/AC.26/1992/16 (1993). The few contrary decisions do not undermine the near universal acceptance in international practice and arbitration of the necessity of the provision of interest in the award.

The Commission should close this loophole by stating that compensation "shall include interest", a proposition that expresses clearly and correctly the content of the law and practice of States. In the absence of this revision to draft article 44 (2), the United States believes that article 44 will not reflect the customary law on compensation but would, in fact, be a step backward in the international law on reparation.

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<sup>16</sup> See also Chile-United States Commission Convened Under the 1914 Treaty for the Settlement of Disputes: Decision with Regard to the Dispute Concerning Responsibility for the Deaths of Letelier and Moffitt, 31 I.L.M. 1 (11 January 1992). The Security Council affirmed the principle that Iraq is responsible for damages arising out of the Gulf War. See Security Council resolution 687. The United States has applied the Lusitania standard in a number of wrongful death cases which it has espoused and settled with other States. See, e.g., "Damages for Wrongful Death: United States-Iraq: USS Stark", in M. Nash, 1981-1988 Cumulative Digest of United States Practice in International Law 2337-40 (discussing U.S. claim against Iraq arising out of attack on U.S. missile frigate USS Stark).

#### 4. Satisfaction

Moral damages, as draft article 45 implies, are part of the wrongdoing State's obligation to provide full reparation. The principle may be found in numerous aspects of State practice. *See, e.g., Determination of Ceilings for Compensation for Mental Pain and Anguish*, Decision taken by the Governing Council of the United Nations Compensation Commission during its Fourth Session, at the 22nd meeting, held on 24 January 1992, United Nations document S/AC.26/1992/8 ("Decision 8"); Chile-United States Commission at paras. 23, 31 (awarding moral damages to surviving family members of decedents). The Commentaries state that "international tribunals have always granted pecuniary compensation, whenever they deemed it necessary, for moral injury to private parties". Commentaries at 291.

Moral damages are equivalent to the harm of mental shock and anguish and consist of monetary payment precisely because they represent a form of compensation for actual harm suffered by a claimant. *See Lusitania Cases* at 15 (holding that an element of wrongful death damages available to claimants is "reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties"). Yet they are placed within the section on "satisfaction" and appear to be bound by the limitations therein. As stated, draft article 45 runs counter to customary international law. The United States recommends that the Commission resolve this problem by removing moral damages from the rubric of satisfaction and placing them under draft article 44's provision for compensation. In addition, the draft should clarify that moral damages consist solely of damage for mental pain and anguish. *See, e.g., United Nations Compensation Commission Decision 8*. Otherwise, the provision for moral damages will not reflect customary international law and would therefore remain unacceptable.

The United States also objects to subparagraph 2 (c) and paragraph 3. Draft article 45 (2) (c) provides that satisfaction, "in cases of gross infringement of the rights of the injured State, [may take the form of] damages reflecting the gravity of the infringement". This provision suggests a punitive function for satisfaction that is not supported by State practice or international decisions.<sup>17</sup> A similar concern is the statement in article 45 (3) that satisfaction is limited to the extent that it "would impair the dignity" of the wrongdoing State. The Commentary states that this provision is important to preclude a "powerful State" from "impos[ing] on weaker offenders excuses or humiliating forms of satisfaction incompatible with the dignity of the wrongdoing State and with the principle of equality". Commentaries at 301. However, the term "dignity" is not defined (and may be extremely difficult to define as a legal principle) and therefore the provision would be susceptible to abuse by States seeking to avoid providing any form of satisfaction. *Cf.* Article 29, Vienna Convention on Diplomatic Relations (providing for protection against an attack on the "dignity" of a diplomat); Article 31 (3), Vienna Convention on Consular Relations (providing for protection of consular post's "dignity"). The United States urges that article 45 (3) be deleted.

#### IV. Dispute settlement

Part Three of the draft articles recognizes that negotiation (article 54), good offices and mediation (article 55), and conciliation (article 56) all play an important role in international dispute settlement. However, the articles go further by making the resort to such tools binding at the request of any State party to a dispute (though the recommendations of the Conciliation Commission may not be binding, participation by both parties seems to be required).

While the attempt to advance the cause of peaceful settlement of disputes is laudable, we see several serious problems in the framework set forth in the draft articles. Most important, to the extent that the draft articles compel resort to such modes of dispute settlement, this framework does not reflect customary international law. Indeed, such a system is

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<sup>17</sup> While some scholars have found that penal sanctions are available in international law, *see, e.g.,* R. Jennings and A. Watts, 1 Oppenheim's International Law 533 (9th ed. 1992), punitive measures and damages - that is, measures and damages unrelated to obtaining cessation of or reparation for a violation of a State's responsibility - generally are not available to injured States. *See, e.g.,* 8 Whiteman, Damages in International Law, at 1215.

unlikely to find widespread acceptance among States. Further, a mechanism designed to meet all possible disputes would not meet the very real differences that arise under the law of State responsibility. Thus, this system likely will be ineffective in resolving many disputes. Finally, such procedures, especially relating to the conciliation process, are slow and expensive, imposing possibly long delays and high costs. Rather than requiring such a procedure, the draft should allow States, upon mutual agreement, to resort to such mechanisms.

The provision of an arbitral tribunal under draft article 58 (1), to which parties may "by agreement" submit their disputes, is unexceptional but unnecessary for the draft articles to function effectively. If, for instance, States are willing to agree to submit their dispute to an international tribunal, they may establish such a tribunal on their own accord or with the assistance of a third party (a disinterested State or international organization, for instance). The United States would support an optional set of dispute settlement procedures for States to follow if it would help them to resolve disputes. See discussion above at § 2 (a) (dispute settlement provisions for countermeasures).

Draft article 60's provision of an appellate function to the International Court of Justice - couched as a challenge to the "validity of an arbitral award" - would likely discourage States from signing on to the compulsory system of the draft articles. Together with the strict limitations on countermeasures, a challenge to an arbitral body's decision would extend the period during which a State must await reparation for a wrongdoing State's violation. As it relates to countermeasures, Part Three suggests that a wrongdoing State might remain in breach of its obligations and yet require a variety of steps, culminating perhaps years after the original wrongdoing in a challenged arbitration and a proceeding before the ICJ. Aside from being a highly complex aspect of law enforcement, this sets up an inefficient system which will impose excessive costs on injured States.

The United States believes that the long-term credibility of a code of State responsibility would be undermined by linking it to a mandatory system of dispute settlement that imposes potentially high costs on States, is ignored by States or, even worse, is seen as unbalanced in its treatment of wrongdoing and injured States. The dispute settlement provisions should be deleted in favour of a single non-binding provision that encourages States to negotiate a resolution of their disputes, if necessary by resort to mutually agreeable conciliation or mediation, or to submit to procedures under existing agreements, or to submit by mutual agreement their disputes to binding arbitration or judicial decision.

## V. Injury to a State

As discussed above, the United States has identified serious flaws in the draft's definition of an injured State as including all States in the context of "State crimes". A similar problem may be found in draft article 40 (2) (e) (ii)-(iii) and (f). These provisions define injury on an abstract basis, without accounting for the wide variety of rules, both conventional and customary, that may provide standing to claim injury under well-developed regimes. Thus, while the draft recognizes the inherent difficulties in defining "injured States" in the context of multilateral treaties and customary international law, these provisions lead to unacceptable and overbroad conceptions of injury.

Draft article 40 (2) (e) (ii) provides that a State may claim injury where the right arises from a multilateral treaty or rule of customary international law and its infringement "necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law". To the extent that this draft article concerns multilateral treaty rules, we think that standing to claim injury would be governed by the specific treaty concerned and, as appropriate, the law of treaties.<sup>18</sup> Thus, draft article 40 (2) (e) (ii) should concern only customary international law. Further the phrase "necessarily affects the enjoyment" is left undefined and could therefore be elastic and uncertain in application. We would propose the addition of an explicit limiting principle of interpretation, such as language providing that an infringement must "materially impair" the rights of the allegedly injured State. Cf. Commentaries at 273 (referring to Article 60 (2) (c) of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 336).

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<sup>18</sup> Draft article 40 (2) does not adequately explain the extent to which its provisions overlap the customary international law of treaties and the Vienna

Draft article 40 (2) (e) (iii) states that an injury to any party may arise where the violation concerns a "right [that] has been created or is established for the protection of human rights and fundamental freedoms". A basic principle of human rights law is that because such violations often go unchallenged, means must be devised whereby other States may demand compliance with the law and international institutions may exercise their authority to ensure compliance. Human rights conventions often provide substantive bases upon which all States have a right to monitor and demand compliance with such rights. Such *erga omnes* rules are well established in State practice with respect to human rights treaties.

Yet the right to claim reparation as an injured State for a violation of human rights is ill-defined by the draft articles. To the extent that the draft articles attempt to assimilate into the requirement of reparation "human rights and fundamental freedoms", the regime of State responsibility becomes a statement of principles which few States, and fewer still tribunals and international organizations, will find useful. With respect to such "injuries" as defined here, there is no support in international practice for providing all States with the *locus standi* to seek reparation in cases where they have not been harmed in the sense provided by a particular rule of law. Indeed, it is unclear how a State might assert a claim in the absence of any substantive right provided to it under an established rule of law.

Finally, draft article 40 (2) (f) provides standing to a State where the allegedly infringed right, found in a multilateral treaty, "has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto". While the phrase "expressly stipulated" suggests a narrowing function, the draft and the Commentaries do not define the term "collective interests". The draft may intend this phrase to cover specific kinds of interests found in specific categories of treaties. The Commission should clarify the meaning of "collective interests" in the text of the provision.

## VI. The law on attribution

Two areas in the draft articles on attribution require refinement or clarification:

### 1. The place of internal law

Article 4 states the correct rule that the wrongfulness of State action "cannot be affected by the characterization of the same act as lawful by internal law". However, in the very next article, the draft provides that the definition of "State organ" depends on whether the particular entity has "that status under the internal law of that State". Although article 4 concerns the characterization of acts while article 5 concerns the characterization of organs, the internal law loophole in article 5 effectively creates the possibility for a wrongdoing State to plead internal law as a defence to an unlawful act.

Under this formulaic rule, it could be that according to some State law, the conduct of State organs will be attributable to the State, while the conduct of identical entities in other States will not be attributable to the State. Cf. R. Ago (Special Rapporteur), *Third Report on State Responsibility*, United Nations document A/CN.4/246/Add.2 (29 April 1971), at para. 160. The determination whether a particular entity is a State organ must be the result of a factual inquiry.

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Convention on the Law of Treaties. In particular, Article 60 of the Vienna Convention provides specific rules for the situation involving a "material breach of a multilateral treaty by one of the parties". Where the draft discusses rights infringed under treaties, it does not develop whether such infringements are akin to material breaches of a treaty or amount to something less. To the extent that the two concepts of infringed right and material breach overlap, the Commission should clarify that the Vienna Convention would govern interpretations of specific treaty regimes and injuries sustained therein.

Compare Case Concerning the Barcelona Traction, Light & Power Co. (Belgium v. Spain), 1970 I.C.J. 3, 38-39, with First National City Bank v. Banco Para El Comercio Exterior De Cuba, 462 U.S. 611, 626-27 (1983). The United States also notes that the proviso that the organ of the State "was acting in that capacity in the case in question" is not defined. The reference to "capacity" could be read as enabling a wrongdoing State to dispute its liability on the grounds that, while the State organ committed the wrongful act, it acted outside its scope of competence. Such a reading would undermine the principle that responsibility for the action of State organs is governed by international law.

## 2. Persons acting on behalf of the State

Draft article 8 provides that the conduct of a person or group of persons may be attributed to the State if "it is established that such person or group of persons was in fact acting on behalf of that State". We agree with the basic thrust of this provision that a relationship between a person and a State may exist de facto even where it is difficult to pinpoint a precise legal relationship. We would note, however, that draft article 11 applies the converse rule to article 8: "The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law." This provision adds nothing to the draft. As the Commentary notes, it merely "confirms the rules laid down in the preceding articles". Commentaries at 49. The duplication of rules provides a tribunal with an additional, if not troublesome, question of which rule to apply in a given situation and whether they differ in application. Article 11 should be deleted.

## VII. Relationship of draft articles to the United Nations Charter

The Commission has sought "quite specific comments by States", Commentaries at 139, footnote 226, with respect to the questions raised by draft article 39, which states that the "legal consequences of an internationally wrongful act" set out in the draft articles "are subject, as appropriate, to the provisions and procedure of the Charter of the United Nations relating to the maintenance of international peace and security".

The United States agrees with the objective of draft article 39 in emphasizing that the Charter's allocation of responsibility for the maintenance of peace and security rests with the Security Council, and that an act of a State, properly undertaken pursuant to a Chapter VII decision of the Security Council, cannot be characterized as an internationally wrongful act. State responsibility principles may inform the Security Council's decision-making, but the draft articles would not govern its decisions.

The Charter states clearly that its obligations prevail over any other international agreements. See United Nations Charter, article 103 (stating that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail"). Article 103 not only establishes the pre-eminence of the Charter, but it makes clear that subsequent agreements may not impose contradictory obligations on States. Thus, the draft articles would not derogate from the responsibility of the Security Council to maintain or restore international peace and security.

The responsibility of the Council, and the coordinate responsibility of Member States to implement Council decisions, pervades the Charter. Article 2 (5) states, for instance, that "all Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter ...". In Article 25, "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". Similarly, Article 48 commits Member States to take the "action required to carry out the decisions of the Security Council for the maintenance of international peace and security". In accordance with these articles, therefore, Member States are obligated to "carry out" decisions of the Council under Chapter VII with respect to the maintenance of peace and security. The Charter does not provide an exception for existing obligations States might owe other States.

The discretion of the Council, moreover, is broad. See United Nations Charter, article 24 (2). Thus, the Council has

authority to take all necessary action, consistent with the purposes and principles of the Charter, to maintain or restore international peace and security. The Council, in connection with its Chapter VII responsibilities, may "deny a State's plea of necessity" or "a State's right to take countermeasures". Commentaries at 139, footnote 226.

#### VIII. Moment and duration of breach

Draft articles 18 and 24 through 26 provide for a complex series of abstract rules governing the characterization of an act of a State as a continuing, composite, or complex act. According to this finely wrought scheme, an act of a State may only result in international responsibility if the particular obligation was in force for that State at the time of the act. This principle, stated succinctly in draft article 18 (1), holds uncontroversially that breach arises "[o]nly if the act was performed at the time when the obligation was in force for that State". Read together, however, these draft articles inject far more complexity into the draft than necessary and provide possible legal hooks for wrongdoing States to evade their obligations.

The structure of these articles will provide ample room for wrongdoing States to seek to litigate issues or avoid obligations that otherwise should be plain. Where an act has a "continuing character", the breach "extends over the entire period during which the act continues and remains not in conformity with the international obligation". Draft article 25 (1). There is little clue in the text or the Commentaries how to distinguish a continuing act from one that does not extend in time. For instance, it may be exceedingly difficult in practice to distinguish between a continuing act and an act that is complete at the moment it is "performed", draft article 24, but that has "effects" or "consequences" extending in time. Cf. Commentaries at 181. Where an act is composite, or "composed of a series of actions or omissions in respect of separate cases", the breach "extends over the entire period from the first of the actions or omissions constituting the composite act ... and so long as such actions or omissions are repeated". Draft article 25 (2). Where an act is complex, or "consisting of a succession of actions or omissions by different organs of the State in respect of the same case", the breach "extends over the entire period between the action or omission which initiated the breach and that which completed it". Draft article 25 (3). The question of whether an act concerns "separate cases" or "the same case" often may be difficult to determine in practice and simply may add confusion to straightforward determinations of responsibility.

These provisions may serve to complicate rather than clarify determinations of responsibility. As Professor Brownlie has written, "the appearance of new, apparently defined, legal categories is of doubtful value. The difficult cases cannot be made less difficult by the invention of categories". Brownlie at 197-98. Cf. J. Pauwelyn, "The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems", 1995 *Brit. Y.B. Int'l L.* 415-450. Consideration should be made by the Commission whether these provisions should be deleted because they add an unnecessary layer of complexity to the draft and risk fostering substantial abuse.

#### IX. Assistance in commission of wrongful act

Draft article 27 provides that assistance to another State constitutes an unlawful act "if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter [State]". The United States agrees that circumstances may arise where two States act jointly in the commission of a wrongful act. See also Brownlie at 190-91. As a result, it is conceivable that an assisting State would be responsible for an action of the receiving State, but it is difficult, if not impossible, to imagine such responsibility of the assisting State in the absence of actual commission of an unlawful act by the receiving State. To this extent, this is indeed a rule of joint responsibility where both States should be held responsible for unlawful action. At the same time, the rule as stated remains vague and would be difficult to apply in practice. For instance, what is the scope of the term "rendered for the commission"? We assume that the term means to cover the case where an assisting State *intends* to assist in the commission of an unlawful act. However, the phrase "rendered for" is rather obscure and may be interpreted as not requiring intent. That "rendered for" incorporates an intent requirement should be clarified in the text of the draft article.



## Conclusion

Several years ago two scholars commented, with respect to the Commission's efforts to codify the law of State responsibility, that "no other codification project goes so deeply into the 'roots', the theoretical and ideological foundations of international law, or has created comparable problems". M. Spinedi and B. Simma, "Introduction", in Spinedi and Simma eds., United Nations Codification of State Responsibility vii (1987). Indeed, as one reviews the draft articles, it becomes clear that the project of codification deserves exceedingly careful review and revision. As these comments have indicated, the United States believes that, while there is much to be commended in the draft articles, there are also several serious and substantial flaws. To a significant degree, the draft contains provisions that do not reflect customary international law. In those cases where progressive development might be warranted, the draft articles take steps in directions that unacceptably complicate the structure of enforcement of international norms.

If the major flaws of the draft are not addressed and corrected, it will be difficult for the project to obtain the wide support from the international community necessary for a movement towards a State responsibility convention.

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