

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION

1980

Volume II
Part One

*Documents of the thirty-second session
(excluding the report of the Commission
to the General Assembly)*

UNITED NATIONS



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New York, 1982



NOTE

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

The word *Yearbook* followed by ellipsis points and the year (e.g., *Yearbook ... 1975*) indicates a reference to the *Yearbook of the International Law Commission*.

Part One of volume II contains the reports of the Special Rapporteurs discussed at the session and certain other documents. Part Two of the volume contains the Commission's reports to the General Assembly.

All references in the present volume to those reports and documents, as well as quotations from them, are to the edited version of those texts as they appear in volume II of the *Yearbook*

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**SUCCESSION OF STATES IN RESPECT OF MATTERS
OTHER THAN TREATIES**

[Agenda item 1]

DOCUMENT A/CN.4/333

**Twelfth report on succession of States in respect of matters other than treaties
by Mr. Mohammed Bedjaoui, Special Rapporteur**

Draft articles on succession to State archives, with commentaries
(continued)

[Original: French]
[20 May 1980]

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ABBREVIATIONS

UNESCO United Nations Educational, Scientific and Cultural Organization

EXPLANATORY NOTE: ITALICS IN QUOTATIONS

An asterisk inserted in a quotation indicates that in the passage immediately preceding the asterisk the italics have been supplied by the Special Rapporteur.

Introduction

1. This study is the sequel to the Special Rapporteur's eleventh report, which was submitted to the Commission at its thirty-first session and dealt with succession in respect of State archives.¹ The purpose of the present study is to make a few additions and changes to that report, which none the less remains the basic document for the Commission's future deliberations, in so far as it did not fully complete its consideration of the report at the last session. The Special Rapporteur hopes that the Commission will consider this study in conjunction with the parts of his eleventh report that were not touched on at that session.

2. The additions and changes proposed below to the eleventh report are based on:

(a) the deliberations at the General Assembly's thirty-fourth session on the subject of the *restitution of works of art to countries victims of expropriation*, in so far as those deliberations have a bearing on the problems of succession to State archives as property of historical and cultural value;

(b) the latest work by UNESCO in this field, more particularly the work of the *Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation*, which ended its first session on 9 May 1980 in Paris;

(c) the Sixth Committee's discussion, at the thirty-fourth session of the General Assembly, of the Special Rapporteur's eleventh report and the views expressed by delegations on the problem of succession in respect of State archives;

(d) the opinions expressed by members of the Commission at its thirty-first session, when the Commission considered the Special Rapporteur's eleventh report and provisionally adopted two articles on succession to State archives.

3. Before proceeding further, the Special Rapporteur wishes to sum up briefly the state of progress of the Commission's work on the subject of succession of States in respect of matters other than treaties.

4. As its title indicates, the topic "Succession of States in respect of matters other than treaties" covers all subjects other than treaties, more particularly, succession to public property, public debts, the legislation and the internal law of the predecessor State, the legal status of the inhabitants (in particular, their nationality), territorial problems, acquired rights and other matters. Since the subject was seen to be both vast and complex, the Commission, at the Special Rapporteur's request, first of all restricted it to *succession of States in economic and financial matters*.

5. However, even as so circumscribed, the topic proved to be too broad for that first stage of codification. Even if, as the Special Rapporteur had proposed, "succession of States in economic and financial matters" was confined to a study of succession to public property and public debts and other important matters were omitted, the field still remained too wide-ranging, for public property and public debts might be regarded as covering not only the property and debts of the State but also those of territorial authorities other than States and of public enterprises or public bodies, not to mention the property and debts of the territory to which the succession of States relates. For that reason, from 1973 onwards, the Special Rapporteur, with the Commission's concurrence, confined his study to a single category of public property and public debts, namely, the category concerning the State itself. Hence, the draft articles adopted by the Commission on the topic from 1973 to 1978 deal exclusively with the succession of States in respect of State property and State debts.²

6. In response to the wish of some members of the Commission and of a number of representatives in the Sixth Committee, and also in keeping with his own inclination, the Special Rapporteur proposed at the Commission's thirty-first session, in 1979, that the draft articles should be supplemented with provisions covering the case of succession in respect of State archives, a topic which, in his view, came under the heading of succession to State property. Accordingly, in his eleventh report he proposed six additional articles (A-F). The Commission adopted in first reading two draft articles, A and B,³ the first containing a definition of state archives and the second relating to succession in respect of State archives in the case of newly independent States.

7. At the General Assembly's thirty-fourth session, in 1979, the Sixth Committee considered all of the draft articles on succession of States in respect of matters other than treaties as adopted by the Commission in first reading, and also the two draft articles (A and B) concerning succession in respect of State archives.⁴ The Sixth Committee and the General Assembly, which referred these texts to States for their comments, expressed the wish that the Commission should complete its work on this topic by preparing some further draft articles on succession to State

¹ See *Yearbook... 1979*, vol. II (Part One), p. 67, document A/CN.4/322 and Add.1 and 2.

² See *Yearbook... 1978*, vol. II (Part Two), pp. 111-113, document A/33/10, chap. IV, sect. B.1.

³ Corresponding to articles A and C initially proposed by the Special Rapporteur in his eleventh report. See *Yearbook... 1979*, vol. II (Part Two), pp. 79 and 81-82, document A/34/10, chap. II, sect. B, addendum.

⁴ *Ibid.*, pp. 15 *et seq.*, document A/34/10, chap. II, sect. B.

archives, in order that there should be a set of draft articles covering succession to State archives in cases of State succession other than decolonization (draft articles B, D, E and F of the Special Rapporteur's eleventh report, not yet considered by the Commission).

8. By its resolution 34/141 of 17 December 1979, the General Assembly noted with appreciation that "at its thirty-first session the International Law Commission, pursuant to General Assembly resolution 33/139 of 19 December 1978, completed the first reading of its draft articles on succession of States in respect of matters other than treaties". But it recommended that the Commission should:

Continue its work on succession of States in matters other than treaties with the aim of completing, at its thirty-second session, *the study of the question of State archives** and, at its thirty-third session, the second reading of all of the draft articles on succession of States in respect of matters other than treaties,

taking into account the written comments of Governments and views expressed on the topic in debates in the General Assembly.

9. The Commission has thus been given the mandate of preparing at its 1980 session some draft articles on succession in respect of State archives in various situations of State succession. In this connection, the Special Rapporteur draws the Commission's attention to his eleventh report and in particular to draft articles B, D, E and F,⁵ which may usefully supplement the two draft articles already adopted by the Commission. In addition, he invites the Commission to take into consideration the present study, the object of which is to provide some more information on the topic and to propose some changes concerning the draft articles which appear in his eleventh report.

⁵ *Ibid.*, vol. II (Part One), pp. 108, 119, 122 and 123, document A/CN.4/322 and Add.1 and 2, paras. 140, 189, 204 and 206 respectively.

CHAPTER I

Action by the United Nations

10. In his eleventh report, the Special Rapporteur discussed at length UNESCO's work concerning succession to State archives, but touched only briefly on the deliberations and recommendations of the United Nations⁶ on the same subject. The few details he provided did not reflect sufficiently the importance which the General Assembly attaches to the problem.

11. The question was included in the Assembly's agenda for the first time at its twenty-eighth session, at the request of Zaire. At that session, the General Assembly affirmed, in resolution 3187 (XXVIII) of 18 December 1973, that:

The prompt restitution to a country of its *objets d'art*, monuments, museum pieces, *manuscripts** and *documents** by another country, without charge, is calculated to strengthen international co-operation.

It recognized in addition "the special obligations in this connection of those countries which had access to such valuable objects only as a result of colonial or foreign occupation". Finally, it invited the Secretary-General of the United Nations, in consultation with UNESCO and Member States, to submit a report to the General

Assembly at its thirtieth session on the progress achieved in that connection.

12. The General Assembly discussed the matter again at its thirtieth session. By resolution 3391 (XXX) of 19 November 1975, it invited, *inter alia*:

(a) Member States to ratify the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted by the UNESCO General conference in 1970;⁷

(b) The Secretary-General of the United Nations to submit a report to the General Assembly at its thirty-second session.

In the same resolution, the General Assembly stated that it looked forward to the meeting of the Committee of Experts to Study the Question of the Restitution of Works of Art, established by UNESCO, which was scheduled to be held in Cairo early in 1976.

13. At its thirty-second session (resolution 32/18 of 11 November 1977), the General Assembly:

(a) renewed its appeal to Member States to sign and ratify the UNESCO Convention of 1970;

⁶ The action by the United Nations was summed up in one paragraph (para. 54).

⁷ UNESCO, *Records of the General Conference, Sixteenth Session, Resolutions*, p. 135.

(b) Affirmed that the restitution to a country of its *objets d'art*, monuments, museum pieces, manuscripts, documents and any other cultural or artistic treasures constituted a step forward towards the strengthening of international co-operation and the preservation and development of cultural values; and

(c) decided to review at its thirty-fourth session the progress achieved and, in particular, the action taken in that regard by UNESCO.

14. At its thirty-third session, in resolution 33/50 of 14 December 1978, the General Assembly welcomed the long-awaited establishment of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation.⁸

15. By the beginning of the Assembly's thirty-fourth

⁸ *Ibid.*, *Twentieth Session, Resolutions* (Paris, 1978), p. 97, resolution 4/7.6/5. Text reproduced in document A/34/529 and Corr.1, annex, appendix I.

session, 43 States had ratified or accepted the UNESCO 1970 Convention.

16. In resolution 34/64 of 29 November 1979, the General Assembly appealed to Member States:

to encourage the mass information media and educational and cultural institutions to strive to arouse a greater and more general awareness with regard to the return or restitution of cultural property to the countries of origin.

17. In the course of the discussion at the thirty-fourth session on the restitution of works of art to the countries which had suffered expropriation, a number of representatives referred specifically to the problem of archives. The representative of Senegal stated that:

UNESCO has established at Timbuctoo, in Mali, the Ahmed Baba Centre to encourage the collection of documents, manuscripts and scriptural materials, and in the archives of Iran, Iraq and India, of course, as in China, Europe and America, are stored many pieces of African history awaiting examination by researchers.⁹

⁹ See *Official Records of the General Assembly, Thirty-fourth Session, Plenary meetings*, 51st meeting, para. 46.

CHAPTER II

Action by UNESCO

18. The Director-General of UNESCO submitted a report, covering the period from September 1977 to June 1979, on the most recent activities undertaken by his organization to promote the return or restitution of cultural property to the countries of origin.¹⁰ The report describes the action taken by the Director-General to develop awareness among the general public and experts and to lay down the principles which might form the basis for the restitution or return of cultural property and define the terms of reference, means of action and working methods of an inter-governmental committee.

19. The object of the public information activities was to dispel the misunderstanding propagated by the press regarding the question of the return or restitution of cultural property to the countries of origin, and also to develop awareness of this operation, not only among experts but also among the general public. In his appeal to the General Assembly of the International Council of Museums (ICOM), at its twelfth session held in Moscow in May 1977, and later in his solemn appeal of 7 June 1978 to the world at large, the Director-General of UNESCO stressed "the importance for the countries of origin of the return of objects with a particular significance from the point of view of the spiritual values and the cultural heritage of the

peoples concerned".¹¹ Information on the nature and scope of the action needed in this field, and on the ethical reasons for it, was disseminated by the specialized publications of UNESCO. At present, preparations are in progress for a seminar of journalists and museum curators and for the publication of a brochure aimed at leaders of public opinion.

20. In addition, the establishment by UNESCO of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation¹² responded to the necessity of seeking ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to the countries having lost them as a result of colonial or foreign occupation.

21. This committee, whose members are 20 States elected by the UNESCO General Conference, acts in an advisory capacity. Its chief function is to facilitate bilateral negotiations for the restitution of works of art, and to promote bilateral and multilateral co-operation, to foster a public information campaign and to guide the planning and implementation of the UNESCO programme of activities in this field. It is also responsible for encouraging the necessary research and studies for the establishment of coherent programmes for the

¹⁰ See A/34/529 and Corr.1, annex.

¹¹ *Ibid.*, para. 5.

¹² See footnote 7 above.

constitution of representative collections in countries whose cultural heritage has been dispersed, encouraging the training of the necessary scientific and technical personnel and promoting international exchanges of cultural property.

22. The Intergovernmental Committee concluded its first session on 9 May 1980, at UNESCO headquarters, Paris, by adopting unanimously a set of recommendations to be submitted to the next General Conference of UNESCO. It took note of, and fully

supported, the Director-General's proposals. It also proposed the establishment of a world-wide inventory of cultural property, action to curb the unlawful traffic in such property, the conducting of public information campaigns and the co-ordination of all forms of co-operation among interested member States. It set out for the first time in specific terms the problem of the return or restitution of cultural property, and suggested appropriate solutions. The Committee was to meet again in September 1981 at UNESCO headquarters.

CHAPTER III

Discussion of the topic in the Sixth Committee

23. At the thirty-fourth session of the General Assembly, in 1979, the Sixth Committee considered the draft articles on succession of States in respect of matters other than treaties which had been adopted in first reading by the Commission. To those articles was added, in the form of an addendum, two draft articles (A and B) on succession in respect of State archives. The Sixth Committee decided to invite the Governments of Member States to comment on the draft as a whole, in order that the Commission should be able to complete its second reading and conclude consideration of the topic before the expiration of its term of office in 1981.

24. A number of issues were raised in the course of the debate in the Sixth Committee. The Special Rapporteur will deal with five of these:

- (a) the title of the draft articles;
- (b) the need to include provisions on State archives;
- (c) the exact legal nature of State archives;
- (d) the definition of State archives;
- (e) the need to supplement articles A and B by other articles covering other types of State succession.

A. Title of the draft articles

25. A number of delegations were of the view that the Commission *should modify the title of the topic under consideration*.¹³ Their reason was that, as it stands, the title suggests that the content of the draft

articles covers all matters other than treaties, whereas the Commission has expressed its intention to restrict the scope of the draft articles, for the time being, to State property, State debts and State archives. The existing wording does not accurately reflect the content of the draft articles, may suggest that other matters will be incorporated later and, in any event, gives the impression that it is not complete.

26. In accordance with the wish of the Commission and its Special Rapporteur, the General Assembly, in its resolution 33/139, expressed the wish that work on this topic should be brought to a speedy conclusion, and it is not the Commission's intention for the moment to codify the succession of States in respect of matters other than the property, debts and archives of the State. It is this decision and this intention actually which raise the problem of the title of the draft articles. Most of the representatives who favoured a change of title suggested that the draft articles should be entitled "Succession of States in respect of State property, State debts and States archives", in line with the title of the Vienna Convention on Succession of States in respect of Treaties. One speaker suggested that the existing title should be retained, with the necessary clarification being added. Accordingly, he proposed the following title: "Succession of States in respect of *certain** matters other than treaties".¹⁴

27. Conversely, some representatives felt that a genuine parallel would exist between the Convention on Succession of States in respect of Treaties and the draft on succession of States in respect of matters other than treaties if the existing wording of the title of the study remained unchanged. The representative of Nigeria, Mr. Sanyaolu, said that, in addition, the existing title was consistent with General Assembly resolution 2634 (XXV).¹⁵

¹³ See the statements by Mr. Barboza (Argentina) (*Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 46th meeting, para. 41, and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Rios (Chile) (*ibid.*, 48th meeting, para. 43, and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Tolentino (Philippines) (*ibid.*, 44th meeting, para. 27, and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Jezil (Czechoslovakia) (*ibid.*, 48th meeting, para. 50, and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Mickiewicz (Poland) (*ibid.*, 48th meeting, para. 59, and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Yimer (Ethiopia) (*ibid.*, 43rd meeting, para. 10, and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Mazilu (Romania) (*ibid.*, 51st meeting, para. 5, and *ibid.*, *Sessional fascicle*, corrigendum).

¹⁴ Statement by Mr. Yimer (Ethiopia) (*ibid.*, 43rd meeting, para. 10; and *ibid.*, *Sessional fascicle*, corrigendum).

¹⁵ *ibid.*, 49th meeting, para. 45; and *ibid.*, *Sessional fascicle*, corrigendum.

28. The Special Rapporteur would like to make two comments on this question, in connection with the Commission's work at its thirty-first session. First, it is quite clear that the question of the title of the topic has no bearing on the Commission's decision to append the study on State archives to the original draft articles. On the contrary, the decision to add to State property and State debts a further topic (although one which is directly related to State property) did not in itself raise the question of the title, which would inevitably have been raised in any event. Indeed, it was more likely to arise with two topics (property and debts) than with three (property, debts and archives). The Special Rapporteur's second comment is that preferably the Commission should not take any decision to change the title for the time being: it would be wiser to await the comments of Governments of Member States. The Committee will be able to take a final decision on the matter during the second reading of the draft articles. Consequently, the Special Rapporteur proposes no change in the title for the moment.

B. The need to codify succession in respect of State archives

29. None of the representatives who spoke in the Sixth Committee's debate on the Commission's report questioned the need to include specific provisions governing succession to State archives in the draft articles on succession in respect of matters other than treaties. There were very few speakers who expressed the wish that the scope of the codification of this topic should be as modest as possible, and then it was not so much because they were unaware of the intrinsic importance of State archives as because they feared that complications would result from a systematic and rigid codification of this topic.¹⁶ On the other hand, all other representatives stressed both the exceptional importance of State archives and the need to codify the various aspects of State succession in this area in the context of all cases of succession.

30. For example, our colleague Mr. Díaz González (Venezuela), speaking also on behalf of the States parties to the Cartagena Agreement,¹⁷ said that State archives "constituted a very special case in the context of succession of States", and that it was important to

¹⁶ See the statement by Mr. Hisaeda (Japan), who said that:

"the scope of the draft articles devoted to that question should be limited, in so far as possible, so that they included, for example, only those documents indispensable for administrative purposes. As for other types of archives, such as historical archives, they could very well be covered by the provisions relating to State property. With regard to article B... It was... necessary to formulate more explicit wording in order to minimize possible disputes... If the scope of the draft articles was limited to official documents connected with administration, drafting difficulties would be reduced to some extent". (*Ibid.*, 42nd meeting, para. 2; and *ibid.*, *Sessional fascicle*, corrigendum).

¹⁷ Subregional integration agreement (Andean Pact) (Bogotá, 26 May 1969).

carry out the necessary codification work "to preserve the rights of people to conserve and recover their historical and cultural heritage." He added,¹⁸

The Latin American countries had been particularly concerned with that question, as was shown by the "Andrés Bello" Cultural Convention,¹⁹ to which the Andean Pact countries were parties.²⁰

Mr. Díaz González considered, therefore, that the two draft articles A and B prepared thus far by the Commission represented a "minimum" in the respective areas covered by them.²¹

31. The same view was shared by many representatives. The representative of Bangladesh, Mr. Sircar, stated that:

His delegation attached great importance to the protection and restitution of historical archives and works of art, and it therefore welcomed the Commission's decision to include provisions on State archives in the draft articles.²²

The representative of Mongolia, Mr. Damdindorz, said that his country, too,

attached great importance to the topic of State archives and welcomed the inclusion of the two draft articles on that topic. Archives were of special significance to newly independent States and must serve to ensure the right of the peoples of those States to development and to information concerning their history and cultural heritage. For that reason, the Commission should at its next session undertake a more detailed study of all aspects of the Question...²³

32. The Special Rapporteur could cite other examples. For the moment, he will do no more than infer that a large majority of States would like the draft articles to contain provisions concerning succession to State archives in all types of territorial succession. Consequently, he urges the Commission to continue its work in this area. In so doing, the Commission will also be responding to the concern clearly expressed by the General Assembly, which drew the appropriate conclusions from the debate in the Sixth Committee, and in its resolution 34/141, of 17 December 1979, recommends that the Commission should "continue its work on succession of States in respect of matters other than treaties with the aim of completing, at its thirty-second session, the study of the question of State archives".* The mandate is therefore quite specific, and the Commission should adhere to it.

C. The exact legal nature of State archives

33. In the opinion of the vast majority of the representatives in the Sixth Committee, State archives

¹⁸ *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 44th meeting, para. 14; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁹ Andrés Bello convention on educational, scientific and cultural integration of the Andean region countries, signed at Bogotá 31 January 1970.

²⁰ *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 44th meeting, para. 14; and *ibid.*, *Sessional fascicle*, corrigendum.

²¹ *Ibid.*

²² *Ibid.*, 50th meeting, para. 29, and *ibid.*, *Sessional fascicle*, corrigendum.

²³ *Ibid.*, para. 36, and *ibid.*, *Sessional fascicle*, corrigendum.

are essentially *State property*, even though it is a special type of property calling for special treatment. Nevertheless, such special treatment should not be taken as grounds for excluding State archives from the general class of State property.

34. For example, Mr. Riphagen (Netherlands) said that "State archives were normally State property in the sense of article 5²⁴ and were covered by the relevant provisions on movable State property, although they were a particular type of State property".²⁵

35. Mr. Barboza (Argentina) accurately summed up the position of the majority of the representatives in the following terms:

Although archives might be regarded to some extent as included under the heading of State property, and the rules applying to State property might also be applied to archives, his delegation thought that the special characteristics of archives made it appropriate to deal with them separately. Some of the criteria applying to their passing by succession as specified in the draft articles were different from the criteria that applied to State property. . . . However, that did not mean that the provisions on that subject could not be included in part II, under State property, as special rules.²⁶

36. A very few representatives took the opposite view that State archives should be treated differently from other movable property, although they did not expressly say that archives differed intrinsically from

movable property.²⁷ Others held the view that State archives should not be classed among State property, on the grounds that they constituted "a special case within the context of State succession".²⁸

37. One representative, who considered that no decision should be taken on the question for the time being, pointed out that the Commission intended to review draft article 5, concerning the definition of State property, "in the light of the decision which might be taken in the future as to the exact relationship between State property and State archives".²⁹ Accordingly, in his opinion, therefore, "the final decision as to whether to keep articles A and B separate or to combine them with the articles on State property would depend on the decision whether or not the expression 'State property' included 'State archives'".³⁰

38. It seems clear to the Special Rapporteur that State archives are essentially State property and, as such, should be governed by the provisions relating to State property. However, it is equally clear that State archives constitute a distinctive class of State property by reason of their characteristics, nature and function. It is this distinctive quality which justifies the preparation of special rules within the context of succession to State property. However, in all matters not covered by these specific rules, the rules formulated for succession in respect of State property are applicable.

39. At the same time, however, the Special Rapporteur is of the view that at the stage which it has now reached in its work the Commission should not, for the time being, take any decisions as to the context in which the articles relating to State archives should appear in the draft as a whole. That is manifestly an important question of substance, for the decision to include or not to include the articles on State archives in the section of the draft articles dealing with State property will determine the applicability or non-applicability, as the case may be, of the general provisions dealing with State property to State archives.

40. In the view of the Special Rapporteur, the Commission should confine itself for the time being to continuing the drafting of the rules concerning succession to State archives in cases of State succession other than that resulting from decolonization, this case being covered in draft article B, which has already been adopted. The Commission might wait for the

²⁴ See footnote 4 above.

²⁵ *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 39th meeting, para. 5, and *ibid.*, *Sessional fascicle*, corrigendum.

²⁶ *Ibid.*, 46th meeting, para. 43; and *ibid.*, *Sessional fascicle*, corrigendum.

See also the statements by Mr. Mickiewicz (Poland), who said that archives were State property which, owing to their special nature and value, required different treatment (*ibid.*, 48th meeting, para. 63; and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Laclata (Spain), in whose view State archives, being State property, should be governed by the provisions laid down for State property (*ibid.*, 44th meeting, para. 4; and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Meissner (German Democratic Republic), who described archives "both as movable State property and as objects of historical and cultural value", which should be mentioned at the end of the articles on State property "to underline their special character and close relationship with State property" (*ibid.*, 43rd meeting, paras. 26 and 28; and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Yimer (Ethiopia), who said that "State archives... were a special type of State property" (*ibid.*, para. 16; and *ibid.*, *Sessional fascicle*, corrigendum); Mr. González Gálvez (Mexico), who said that the definition of State archives in article A should include a reference to article 5, which defined State property (*ibid.*, 41st meeting, para. 44, and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Kolesnik (USSR), who said that State archives, while constituting State property, should be subject to special treatment (*ibid.*, 42nd meeting, para. 10; and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Damdindorzh (Mongolia), who said that the articles on State archives should be placed at the end of part II, dealing with State property (*ibid.*, 50th meeting, para. 36; and *ibid.*, *Sessional fascicle*, corrigendum); Mr. Elaraby (Egypt), who considered that State archives, as State property, should be mentioned under the heading of State property, even though they were of a special nature (*ibid.*, 51st meeting, para. 19, and *ibid.*, *Sessional fascicle*, corrigendum); etc.

²⁷ See statement by Mr. Muchui (Kenya) (*ibid.*, 43rd meeting, para. 1; and *ibid.*, *Sessional fascicle*, corrigendum).

²⁸ Statement by Mrs. Konrad (Hungary) (*ibid.*, 44th meeting, para. 33; and *ibid.*, *Sessional fascicle*, corrigendum). See also the statement by Mr. Tolentino (Philippines) (*ibid.*, para. 27; and *ibid.*, *Sessional fascicle*, corrigendum).

²⁹ *Yearbook... 1979*, vol. II (Part Two), p. 18, document A/34/10, chap. II, sect. B, art. 5, para. (12) of the commentary.

³⁰ Statement by Mr. Asthana (India) (*Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 51st meeting, para. 61; and *ibid.*, *Sessional fascicle*, corrigendum).

comments of Governments before determining, in the second reading of the draft, the context in which the articles on State archives should be included in the draft as a whole.

41. One question which might arise—and in fact has already arisen—is, if State archives genuinely constitute a category of State property, why should they not be governed by the rules drafted for succession to State property? In other words, if archives were equated with property, there would be no need for further codification. This line of thinking does not take sufficient account of the special character of archives as a particular type of State property, certain aspects of which call for special codification.

42. The representative of Spain, Mr. Laclea, who raised this question in the Sixth Committee, took to their furthest extreme the consequences of the fact that State archives belonged to the general category of State property, and it was only for reasons of practicality that he accepted that the Commission should continue its codification work on State archives. In this connection, he said his delegation believed that:

such archives were State property and would therefore be subject to the provisions of the relevant articles. *Thus, it might not be necessary to add specific articles on State archives.** Nevertheless, the proposed texts might contribute an element of specific interpretation and could therefore be included in part II of the draft articles [State property].³¹

43. The representative of the Netherlands, Mr. Riphagen, adopted a much more subtle approach, saying that:

State archives were normally State property in the sense of article 5 and were covered by the relevant provisions on movable State property, although they were a particular type of State property and of particular importance for newly independent States. Nevertheless, the treatment of State archives in other types of State succession might also require attention, and his delegation appreciated that the General Assembly might request the Commission to study that matter further. It would, however, prefer to leave the matter as it now stood.³²

44. The answer to the Spanish representative's argument can be found in the impeccable presentation of the various aspects of the problem by Mr. Barboza of Argentina, who said:

*Although archives** might be regarded to some extent as included under the heading of *State property*, and the rules applying to *State property* might also be applied to *archives** his delegation thought that the *special characteristics of archives** made it appropriate to deal with them separately. Some of the criteria applying to their passing by succession . . . were different from the criteria that applied to State property.³³

45. Similarly Mr. Yankov of Bulgaria summed up clearly the direction that the Commission's research

³¹ *Ibid.*, 44th meeting, para. 4; and *ibid.*, *Sessional fascicle*, corrigendum.

³² *Ibid.*, 39th meeting, para. 5; and *ibid.*, *Sessional fascicle*, corrigendum.

³³ *Ibid.*, 46th meeting, para. 43; and *ibid.*, *Sessional fascicle*, corrigendum.

should take when he said that the question of State archives:

should be treated *mutatis mutandis* within the framework of the rules governing State succession in respect of State property,* with the proviso that *the specific aspects of the subject-matter of State archives should be given due consideration*.*³⁴

46. In sum, the task of the Commission for the present session is to prepare draft articles covering succession to State archives, except for the case of decolonization, which is already covered by article B. The Commission may defer until the second reading a decision as to where these articles are to appear in the draft as a whole. As the representative of Byelorussian SSR, Mr. Rassolko, said his delegation was:

in favour of continuing the work on State archives . . . and studying all aspects of the problems related to the possibility of their transfer in the case of different types of successor States.³⁵

These are the express terms of reference given to the Commission by General Assembly resolution 34/141.

D. Definition of State archives

47. The developments described above demonstrate that the problem of the definition of State archives constituted the core of the debate in the Sixth Committee. All representatives referred to the question, either to express satisfaction with draft article A proposed to this effect by the Commission,³⁶ or, as was more often the case, to request the Commission to review the proposed definition. Some found the definition too vague and uncertain.³⁷ Others appreciated the difficulty of arriving at any definition.³⁸ Some representatives considered that the definition should be limited to purely administrative archives.³⁹ Yet others proposed that the definition should be broadened by deleting the reference therein to the internal law of the predecessor State⁴⁰ or by including a more explicit reference to the historical and cultural element, thus making archives a component of the national cultural heritage of peoples.⁴¹

³⁴ *Ibid.*, para. 59; and *ibid.*, *Sessional fascicle*, corrigendum.

³⁵ *Ibid.*, 44th meeting, para. 21; and *ibid.*, *Sessional fascicle*, corrigendum.

³⁶ Statement by Mr. Al-Khasawneh (Jordan) (*ibid.*, 51st meeting, para. 54; and *ibid.*, *Sessional fascicle*, corrigendum).

³⁷ Statement by Mrs. Konrad (Hungary) (*ibid.*, 44th meeting, para. 33; and *ibid.*, *Sessional fascicle*, corrigendum).

³⁸ Statement by Mr. Quateen (Libyan Arab Jamahiriya) (*ibid.*, 50th meeting, para. 2; and *ibid.*, *Sessional fascicle*, corrigendum).

³⁹ See for example statement by Mr. Hisaeda (Japan) (*ibid.*, 42nd meeting, para. 2; and *ibid.*, *Sessional fascicle*, corrigendum).

⁴⁰ Statement by Mr. Elaraby (Egypt) (*ibid.*, 51st meeting, para. 19; and *ibid.*, *Sessional fascicle*, corrigendum).

⁴¹ Statements by Mr. Sanyaolu (Nigeria) (*ibid.*, 49th meeting, para. 49; and *ibid.*, *Sessional fascicle*, corrigendum) and Mr. Mazilu (Romania) (*ibid.*, 51st meeting, para. 5; and *ibid.*, *Sessional fascicle*, corrigendum).

48. In the view of the Special Rapporteur, the Commission, which has already transmitted the text of draft article A to the Governments of Member States for their comments, should leave it untouched for the time being and should defer a review of the text until the second reading of the complete draft. It will consider the definition of State archives in conjunction with the review of the definition of State property contained in draft article 5.⁴²

E. Need to supplement articles A and B by other articles covering types of succession of States other than decolonization

49. The need to supplement articles A (State archives) and B (Newly independent State) with other

⁴² See statements in the same vein by a number of representatives, in particular the statement by Mr. Asthana (India) (*ibid.*, para. 61; and *ibid.*, *Sessional fascicle*, corrigendum).

articles concerning succession to State archives in respect of other types of State succession was clear to most of the representatives in the Sixth Committee.

50. Although State archives belong to the category of State property, nevertheless, because of their special characteristics it is not always possible to reach solutions valid for State archives on the basis of the general rules relating to State property. Besides, the draft articles on succession of States in respect of matters other than treaties would be incomplete if succession to State archives were considered in the case of only one type of State succession to the exclusion of all others, whereas succession in respect of State property and succession in respect of State debts was considered in relation to all types of succession. It was for this reason that the General Assembly, on the recommendation of the Sixth Committee, adopted resolution 34/141 giving the Commission the mandate to draft additional provisions for State archives, covering the other cases of State succession.

CHAPTER IV

Minor amendments to the draft articles proposed by the Special Rapporteur in his eleventh report

51. The Commission has adopted in first reading, and transmitted to the General Assembly and to the Governments of Member States, the following two draft articles relating to the succession of States in the matter of State archives.

Article A. State archives

For the purposes of the present articles, "State archives" means the collection of documents of all kinds which, at the date of the succession of States, belonged to the predecessor State according to its internal law and had been preserved by it as State archives.

Article B. Newly independent State

1. When the successor State is a newly independent State,

(a) archives having belonged to the territory to which the succession of States relates and become State archives of the predecessor State during the period of dependence shall pass to the newly independent State;

(b) the part of State archives of the predecessor State which, for normal administration of the territory to which the succession of States relates, should be in that territory, shall pass to the newly independent State.

2. The passing or the appropriate reproduction of parts of the State archives of the predecessor State other than those dealt with in paragraph 1, of interest to the territory to which the succession of States relates, shall be determined by agreement between the predecessor State and the newly independent State in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives.

3. The predecessor State shall provide the newly independent State with the best available evidence of documents from the State archives of the predecessor State which bear upon title to the territory of the newly independent State or its boundaries, or which are necessary to clarify the meaning of documents of State

archives which pass to the newly independent State pursuant to other provisions of the present article.

4. Paragraphs 1 to 3 apply when a newly independent State is formed from two or more dependent territories.

5. Paragraphs 1 to 3 apply when a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations.

6. Agreements concluded between the predecessor State and the newly independent State in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

52. Accordingly, for the purpose of covering all the eventualities arising from succession in respect of State archives, the following points remain to be dealt with:

(a) transfer of part of the territory of one State to another State;

(b) uniting of States;

(c) separation of part or parts of the territory of a State;

(d) dissolution of a State.

53. The Special Rapporteur will not in the present study cite again all the precedents (case law, agreements and State practice) relating to succession in respect of State archives; these will be found in his eleventh report.

A. Transfer of part of the territory of one State to another State

54. In his eleventh report, the Special Rapporteur had proposed a preliminary draft article B, the text of

which is reproduced below as Article B' to avoid confusion with the article B adopted by the Commission, which deals with the case of a newly independent State.

Article B'. Transfer of a part of the territory of one State to another State

Where a part of the territory of one State is transferred by that State to another State:

1. The passing of the State archives connected with the administration and history of the territory to which the succession of States relates shall be settled by agreement between the predecessor State and the successor State.

2. In the absence of agreement,

(a) the following archives pass to the successor State:

- (i) archives of every kind belonging to the territory to which the succession of States relates,
- (ii) the State archives that concern exclusively or principally the territory to which the succession of States relates, if they were constituted in the said territory;

(b) the following archives remain with the predecessor State:

the State archives concerning exclusively or principally the territory to which the State succession relates, if they were constituted in the territory of the predecessor State.

3. The State to which these State archives pass or with which they remain shall, at the request and at the expense of the other State, make any appropriate reproduction of these State archives.

55. In order to enable the Commission to form a clear opinion as to the scope of this preliminary draft article, the Special Rapporteur cites below the text of the corresponding provision which lays down the rule concerning succession to State property:

Article 10. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of State property of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.*

2. In the absence of an agreement:

(a) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State.*

56. As State archives are a class of movable State property, the provisions proposed in draft article B' should be compared with the terms of subparagraph 2 (b) of article 10. Naturally, draft article B', like article 10, gives preference to agreement between the parties. In the absence of agreement, article 10 provides that the decisive criterion is the connection between the movable State property and the activity of the predecessor State in respect of the territory affected by the State succession. Much the same criterion is applied in draft article B': the test is whether the archives "belong" to the territory in question. The documents involved were produced, created—"generated"—in or by the territory concerned by the State

succession. They may be local archives relating specifically to the territory, and in that case there is no reason to deprive that territory to the benefit of the former predecessor State. They may, however, also be State archives formed in the territory and relating to the predecessor State's activity in the territory. Normally such archives should pass to the successor State.

57. From this point of view it is arguable that the criterion followed in article 10 is significantly broadened in draft article B'. Yet at the same time, and conversely, the criterion applied in article 10 is considerably narrowed in so far as the State archives connected with the predecessor State's activities in the territory transferred *do not pass* to the successor State if they were *constituted* in the predecessor State's territory. In this way, the criterion of the "activity" in the territory which formed the basis of the provisions of article 10 concerning State property is adjusted to the specific case of State archives.

58. One further point to be noted is that, in the case where part of a State's territory is transferred to another State, the provision approved by the Commission was meant to cover essentially transfers of small parcels of land of the kind that are generally arranged by agreement between the States concerned. As a rule, that agreement settles the question of State archives.

59. The Special Rapporteur cannot think of a better solution than that proposed in draft article B'. At most, if the Commission should wish to simplify the operative terms of the article he might (although he would do so with regret) suggest that subparagraph 2(a)(i) might be dropped, that is, the clause concerning "archives of every kind belonging to the territory to which the succession of States relates". Since the archives in question are generally, although not invariably, local archives and not State archives and since, furthermore, they are documents *belonging* to the territory transferred, naturally the predecessor State does not remove them.

60. Similarly, for the sake of simplification it might be said that subparagraph 2(a)(ii) contains the substance of subparagraph 2(b), for if the State archives concerning "exclusively or principally the territory to which the succession of States relates" pass to the successor State "if they were constituted in the said territory" (subparagraph 2(a)(ii)), the inference to be drawn *a contrario* is that they do not pass to the successor State "if they were constituted in the territory of the predecessor State" (subparagraph 2(b)). Hence paragraph 2(b) might be omitted.

61. Accordingly, *though at the risk of some loss of clarity*, the article might be redrafted in simpler language as follows:

Article B'. Transfer of a part of the territory of one State to another State

Where a part of the territory of one State is transferred by that State to another State:

1. The passing of the State archives connected with the administration and history of the territory to which the succession of States relates shall be settled by agreement between the predecessor State and the successor State.

2. In the absence of agreement, the State archives concerning exclusively or principally the territory to which the State succession relates pass to the successor State, if they were constituted in the territory of the predecessor State.

3. The State to which these State archives pass or with which they remain shall, at the request and at the expense of the other State, make any appropriate reproduction of these State archives for that other State.

B. Uniting of States

62. In his eleventh report, the Special Rapporteur proposed a draft article D in the following terms:

Article D. Uniting of States

1. Where two or more States unite and thus form a successor State, the State archives of the predecessor States shall, subject to the provisions of paragraph 2, pass to the successor State.

2. The allocation of the State archives of the predecessor States as belonging to the successor State or, as the case may be, to its component parts, shall be governed by the internal law of the successor State.

63. The Special Rapporteur reproduces below, for the sake of comparability, the text of the provision which deals with the succession to State property in the case of a uniting of States:

Article 12. Uniting of States

1. When two or more States unite and so form a successor State, the State property of the predecessor States shall pass to the successor State.

2. Without prejudice to the provision of paragraph 1, the allocation of the State property of the predecessor States as belonging to the successor State or, as the case may be, to its component parts shall be governed by the internal law of the successor State.

64. The parallel between the two articles is obvious, and the Special Rapporteur has nothing to add to the reasoning set out in his eleventh report in support of draft article D. Without going over the ground covered by the debate in the Commission and in its Drafting Committee, he suggests that draft article D might be brought more closely into line with article 12 if the passage "subject to the provisions of paragraph 2" was deleted from paragraph 1 and an analogous proviso was inserted at the beginning of paragraph 2.

65. Draft article D would then read as follows:

Article D. Uniting of States

1. Where two or more States unite and thus form a successor State, the State archives of the predecessor States shall pass to the successor State.

2. Without prejudice to the provision in paragraph 1, the allocation of the State archives of the predecessor States as belonging to the successor State or, as the case may be, to its component parts, shall be governed by the internal law of the successor State.

66. The perfect parallel between article D and article 12 raises, of course, *the problem of the usefulness of article D*, for it merely restates and reaffirms, in identical language, the provisions of article 12. However, since the Commission has not settled, and is unlikely to settle at its present session, the problem of the context in which the articles on State archives are to appear in the draft as a whole, the Special Rapporteur suggests that draft article D should stand for the time being. If subsequently the articles dealing with State archives should be inserted under the heading "State property", the Commission would then have to come to a decision on the repetitive draft article D.

C. Separation of part or parts of the territory of a State

67. In his eleventh report, the Special Rapporteur proposed a draft article E dealing with this eventuality and reading as follows:

Article E. Separation of part or parts of the territory of a State

1. Where a part or parts of the territory of a State separate from that State and form a State, the transfer of the State archives of the predecessor State to the successor State shall be settled by agreement between the predecessor State and the successor State.

2. In the absence of an agreement:

(a) the State archives of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates pass to the successor State;

(b) the State archives of the predecessor State, other than those referred to in paragraph 2(a) above, pass to the successor State in an equitable proportion.

3. Each of the two States shall, for the use of the other State and at its request, make an appropriate reproduction of the State archives which it has retained or which have passed to it, as the case may be.

4. The provisions of paragraphs 2 and 3 above are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

5. The provisions of paragraph 1 to 4 above apply where a part of the territory of a State separates from that State and unites with another State.

68. For the sake of good order, the Special Rapporteur reproduces below the text of the corresponding draft article dealing with succession to State property:

Article 13. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree,

(a) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory

to which the succession of States relates shall pass to the successor State;

(c) movable State property of the predecessor State other than that mentioned in subparagraph (b) shall pass to the successor State in an equitable proportion.

2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

3. The provisions of paragraph 1 and 2 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

69. The Special Rapporteur has no fresh proposal to make and no amendment to suggest for improving the text of draft article E, and submits the text as it stands to the Commission for its consideration.

D. Dissolution of a State

70. In his eleventh report, the Special Rapporteur proposed a draft article F reading as follows:

Article F. Dissolution of a State

1. If a predecessor State dissolves and disappears and the parts of its territory form two or more States, the transfer of the State archives to the different successor States shall be settled by agreement between them.

2. In the absence of an agreement,

(a) the State archives of all kinds of the predecessor State, wheresoever they may be, pass to the successor State if they relate exclusively or principally to the territory of that successor State, which shall be responsible for making an appropriate reproduction thereof for the use of the other successor States, and at their request and expense;

(b) State archives which are indivisible or which relate equally to the territories of two or more successor States pass to the successor State in whose territory they are situated, the other

successor States concerned being equitably compensated, and the successor State to which they pass shall be responsible for making an appropriate reproduction thereof for the use of the other successor States concerned and at their request;

(c) State archives of the type referred to in paragraph (b) above which are kept outside the territory of the dissolved predecessor State pass to one of the successor States concerned according to the conditions laid down in paragraph (b).

71. The corresponding article (14) relating to State property is drafted in the following terms:

Article 14. Dissolution of a State

1. When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree,

(a) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) immovable State property of the predecessor State situated outside its territory shall pass to one of the successor States, the other successor States being equitably compensated;

(c) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territories to which the succession of States relates shall pass to the successor State concerned;

(d) movable State property of the predecessor State other than that mentioned in subparagraph (c) shall pass to the successor State in an equitable proportion.

2. The provisions of paragraph 1 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

72. For the reasons given in his eleventh report, the Special Rapporteur considers the provisions proposed in his draft article F fully justified and equitable. Consequently, he does not think he can suggest any change in that draft text.

Conclusion

73. In conclusion, the Special Rapporteur would stress once again not only that State archives are an important part of the *historic and cultural heritage* of any national community but also that the production and preservation of the archives have become a more than indispensable means of administration—one of *the keys to power*. The settlement of the problem of archives in the context of State succession is all the more welcome as UNESCO and the General Assembly of the United Nations are taking an active interest in the protection of the national cultural heritage, of which archives form an integral part. The problem of archives should be envisaged at all times in terms of the *right to development*, the *right to information* and the *right to a cultural identity*, in the framework of the establishment of a new international order in all these areas.

74. On the conclusion of his twelve reports (1968–1980) on the succession of States in respect of matters other than treaties, the Special Rapporteur thinks it fitting to point out once again that, despite the Commission's efforts and his own, the topic of succession between subjects of international law is still

far from exhausted. *The Commission has not examined the question of the succession of Governments nor that of the succession of one international organization to another.* Nor has the Commission considered the entire topic of succession of States in respect of matters other than treaties, for it has not dealt with such questions as *succession to territorial rights, the nationality and status of the inhabitants of transferred territories, or succession in respect of legislative and judicial matters*, etc. Even as regards the succession of States in the economic and financial field, the Commission has dealt *only with the property, debts and archives of the State*, and has not covered the problems of succession affecting the *property, debts and archives of public enterprises, national corporations, public establishments or local or provincial territorial units*. Nevertheless, in view of the vastness of the subject of succession in international law, the Commission, which honoured the Special Rapporteur by agreeing to his suggestions, was right in restraining its ambition and limiting the scope of its work in this way, lest the drafting of articles on the topic become a virtually unending task.

STATE RESPONSIBILITY

[Agenda item 2]

DOCUMENT A/CN.4/318/ADD.5-7

Addendum to the eighth report on State responsibility, by Mr. Roberto Ago*

The internationally wrongful act of the State, source of international responsibility (part I) (concluded)

[Original: French]
[29 February, 10 and 19 June 1980]

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ABBREVIATIONS

C.N.R.	Consiglio Nazionale delle Ricerche (Italy)
GATT	General Agreement on Tariffs and Trade
I.C.J.	International Court of Justice
<i>I.C.J. Pleadings</i>	<i>I.C.J., Pleadings, Oral Arguments, Documents</i>
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
ILA	International Law Association
IMCO	Inter-Governmental Maritime Consultative Organization
OAS	Organization of American States
P.C.I.J.	Permanent Court of International Justice
<i>P.C.I.J., Series A</i>	<i>P.C.I.J., Collection of Judgments (through 1930)</i>
<i>P.C.I.J., Series A/B</i>	<i>Judgments, Orders and Advisory Opinions (from 1931)</i>
<i>P.C.I.J., Series C</i>	
—Nos. 1-19	<i>P.C.I.J., Acts and Documents relating to Judgments and Advisory Opinions given by the Court (through 1930)</i>
—Nos. 52-88	<i>P.C.I.J., Pleadings, Oral Statements and Documents (from 1931)</i>
S.I.O.I.	Società Italiana per l'Organizzazione Internazionale (Italy)

EXPLANATORY NOTE: ITALICS IN QUOTATIONS

An asterisk inserted in a quotation indicates that, in the passage immediately preceding the asterisk, the italics have been supplied by the author of the present report.

* Sections 5 and 6 of chapter V of the eighth report were presented by Mr. Ago, former Special Rapporteur, after his resignation from the Commission. They complete document A/CN.4/318 and Add. 1-4, which is reproduced in *Yearbook . . . 1979*, vol. II (Part One), p. 3.

CHAPTER V

Circumstances precluding wrongfulness (*concluded*)¹

5. STATE OF NECESSITY

1. In section 4 of this chapter (*force majeure* and fortuitous event), we had occasion more than once to refer to “state of necessity” (*état de nécessité*). The purpose, of course, was not to determine then and there the meaning and scope of that concept, but rather to define, through contrast, the contours and limits of the concepts then being considered. In paragraph 103, for instance, we showed that in the most typical case of *force majeure* (where an unforeseen and unavoidable external circumstance, an irresistible “force” beyond the control of the subject taking the action, makes it materially impossible for that subject to act in conformity with an international obligation), the conduct actually adopted, which as such constitutes an act of the State, is an absolutely *involuntary* action. Similarly, in paragraph 104, we observed that in what may be considered a typical case of what is known as “fortuitous event” (where an unforeseen external circumstance makes it impossible for the person whose act is attributed to the State to realize that his conduct is different from that required by an international obligation), it is the fact that the conduct is not in conformity with the international obligation, if not the conduct itself, which is also quite involuntary and *unintentional*. On the other hand, in paragraph 102 we stated that in cases where the excuse for the State’s action or omission is a state of necessity, the “voluntary” nature of the action or omission and the “intentional” aspect of the failure to conform with the international obligation are not only undeniable, but also a logical and inherent part of the excuse given. This is so, of course, whatever the objective evaluation of such an excuse.

2. In the preceding section,² we also mentioned the criteria for differentiating between the situations usually envisaged when the term “state of necessity” is used and situations which, in different respects, but more superficially than concretely, could be considered comparable to a state of necessity. We referred to cases where the irresistible external circumstance (also at work here), while not materially forcing those acting on behalf of the State to engage, quite involuntarily, in conduct conflicting with the requirements of an international obligation of that State, nevertheless puts them in a position of such “distress” that the only way they can avert tragedy for themselves—and possibly those who may be placed in their charge—is by acting in a manner not in conformity with an international

obligation of their State. We observed that in what for us is the well-founded opinion of the majority of those few writers who have considered the question, such a case may be said to resemble *force majeure*,³ since the external circumstances at work are usually the same and their effect is to make it relatively, if not absolutely impossible to act in conformity with the international obligation. Although the conduct actually engaged in by those concerned is not entirely involuntary as in cases where it is materially and absolutely impossible to comply with the international obligation, it is voluntary more in theory than in practice, since the element of volition is “nullified” by the situation of distress of the persons taking the action. This is not the case when Governments, seeking justification for their conduct, invoke a “state of necessity”. The “necessity” then invoked is a “necessity of State”. The alleged situation of extreme peril does not take the form of a threat to the life of individuals whose conduct is attributed to the State, but represents a grave danger to the existence of the State itself, its political or economic survival, the continued functioning of its essential services, the maintenance of internal peace, the survival of a sector of its population, the preservation of the environment of its territory or a part thereof, etc.⁴ The situation may or may not be due to a sudden unforeseen external event; it may also be the foreseeable but unavoidable consequence of factors which have long been present. The State organs then called upon to decide on the conduct of the State are definitely not in a situation likely to nullify the element of volition. To be sure, they decide what course of conduct is to be adopted to deal with the abnormal situation of peril facing the State of which they are the responsible organs, but their free will is in no way impaired. The conduct engaged in will therefore stem from a deliberate choice, fully conscious and voluntary in every respect. Obviously, then, there is a marked difference between the concept we are now considering and all those that were considered in the preceding section within the general framework of “*force majeure*”.

3. Once these points have been made concerning the distinction to be drawn between the concepts of state of necessity, *force majeure* and, *a fortiori*, fortuitous event, there is hardly any need to add that it is even

¹ For the first part (sections 1–4) of Chapter V, see *Yearbook... 1979*, vol. II (Part One), pp. 27 *et seq.*, document A/CN.4/318 and Add.1–4.

² *Ibid.*, pp. 48–49 and 59 *et seq.*, paras. 103, 129 *et seq.*

³ We think it useful again to highlight this conviction, because there are those, like L. Buza (“The state of necessity in international law”, *Acta juridica Academiae Scientiarum Hungaricae*, (Budapest, Akadémiai Kiadó, 1959) vol. I, pp. 213–214) who include in the category of “state of necessity” cases where only the members of organs acting on behalf of the State find themselves in a situation of distress.

⁴ These are examples of what is often invoked in this context as “essential” or “particularly important” interests of the State.

easier to draw such a distinction between the other "circumstances" considered earlier. There is obviously no similarity between the case in which a "state of necessity" is invoked as the alleged circumstance precluding the wrongfulness of an act of the State that is not in conformity with an existing international obligation towards another State and the case in which what is invoked as that circumstance is the "consent" of the latter State to the commission of the act in question.⁵ In a way, a State which claims to be taking action against another State because it finds itself in a state of necessity thereby indicates that it did not seek the consent of the other State in question, or that such consent, if sought, was not granted. On the other hand, there is no similarity between the case of a State which invokes a state of necessity to justify what would otherwise be wrongful conduct towards another State and the case of a State which describes its action towards another State as the legitimate application of a sanction,⁶ as a legitimate reaction to an internationally wrongful act already committed by that other State. In the case being considered, the State which is affected by the conduct allegedly adopted in a state of necessity has not committed any prior international offence, and the State engaging in conduct which it feels is prompted by "necessity" in no way expects to be considered the victim of an internationally wrongful act committed by the other State.

4. Again, in differentiating between a "state of necessity" and other situations which may be examined as circumstances likely to preclude the wrongfulness of an act of the State, it should be added that any confusion between state of necessity and self-defence should also be avoided. The latter concept will be dealt with in the following section of this chapter, when we shall see there that it is just possible to find a point of resemblance between self-defence and another "circumstance", namely, the one discussed in section 3. There is indeed a common element in the case of a State acting in "self-defence" and that of a State applying legitimate sanctions against a State which is guilty of an internationally wrongful act. In both cases, the adoption by the State of conduct which is not in conformity with the requirements of an international obligation towards another State is preceded by the commission of an international offence by the latter State. It should also be emphasized that the offence to which the State is reacting in self-defence is not just any type of internationally wrongful act, but a specific type of offence: armed aggression, the use of force in an attack against the State in question. Moreover, and this is one key element to be underlined, the purpose of the action taken in self-defence is not, or at least is not primarily, the implementation (*mise en oeuvre*) of an international responsibility. The State acting in a state

of self-defence has other, more immediate goals than that of imposing on the State with which it is at variance a "sanction" for the wrongful act committed against it, although it may also seek that end subsequently. Its immediate and basic aim is to protect itself from the aggression and its effects, to thwart the purpose of the aggression. Without wishing to anticipate by making at the current stage the points which will be made later, we shall confine ourselves here to the observation that there are no similarities between self-defence and state of necessity in this case. Admittedly, the State acting in self-defence is seeking to avert a danger threatening its existence; but this is a danger caused by the wrongful act which is an armed aggression perpetrated by a State which is being resisted through measures that, precisely because of the initial aggression, no longer constitute the breach of an international obligation. On the other hand, as stated in the preceding paragraph, when a State, in order to justify conduct not in conformity with an international obligation linking it to another State, can do no better than to allege that it acted in a "state of necessity", it has no kind of internationally wrongful act committed by the other State to adduce in its defence,⁷ and is less in a position than ever to claim that it has been the victim of an armed attack by that

⁷ As far back as 1917, C. de Visscher said:

"The existence of an unjust act, contrary to a formal rule of international law, is, we have seen, a common element that is found at the base of the law of self-defence and the law of reprisal. That element is no longer found in the state of necessity (*Notstand*)."
("Les lois de la guerre et la théorie de la nécessité", *Revue générale de droit international public* (Paris), vol. XXIV (1917), pp. 87.)

Several years later, A. Verdross observed that "The state of necessity... is characterized by the fact that a State... violates the right of an *innocent* State in order to protect itself" ("Règles générales du droit international de la paix", *Recueil des cours de l'Académie de droit international de la Haye, 1929-V* (Paris, Hachette, 1931), vol. 30, pp. 488-489). More recently, M. Sørensen noted that "'state of necessity' differs from 'self-defence' in that it does not presuppose a wrongful act on the part of the other State, and the act is not necessarily directed against the person who created the danger." ("Principes de droit international public", *Recueil des cours...*, 1960-III (Leyden, Sijthoff, 1961), vol. 101, pp. 219-220). See also A. Ross, *A Textbook of International Law* (London, Longmans, Green, 1947), pp. 247-248; J. L'Huillier, *Eléments de droit international public* (Paris, Rousseau, 1950), p. 370; G. Schwarzenberger, "The fundamental principles of international law", *Recueil des cours...*, 1955-I (Leyden, Sijthoff, 1956), vol. 87, p. 343; D. W. Bowett, *Self-defence in International Law* (Manchester, Manchester University Press, 1958), p. 10; Buza, *loc. cit.*, pp. 216-217; A. P. Sereni, *Diritto internazionale*, (Milan, Giuffrè, 1962), vol. III, p. 1529. See also P. Lamberti Zanardi (*La legittima difesa nel diritto internazionale* (Milan, Giuffrè, 1972), pp. 31 *et seq.*, and "Necessità" (*Diritto internazionale*), *Enciclopedia del diritto* (Milan, Giuffrè, 1977), vol. 27, pp. 898 *et seq.*) and J. Žourek ("La notion de légitime défense en droit international", *Annuaire de l'Institut de droit international, 1975* (Basel), vol. 56, pp. 21 *et seq.* and 66), who showed that this distinction has gradually become clearer during the twentieth century with the progressive affirmation of the prohibition of the use of force and the outlawing of war.

⁵ See sect. 2 (*Yearbook ... 1979*, vol. II (Part One), pp. 30 *et seq.*, document A/CN.4/318 and Add.1-4).

⁶ See sect. 3 (*ibid.*, pp. 39 *et seq.*).

State. The latter's "innocence", in terms of respect for international law, is not called in question.

5. Some doubt may nevertheless subsist concerning the relationship between state of necessity and self-defence. A State may invoke as a circumstance precluding the wrongfulness of the conduct it has adopted towards another State the fact that it resorted to that conduct to prevent aggression, or more generally the use of force against it, by that other State. Of course, we are setting aside for the time being the question whether or not, in such a case, international law holds that such preventive conduct is not wrongful, even though it is not in conformity with an international obligation. The question that concerns us here is a purely systematic one: should this hypothesis be considered in the context of state of necessity, since at the time when the preventive action against another State is taken, the expected wrongful use of force by the latter has not, (or at least, has not yet) taken place, and the State that acts can thus only allege the necessity to protect itself against a grave and imminent danger? Or should this question, on the other hand, be considered in the context of self-defence, since it is after all the threat, if not the realization of the feared actions which is the reason for the preventive measures taken against the State whose attack is feared? In our view, the second solution is the correct one, for if it were acknowledged that the measures in question could not be wrongful, the basis for that view would still be a wrongful factor imputable to the State against which the measures are taken.⁸ Furthermore, the Charter of the United Nations refers to the threat and use of force in the same provision and provides for the same type of measures with regard to both. We shall therefore consider the hypothesis mentioned above in the next section.

6. We have thus reviewed all the differences between the concept of state of necessity and the other concepts that have been or will be considered in this chapter; in other words, we have traced the outline of the concept in question. We must now go to the heart of the matter in order to define this concept with the precision required by the particularly delicate character of the problem to be solved. Only on the basis of the results thus achieved can we correctly pose the question as to whether, in what conditions and in what situations, state of necessity may constitute a circumstance that can preclude the international wrongfulness of an act of the State.

7. In this connection, we must first clear away any vestiges of the natural law concepts that predominated longer in this area than in others and have distorted the outline of the question with which we are concerned. In particular, we must eliminate the idea, still uncon-

sciously present in some learned circles, that the problem inherent in state of necessity is that of an opposition, a conflict between two "subjective rights", one of which must inevitably be sacrificed to the other: on the one hand, the right of State X that State Y must respect by virtue of an international obligation linking it to X, and on the other, the alleged "right" of State Y, which the latter could in turn assert with regard to X. This idea originated in the nineteenth century in the belief, widespread at that time, in the existence of certain "fundamental rights of States", defined as the "right to existence" or more especially "the right of self-preservation" ("*Recht auf Selbsterhaltung*"), advanced by many writers as being the fundamental subjective right of any State, which should naturally take precedence over any right of a foreign State. According to this approach, any conduct on the part of the State deemed necessary to ensure the preservation of its existence was bound to be considered juridically legitimate, even if it was undeniably contrary to an international obligation of that State.⁹ The theory of "fundamental rights" of States, as then conceived, was the product of pure abstract speculation with no basis in international legal reality, and has since become outdated; in particular, the idea of a right of "self-preservation" has been completely abandoned. Traces of its existence subsist, however, as regards the question under consideration: on the one hand, the idea of an almost natural connection between the concept of necessity and that of self-preservation persisted for many years,¹⁰ while on the other hand,

⁹ See, for example, J.L. Klüber, *Droit des gens moderne de l'Europe*, 2nd ed. (Paris, Guillaumin, 1874), pp. 75-76; W.E. Hall, *A Treatise on International Law*, 8th ed. (Oxford, Clarendon Press, 1924), pp. 322 *et seq.*; H. Wheaton, *Elements of International Law*, 6th ed. rev. by A.B. Keith (London, Stevens, 1929), vol. I, pp. 150 *et seq.*; A.W. Heffter, *Das europäische Völkerrecht der Gegenwart*, 6th ed. (Berlin, Schroeder, 1873), pp. 59 *et seq.*; A. Rivier, *Principes du droit des gens* (Paris, Rousseau, 1896), vol. I, pp. 277-278; T. Twiss, *The Law of Nations (considered as Independent Political Communities)*, rev. ed. (Oxford, Clarendon Press, 1884), pp. 178 *et seq.* During the early decades of the twentieth century, the idea of a "right of self-preservation" or "right to existence" was still regarded as the basis of the plea of necessity by writers such as A.S. Hershey, *The Essentials of International Public Law and Organisation*, 2nd ed. (New York, Macmillan, 1927), p. 231 *et seq.*; A. Faatz, "*Notwehr*" und "*Notstand*" im Völkerrecht (Greifswald, 1919) [thesis], pp. 25 *et seq.*; C.G. Fenwick, *International Law* (London, Allen and Unwin, 1924), pp. 142 *et seq.*; E. Vitta, "La necessità nel diritto internazionale", *Rivista italiana per le scienze giuridiche* (Rome), new series, vol. XI (1936), pp. 307 *et seq.*

¹⁰ Even a writer such as Anzilotti, who contributed so effectively to the criticism and abandonment of the theory of the fundamental rights of States, continued to base the "lawfulness" of the 'act of necessity' on the fact that it was effected in the context of the freedom that the law allows its subjects to ensure their self-preservation. See "La responsabilità internazionale des Etats à raison des dommages soufferts par des étrangers", *Revue générale de droit international public* (Paris), vol. XIII, No. 2 (1906), pp. 304-305, repr. in: S.I.O.I., *Opere di Dionisio Anzilotti*, vol. II, *Scritti di diritto internazionale pubblico*. (Padua, CEDAM, 1956), pp. 200-203; and *Corso di diritto internazionale*, 4th ed.: S.I.O.I., *Opere di Dionisio Anzilotti*, vol. I (Padua, CEDAM, 1955), p. 418.

⁸ Verdross also views the hypothetical reaction to an unjustified threat in the context of "self-defence" (*loc. cit.*, p. 485) and observes that "the State acting in a state of necessity thus violates the right of a State by which it is neither attacked nor threatened" (*ibid.*, p. 489).

situations of necessity continued to be viewed as characterized by an alleged conflict between two international subjective rights.

8. With regard to the first point, it should be stressed that the concepts of self-preservation and state of necessity are in no way identical, nor are they indissolubly linked in the sense that one is merely the basis and justification of the other.¹¹ The idea of self-preservation, if it were to be retained at all costs despite the unpleasant memories it evokes because of the abuses to which it has given rise in the course of history, could logically win wider acceptance in one connection and more limited acceptance in another than the concept of state of necessity as a circumstance precluding the otherwise indisputable wrongfulness of an act of the State. It could be viewed as being at the origin of clearly lawful acts, an act of retortion, for example, whose lawfulness can be established without any recourse to a "ground of necessity". Moreover, if the idea of self-preservation were to be cited as justification for certain acts of the State not in conformity with an international obligation and dictated by "necessity", the same would have to be done in the case of conduct taking the form, for example, of legitimate sanctions against a State that has committed an internationally wrongful act, or, above all, for any action taken in self-defence to resist aggression. On the other hand, it must be noted—and this is the aspect we consider the most important—that, even in cases of "necessity", the concept of self-preservation can only be used to explain actions taken with a view to averting an extreme danger threatening the very existence of the State, whereas, according to the opinion that predominates today, the concept of state of necessity can be invoked above all to preclude the wrongfulness of conduct adopted in certain conditions in order to protect an essential interest of the State, without its existence being in any way threatened.¹² The idea of self-preservation—which in fact has no basis in any "subjective right", or at least in any principle for which there is room in the field of law¹³—can therefore be decisively dismissed from our

present context, being worthless for the purpose of a definition of the "legal" concept of "state of necessity" as a circumstance which might conceivably preclude the wrongfulness of an act of the State.¹⁴

9. With regard to the second of the two points mentioned above,¹⁵ it may be noted that some adherents of the idea that state of necessity is a circumstance involving a conflict between two contrary international "subjective rights" refused to admit

be taken on grounds of self-defence, self-help or necessity, but also any breaches of international law which, otherwise, it would be impossible to justify even on the dubious level of quasi-legal terminology. Whatever, subjectively, may be the intentions of individual international lawyers, who endow self-preservation with the dignity of a legal principle, the function of this 'principle' is purely ideological. It is one of the ironies of the situation that legal 'purists' should elevate into a legal principle this category of group psychology, which as a legal principle, is devoid of any sustaining rule of international law, lacks any supporting evidence and serves merely as one of the backdoors through which to escape with a show of good conscience from the restraints imposed on instincts by international law. It is one of the purposes of the inductive method to make manifest the lack of legal foundation of any such pseudo-principle and of the sociological interpretation of international law to bring into the open the real functions which such notions are made to fulfil. Thus, it is submitted that, without any loss, the mischievous notion of 'self-preservation' is overdue for elimination from the vocabulary of the international lawyer."

¹⁴ Apart from the concept of self-preservation, there are others which it seems to us are equally incapable of being used to cast light on the distinctive features of the situation underlying a state of necessity; we are referring to the concept of self-protection and the practically synonymous concept of self-help. The latter term in particular is used by writers on English and related systems of law, sometimes to describe, in contrast to self-defence, the application of punitive or enforcement measures (Schwarzenberger, *loc. cit.*, pp. 342–343; Bowett, *op. cit.*, pp. 11 *et seq.*), and sometimes as the basis for a whole wide series of measures, ranging from retortion to self-defence itself (G. von Glahn, *Law among Nations: An Introduction to Public International Law* (London, Macmillan, 1965), p. 498). In the Italian literature we find some writers, such as G. Morelli (*Nozione di diritto internazionale*, 7th ed. (Padua, CEDAM, 1976), pp. 335–336) and Sereni (*op. cit.*, pp. 1524 *et seq.*) who regard self-help as a special circumstance precluding wrongfulness and materializing in coercive and other acts aimed at obtaining the performance of an obligation by the obligated subject or at bringing about, in his stead, the intended result of the obligation. In our view, whatever place such a "circumstance" would supposedly fill is already occupied by the other circumstances dealt with in this chapter. Moreover, the International Court of Justice, in its judgement in the *Corfu Channel case* (*I.C.J. Reports 1949*, p. 33), did not accept the United Kingdom's argument that the minesweeping operation undertaken by its ships in Albanian territorial waters on 12 and 13 November 1946 was justified as an act of self-help. But leaving this aside, what we are particularly concerned to emphasize is that all concepts of this kind, being abstractions created in the legal literature on the basis of a motley collection of cases, can apply to a whole range of situations of which state of necessity is only one example among others. The concepts of self-protection and self-help, being even broader in their acceptance than the concept of self-preservation, are certainly not fit to be used to characterize specifically state of necessity as compared with other situations in which a State is internationally entitled to take action for its own protection.

¹⁵ Para. 7, *in fine*.

¹¹ Concerning the errors resulting from the confusion between the concepts of necessity and self-preservation in the legal writings of the nineteenth and early twentieth centuries, see, recently, I. Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963), pp. 46 *et seq.*; Žourek, *loc. cit.*, pp. 21 and 66; and Lamberti Zanardi, "Necessità..." (*loc. cit.*), pp. 898–899.

¹² Buza (*loc. cit.*, pp. 210–211) likewise emphasizes the excessively restrictive character of a definition of state of necessity in terms of the "right of preservation" and the contrary danger that the idea of this right lends itself to dangerous extensions.

¹³ Schwarzenberger (*loc. cit.*, pp. 343 *et seq.*) effectively exposes the purely abstract nature of the formulation of a principle of self-preservation and ponders what the common denominator could be in the minds of those writers who continued to cling to such an idea. Rejecting any suggestion that this common denominator might be found in the field of law, he states:

"It is a physiological denominator: the instinct of self-preservation. ... Regrettably, it links not only action alleged to

defeat when they too were forced to agree that the notion of a genuine "subjective right" of self-preservation could not be entertained. In place of that insubstantial "right", adopting a terminology used by writers of an earlier age, such as Grotius and Vattel, to describe the right which, in their view, necessity sometimes conferred on the State over certain foreign-owned property,¹⁶ they constructed the general concept of a "right of necessity".¹⁷ It is the "subjective right" thus defined, and no less "so-called" than those it is supposed to replace, that conflicts with the "subjective right" of a foreign State which, it is argued, must yield to it. However, it seems to us that the idea of a subjective right of necessity, which may have been marginally acceptable in times when the science of law had not yet refined its concepts, is absolute nonsense today. The term "right" ("*droit*" in the subjective sense) indicates a "claim" which the law ("*droit*" in the objective sense), invoking the legal order, accords to a subject vis-à-vis other subjects, of whom he may rightfully require a specific performance or a specific conduct. When someone invokes as an excuse a situation of "necessity", what he is trying to do is to justify his attitude in denying a legitimate legal claim against him by another and not in putting forward some claim of his own against another. Anzilotti very rightly contests the assertion that a State acting under pressure of necessity is exercising a "subjective right" which entails an "obligation" on the part of the State injured by its acts; he notes that, in such a case, "necessity" simply "legitimizes" those acts, although they are contrary to an international obligation.¹⁸ And Verdross no less

rightly demonstrates that, in the situation described by the term "state of necessity", the conflict is not between two "rights" but between a "right" and a mere "interest", however vital.¹⁹

10. To sum up, the circumstance concerning which we must determine whether (and in what conditions) it may have the effect of precluding, by way of exception, the wrongfulness of certain State conduct, whether that circumstance is defined as "state of necessity" or simply "necessity", as was done in the English legal literature of an earlier age, is a factual situation in which a State asserts the existence of an interest of such vital importance to it that the obligation it may have to respect a specific subjective right of another State must yield because respecting it would, in view of that circumstance, be incompatible with safeguarding the interest in question. Thus, the crux of the problem of the merits of the "state of necessity" in international law is whether or not there are cases in which international law sanctions such an attitude—cases in which it allows the "subjective right" of a State to be sacrificed for the sake of a vital interest of the State which would otherwise be obliged to respect that right.

11. It is abundantly clear from the considerations we have so far set down that a valid reply to this question cannot be based on pre-established and preconceived criteria, whether the use of such criteria would or would not be conducive to recognition of the excuse of necessity in international legal relations. Nor do we believe that the question can be answered solely on the basis of general principles of internal law. Such principles can no doubt be of some help to us, provided, however, that it is borne in mind, firstly, that determining their existence in this matter is by no

¹⁶ H. Grotius, *De jure belli ac pacis, libri tres* [1646] (book II, chap. II, para X): *The Classics of International Law*, Carnegie Endowment for International Peace (Oxford, Clarendon, 1925), vol. II (English trans.), p. 195; and E. de Vattel, *Le droit des gens ou Principes de la loi naturelle* [1758]: *ibid.* (Washington, D.C., Carnegie Institution of Washington, 1916), vol. II, book IV, chap. IX, para. 119. However, Rivier remarked, in connection with the "plea of necessity": "It is also called the right of necessity, but this should not mislead us as to its true nature..." (*op. cit.*, p. 278.)

¹⁷ K. Strupp ("Das völkerrechtliche Delikt", *Handbuch des Völkerrechts*, ed. F. Stier-Somlo (Stuttgart, Kohlhammer, 1920), vol. III, part 1, pp. 126 and 148, and "Les règles générales du droit de la paix", *Recueil des cours... 1934-I* (Paris, Sirey, 1934), vol. 47, p. 567) was the main proponent of a genuine "right of necessity". This term is also used by G. Cohn ("La théorie de la responsabilité internationale". This term is also used by G. Cohn ("La théorie de la responsabilité internationale", *Recueil des cours... 1939-II* (Paris, Sirey, 1947), vol. 68, pp. 317–318) and by R. Redslob (*Traité de droit des gens* (Paris, Sirey, 1950), p. 249). More recently, B. Graefrath, E. Oeser and P. A. Steiniger (*Völkerrechtliche Verantwortlichkeit der Staaten* (Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1977), p. 75) stated, in regard to necessity, that one should speak of a "right" and not merely of a circumstance excluding wrongfulness.

¹⁸ See Anzilotti, "La responsabilité internationale..." (*loc. cit.*), p. 304, where he objects to "explaining the principle in question as a conflict between two contrary and irreconcilable rights, the lesser of which must yield to the greater", and states that "what is absent in these cases is the obligatory character of a legal rule". See also, by the same author, *Corso...* (*op. cit.*), pp. 416–417, where he sets his argument against that of Strupp.

According to G. Sperduti, the possibility cannot be excluded out of hand that international law should take into consideration the situation of necessity in which a State finds itself, not only to preclude the wrongfulness of conduct not in conformity with an international obligation which that State adopted in such a situation, but also to grant it a subjective right to adopt such conduct. For this purpose, we have only to imagine that there are two rules: one which takes into consideration the situation of necessity as cause for suspending the rule containing the obligation, and a second rule, linked to the first, which would grant the State that was in such a situation the subjective right to adopt the conduct which became lawful as a result of the first rule. It is therefore solely on the basis of an analysis of the prevailing law that it can be established whether, in international law, the conduct adopted in state of necessity is conduct which is merely lawful or whether it is conduct resulting from a subjective right. (G. Sperduti, "Introduzione allo studio delle funzioni della necessità nel diritto internazionale", *Rivista di diritto internazionale* (Padua), vol. XXII (1943), pp. 101–102.)

¹⁹ Verdross, "Règles générales..." (*loc. cit.*), pp. 488–489: "The state of necessity... is characterized by the fact that a State, finding itself torn between protection of its vital interests and respect for the right of another, violates the right of an *innocent* State in order to save itself." See also Schwarzenberger, "The fundamental principles..." (*loc. cit.*), p. 343: "Thus, necessity does not give any right, but may provide a good excuse."

means as easy as one might wish,²⁰ and, secondly, that transferring them from the field of relations between individuals to that of relations between States is a dubious undertaking.²¹ Ultimately, the relevant answer for our purposes must, as always, be sought in the realities of international life. However, if we want the truth on this subject to stand out with all the clarity and objectivity that is needed to reassure us, the question itself must be put in precise and comprehensive terms; in particular, it must be confined within the bounds which necessarily belong to it—within the limits which it logically implies—because, needless to say, anyone who would have State practice and the rulings of international judicial organs grant absolute compliance to any State claiming to be released from an international obligation even a major one, simply on the ground that it has an interest in acting in that way—an interest which, moreover, it arrogates the right unilaterally to term essential or even vital for it—must inevitably suffer a rebuff, lest the entire system of international legal relations should be annihilated. Before one could even contemplate the possibility that a situation of “necessity” might constitute a circumstance precluding the wrongfulness of conduct by a State which is not in conformity with an international obligation towards another State, the situation in question would have to be extremely serious, and irrefutably so. A number of particularly strict conditions would therefore have to be met. We shall attempt to enumerate them, assisted by the results of a long and careful study of the subject by the most authoritative writers, largely on the basis of the principles accepted in this connection by national legal systems.

12. The “excuse of necessity” may conceivably be accepted in international law only on condition that it

²⁰ For a comparative study of the concept of “state of necessity” in systems of internal law and of the conditions to which it is subject, see D. F. Diaz Palos, “Estado de necesidad”, *Nueva enciclopedia jurídica* (Barcelona, Seix, 1956), vol. VIII, pp. 904 *et seq.* For the situation in French law, see R. Rodière, “Responsabilité du fait personnel”, *Répertoire de droit civil*, 2nd ed. (Paris, Dalloz, 1975), vol. VI, pp. 8–9, and “Responsabilité pénale”, *Nouveau répertoire de droit*, 2nd ed. (Paris, Dalloz, 1965), vol. IV, pp. 185–186; in Italian law, B. Inzitari, “Necessità (Diritto privato)”, *Enciclopedia del diritto* (Milan, Giuffrè, 1977), vol. 27, pp. 852 *et seq.*, and C. F. Grosso, “Necessità (Diritto penale)”, *ibid.*, pp. 897 *et seq.*; in German law, A. Schönke, and H. Schröder, *Strafgesetzbuch: Kommentar*, 19th ed., rev. by T. Lenckner (Munich, Beck, 1978), pp. 485 *et seq.* The general concept of “state of necessity” does not seem to be familiar in the laws of the common-law countries.

²¹ Anzilotti (*Corso... (op. cit.)*, p. 418) observes that “the elements of the state of necessity are less easy to define in international law than in internal law; perhaps it is not incorrect to say that any question is in substance an individual question”. On the other hand, F. von Liszt is of the view that “The ideas accepted in penal law and in private law of self defence and of necessity also apply to international law” (F. von Liszt, *Das Völkerrecht*, 12th ed. (Berlin, Springer, 1925), p. 285); and Redslob states that “The right of necessity proceeds from a conception of justice. It is affirmed, in many variations, in civil and criminal laws; it has its place in international law.” (*op. cit.*, p. 249.)

is absolutely of an exceptional nature. It follows that the interest of a State in defeating, if need be, any subjective right of another State must in turn be one of those interests which are of exceptional importance to the State seeking to assert it. We are not, however, suggesting that the interests to be taken into account be limited to the “existence” of the State.²² The end-result of that theoretical limitation, which again was due to an erroneous identification of the concept of necessity with the concept of self-preservation, and also to certain misguided analogies with internal law, was to create a false picture of the question; cases in which a state of necessity has been invoked on the ground of an interest of the State other than the preservation of its very existence have in the long run been more frequent and less controversial than others. To put it more simply, one should say that what is involved is an “essential”²³ interest of the State. In our view, however, it would be pointless to attempt to go into greater detail and establish categories of interests to be considered essential for the purposes of the present discussion.²⁴ How “essential” a given interest may be naturally depends on the totality of the conditions in which a State finds itself in a variety of specific situations; it should therefore be appraised in relation to the particular case in which such an interest is involved, and not predetermined in the abstract.

13. The threat to such an essential interest of the State must be extremely grave, representing a present danger to the threatened interest,²⁵ and its occurrence must be

²² As argued by Anzilotti, *Corso... (op. cit.)*, pp. 418 *et seq.*: A. Vonlanthen, *Die Völkerrechtliche Selbstbehauptung des Staates* (Fribourg (Switzerland), Paulusdruckerei, 1944) [thesis], pp. 175 *et seq.* (the author refers to the existence of the State or of its population); Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), p. 71; Sereni, *op. cit.*, p. 1530. In his 1939 work on “Le délit international” (*Recueil des cours... 1939-II* (Paris, Sirey, 1947), vol. 68, p. 545), the author of the present report falls into the same error.

²³ For the reasons just stated, the expression “essential interests” seems to us closer to reality than the expression “vital interests”, used by Verdross, (“Règles générales...” (*loc. cit.*), p. 489) or “supreme good” used by Redslob (*Traité... (op. cit.)*, p. 249).

²⁴ Strupp (“Les règles générales...” (*loc. cit.*), p. 568) attempts a kind of enumeration of such categories when he speaks of cases in which a State is threatened “by a great danger to its existence, its territorial or personal status, its government or its very form, limiting or even destroying its independence or its ability to act”. In our view, this enumeration would be of little use in determining, in a specific situation, whether or not the conditions for the existence of a “state of necessity” are fulfilled in these terms.

²⁵ See Strupp, “Les règles générales...” (*loc. cit.*), p. 568 (present or imminent danger); Anzilotti, *Corso... (op. cit.)*, p. 419 (grave and imminent danger); Ago, *loc. cit.*, p. 540 (grave and imminent danger); G. Balladore Pallieri, *Diritto internazionale pubblico*, 8th ed. (Milan, Giuffrè, 1962), p. 247 (grave and imminent danger); Vonlanthen, *op. cit.*, pp. 175 *et seq.* (a present and immediately upcoming danger); Redslob, *op. cit.*, p. 249 (grave and present danger); Cheng, *op. cit.*, p. 71 (actual and not merely apprehended); Buza, *loc. cit.*, p. 214 (immediate danger). Sereni (*op. cit.*, p. 1530) further states that it must have been an unforeseeable danger.

entirely beyond the control of the State whose interest is threatened.²⁶ It would obviously be out of the question for a State intentionally to create a situation of danger to one of its major interests solely for the purpose of evading its obligation to respect a subjective right of another State.

14. The adoption by a State of conduct not in conformity with an international obligation towards another State must truly be the only means available to it for averting the extremely grave and imminent peril which it fears; in other words, it must be impossible for the peril to be averted by any other means, even one which is much more onerous but which can be adopted without a breach of international obligations.²⁷ In addition, the conduct in question must be clearly indispensable in its totality, and not only in part, in order to preserve the essential interest which is threatened. Any action in excess of what is strictly necessary for that purpose is *ipso facto* a wrongful act, even if the excuse of necessity would otherwise be allowed to operate. For instance, it is obvious that, once the peril had been averted through the adoption of the conduct not in conformity with the international obligation, any subsequent persistence in that conduct would again become wrongful, even if its wrongfulness had been precluded during the preceding period. Compliance with the international obligation which was infringed must, in so far as this is still materially possible, immediately resume.

15. The interest protected by the subjective right vested in the foreign State, which is to be sacrificed for the sake of an "essential interest" of the obligated State, must obviously be inferior to that other interest. It is particularly important to make this point because, as stated above,²⁸ the idea that the only interest for the protection of which the excuse of necessity might be invoked is the very existence of the State has now been completely discarded. Consequently, the interest in question cannot be one which is comparable²⁹ and

equally essential to the foreign State concerned. Nevertheless, it is rather an exaggeration to refer, as is sometimes done in this connection, to a "good of little value"³⁰ or to "secondary values".³¹ It is a matter of relation of proportion, rather than of absolute value.

16. Even if the conditions thus far mentioned were all fulfilled in a particular case, the fact that a State invoked a state of necessity as an excuse could not have the effect of precluding the wrongfulness of conduct by that State which was not in conformity with an international obligation if the obligation in question had been specially designed to operate also, or in particular, in abnormal situations of peril to the obligated State or to its essential interests, or with the manifest intention of precluding the wrongfulness of a breach of that obligation on the ground of necessity.³² While this conclusion is more or less automatic when the special scope of the obligation is explicitly defined in the rule from which it flows, or in other rules contained in the same instrument, it might also be considered inevitable in other cases too, when the fact that there was no excuse of necessity for failure to comply with the obligation is implicitly but inevitably indicated by the very nature of the rule which is its source, by the purpose or aims of that rule, or by the circumstances in which it was formulated and adopted. While the analysis of practice will provide a more fully documented reply to this question, it can be said at the present stage that we exclude the possibility that state of necessity operates as a circumstance precluding the wrongfulness of conduct not in keeping with an obligation stemming from one of the rules of *jus cogens* or certain rules of humanitarian international

protection normally accorded to these interests, so that a socially important interest shall not perish for the sake of respect for an objectively minor right. In every case a comparison of the conflicting interests appears to be indispensable." (Cheng, *op. cit.*, pp. 74-75.)

and L. Buza emphasizes that "the protected right must be more important than the injured" (*loc. cit.*, p. 213).

³⁰ Term used by Cohn ("un bien de peu de valeur"): *loc. cit.*, p. 317.

³¹ Sørensen's expression: *loc. cit.*, p. 220.

³² François notes that "state of necessity cannot be invoked as a circumstance precluding wrongfulness if, at the time when the rule was formulated, account was already taken of the abnormal situation in which the State concerned might find itself." He goes on to say:

"A belligerent, for example, cannot evade the rules relating to the law of war by invoking the danger in which its country finds itself. Grotius's adage, *licere in bello quae ad finem sunt necessaria*, constitutes a guideline when it comes to jointly establishing the rules of the law of war; it cannot justify a breach of the provisions once they have been adopted and put into effect. The law of war is based on the consent of States to refrain from certain acts in case of war, i.e. when the vital interests of States are at stake. In adopting that law, a State waives the right to invoke the distress in which it finds itself in order to free itself from its obligations." (G. P. A. François, "Règles générales du droit de la paix", *Recueil des cours...*, 1938-IV (Paris, Sirey, 1938), vol. 66, p. 183.)

See also Buza, *loc. cit.*, p. 224.

²⁶ See Anzilotti, *Corso...* (*op. cit.*), p. 419; Vitta, *loc. cit.*, p. 320; Ago, *loc. cit.*, p. 545; Vonlanthen, *op. cit.*, Redslob, *op. cit.*, p. 249; L'Huillier, *op. cit.*, p. 369; Buza, *loc. cit.*, p. 215; Sereni, *op. cit.*, p. 1530.

²⁷ The point that state of necessity cannot logically operate as a circumstance precluding the wrongfulness of State conduct when the danger that such conduct is intended to prevent could be averted by some other means is expressly made by K. Strupp, *Éléments du droit international public universel, européen et américain* (Paris, Les éditions internationales, 1930), vol. 1, p. 343, and "Les règles générales..." (*loc. cit.*), p. 568; by Vitta, *loc. cit.*, p. 320; by Ago, *loc. cit.*, p. 545; by Vonlanthen, *op. cit.*; by L'Huillier, *op. cit.*, p. 369; by Buza, *loc. cit.*, pp. 214-215. Redslob (*op. cit.*, p. 349) and Cheng (*op. cit.*, pp. 71 and 74) particularly emphasize that state of necessity cannot serve as a valid excuse unless all "legitimate" means to avert the peril have been unsuccessfully employed.

²⁸ See para. 12.

²⁹ Bin Cheng observed:

"It is the great disparity in the importance of the interests actually in conflict that alone justifies a reversal of the legal

law. Moreover, in view of the compelling reasons which lead to the definitive affirmation of the prohibition of the use of force against the territorial integrity or political independence of any State, it seems to us inconceivable that the legal conviction of States would today accept "necessity" as justification for a breach of that prohibition and, more generally, for any act covered by the now accepted concept of an "act of aggression".³³

17. Furthermore, there is no reason why state of necessity should come into play as a "circumstance precluding the wrongfulness" of an act of the State in the opposite case, namely, when the rule establishing the obligation—a conventional rule, of course—explicitly or implicitly subordinates observance of the obligation to the proviso that certain circumstances do not render such fulfilment too onerous or dangerous.³⁴ The concept of "necessity" is then in fact incorporated in the obligation itself, setting a limit to its scope. The State which, finding itself in such abnormal circumstances, then engages in conduct different from that provided for in the obligation for normal circumstances, in no way breaches the obligation and does not commit any act "not in conformity" with the requirements of that obligation. There is thus no wrongfulness on the part of that State to be precluded.

18. The possible preclusion of the wrongfulness of a given act committed by a State, if accepted in a particular case for reasons of "necessity", would in itself preclude only the consequences for which the State committing the act in question would otherwise be held responsible under international law by reason of the wrongfulness of that act. The preclusion would therefore in no way cover consequences to which the same act might give rise under another heading, in particular the creation of an obligation to compensate for damage caused by the act of "necessity" would be incumbent on that State on a basis other than that of *ex delicto* responsibility.³⁵ However, it is obvious that

the recognition of the existence of such an obligation cannot wrongly be adduced as a basis for concluding that the act producing it is even partially wrongful,³⁶ and for arguing that the state of necessity has no value as a circumstance precluding the wrongfulness of an act of the State in international law.

19. We must therefore refer to a concept of state of necessity based clearly on the aforementioned conditions and limits when taking up our consideration of international judicial and diplomatic practice in order to determine whether that practice does or does not confirm the acceptability of the state of necessity in general international law as a circumstance precluding the wrongfulness of an act of the State.

20. In this connection, it should first be noted that the request for information submitted to States by the Preparatory Committee for the Conference for the Codification of International Law (The Hague, 1930) did not put to them the question whether or not a "state of necessity" should be regarded as a circumstance precluding the wrongfulness of an act of the State. Two States, Denmark and Switzerland, nevertheless referred to that issue in their replies.

In replying to point XI (a) of the request for information, concerning the circumstances in which a

³³ We believe that these observations should enable some writers to overcome the fears aroused by the well-known abuses of the concept of "necessity" which occurred when it was invoked as a pretext for justifying armed attacks on other States, armed intervention in the internal affairs of other States, or similar actions. We shall have occasion to revert to this essential point later.

³⁴ Anzilotti (*Corso... (op. cit.)*, pp. 414–415) notes that obligations explicitly formulated along these lines are frequent in the law of war and mentions as examples several provisions of the rules annexed to the Convention (IV) respecting the laws and customs of war on land (The Hague, 18 October 1907). He observes in this connection that "one cannot speak of acts objectively contrary to the norm if the norm itself allows them".

³⁵ The idea that conduct of a State which acted in "state of necessity" could be considered lawful while at the same time that State was obliged to compensate the State that suffered damages caused by such conduct is already found in the writers of the nineteenth century. Thus Twiss (*op. cit.*, p. 185) and Hall (*op. cit.*, p. 326), while affirming the "right" of the aggressive State to penetrate the territory of a neutral State if that proved indispensable to save its existence, are of the opinion that the

State which adopted such conduct must compensate the neutral State for any damage which it had caused. A. Rivier and F. von Liszt express themselves in broader terms. Rivier, after stating that the State "is authorized... [to] violate the right of another nation" if that is necessary to preserve its own existence, adds that "the violation of the right must be limited to the unavoidable, and... the damaged caused must be made good" (Rivier, *op. cit.*, p. 278). Von Liszt says the state of necessity precludes "the unlawful nature of the injury committed", but adds that the State which claims state of necessity "owes compensation to the State which it injures" (von Liszt, *op. cit.*, p. 201). However, it is principally in modern doctrine that the conviction appears that the possible obligation to indemnify victims and to compensate damages is entirely alien to the idea of the existence of a responsibility for a wrongful act. Thus A. P. Sereni writes: "It seems, moreover, that the state of necessity, while precluding wrongfulness, does not do away with compensation for damage" (*op. cit.*, p. 1531). Even clearer is the view on this subject of A. Favre: "In any case, the State which performs the act of necessity is obliged to compensate for the damage, even though the consequence of the state of necessity was to preclude wrongfulness" (*Principes du droit des gens* (Paris, Librairie de droit et de jurisprudence, 1974), p. 644), and of Sørensen, who states: "We are speaking here of the problem of the duty to compensate for the damage caused by a lawful act" (*loc. cit.*, p. 221).

It is interesting to note that in internal law too the most recent trend in judicial practice has been to consider state of necessity as a circumstance precluding both the criminal wrongfulness and the civil wrongfulness of an act acknowledged to have been committed in such conditions, and to treat the obligation to compensate the victims as an obligation arising from a lawful act. The criteria applied with a view to fixing the compensation are in part different from those used to determine *ex delicto* civil liability. On this point see, for example, Inzitari, *loc. cit.*, pp. 852 *et seq.*; Díaz Palos, *loc. cit.*, pp. 919–920.

³⁶ We feel that this error is committed by A. Sánchez de Bustamante y Sirvén, (*Droit international public*, trans. P. Goulé (Paris, Sirey, 1936), vol. III, p. 527), and J. Combacau ("La responsabilité internationale", in: H. Thierry *et al.*, *Droit international public* (Paris, Montchrestien, 1975), pp. 658–659).

State can legitimately claim to have acted in self-defence, Denmark stated:

Self-defence and necessity should as a matter of principle be an admissible plea in international law; but, as in private law, they should be subject to certain limitations which have not yet been fixed with sufficient clearness. . . .*

Nor, generally speaking, can the right of necessity be pleaded; for in such cases the State would apply its own laws on expropriation, etc., which would be equally valid against its own nationals. It will be desirable in future to make an attempt to limit as far as possible, if not to abolish completely, the far-reaching right of necessity recognised by former international law, and particularly the former right of war. The State should respect existing national and international law and must not trespass on the rights of other nations on the ground that its own interests are threatened. As a general rule, no right of necessity should be recognised in public international law above and beyond the right of necessity allowed to private individuals in private law.³⁷

These comments are obviously vague; in particular, they do not enable one to grasp the precise dimension of the distinction which the Danish Government apparently seeks to make between “necessity” and “right of necessity”. Let us note simply that, while the Danish Government agreed that in international law necessity could constitute a circumstance precluding wrongfulness, it believed that it should be acknowledged to exist only within very limited bounds, so as to avoid a repetition of past abuses.

Switzerland, in its reply to point V of the request for information, concerning State responsibility for acts of the executive organ, stated:

It has been argued that an act accomplished by a State within the limits of its law and inspired by considerations of national defence does not constitute an international delict even though it may injure another State. A rule like this would obviously be too absolute; it would create conditions of juridical uncertainty almost amounting to a total negation of law. We should, however, admit the right of self-preservation and allow to the State a right of lawful defence provided this right is interpreted strictly and is rigorously subordinated to the existence of unjust and unlawful aggression. We should therefore clearly distinguish between this right and the *law of necessity*,* which can be used as a cloak to cover every form of injustice and arbitrariness.³⁸

Here we see the re-emergence, on the basis of the two concepts of “self-defence” (*légitime défense*—translated as “lawful defence” in the League of Nations text) and “necessity”, of the old idea of the “right of self-preservation”. At first sight, these terms might give the impression that the Swiss Government was loath to acknowledge that necessity had any standing in international law. Its opposition is not, however, a matter of principle; it is based solely on a fear of possible abuses. That being the case, one wonders whether a properly restrictive formula might not have sufficed to dispel such misgivings. Moreover, we have already seen that the Swiss Government declared itself in favour of accepting *force majeure* as a

circumstance precluding international wrongfulness.³⁹ It was not clear from the Swiss reply on that subject whether, in speaking of “*force majeure*”, a concept which has often been found to shade into that of “necessity”, the authors of the reply meant to refer to that truly *absolute* impossibility of complying with an obligation which is the very essence of *force majeure* or rather, in a broader sense, to serious difficulties which would prevent the fulfilment of the obligation except at the cost of sacrificing an essential interest of the State, and therefore would also cover cases of “necessity”. In short, it cannot be said that any decisive conclusions can be drawn, for our present purposes, from the few statements of position made at the time of the 1930 Codification Conference.

21. In international practice, cases abound in which a State has invoked a situation of necessity (whether it used those precise terms or others to describe it) with the aim of justifying conduct different from that which would have been required of it in the circumstances under an international obligation incumbent on it. It will be fitting, however, to refer to and analyse only those cases which may, in one way or another, prove conclusive for our present purposes. It will also be fitting to concentrate on those which relate to areas where the applicability of the plea of necessity—subject always to the conditions and limits which we have endeavoured to define—does not appear to have given rise to real objections of principle, even though reservations and firm opposition may have been expressed with regard to its application in the specific cases concerned. That point being established, we shall, as we did in connection with other “circumstances”, examine separately those cases in which necessity was pleaded as a ground for non-compliance with an obligation “to do” and those in which it was invoked to justify conduct not in conformity with an obligation “not to do”. Within each of these two categories, it will be useful to group cases according to their specific subject-matter.

22. An extensive series of cases of non-compliance, on grounds of necessity, with obligations *to do* relate to the *repudiation of suspension of payment of international debts*. Thus, in the *Russian indemnity* case, which has already been considered from another standpoint,⁴⁰ the Ottoman Government, in order to justify its delay in paying its debt to the Russian Government, invoked among other reasons the fact that it had been in an extremely difficult financial situation, to which at the time it applied the term “*force majeure*” but which, rather, as we have several times pointed out, bore the hallmark of a “state of necessity”. In this connection, the Permanent Court of Arbitration, to which the dispute was referred, stated:

³⁷ League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (C.75.M.69.1929.V), p. 126.

³⁸ *Ibid.*, p. 58.

³⁹ See *Yearbook... 1979*, vol. II (Part One), p. 50, document A/CN.4/318 and Add.1–4, para. 108.

⁴⁰ *Ibid.*, p. 34, para. 65.

The exception of force majeure, invoked in the first place, is arguable in international public law, as well as in private law; international law must adapt itself to political exigencies. The Imperial Russian Government expressly admits... that the obligation for a State to execute treaties may be weakened "if the very existence of the State is endangered, if observation of the international duty is... self-destructive*".

It is indisputable that the Sublime Porte proves, in support of the exception of *force majeure*... that Turkey was faced between 1881 and 1902 with the gravest financial difficulties, compounded by domestic and external events (insurrections, wars), which forced it to allocate a large part of its revenues to special purposes, to submit to foreign control a part of its finances, even to grant a moratorium to the Ottoman Bank, and in general to be unable to fulfil its obligations without delays or omissions, and only then at the cost of great sacrifices. However, it is alleged on the other hand that, during the same period and especially after the establishment of the Ottoman Bank, Turkey was able to contract loans at favourable rates, to convert others, and lastly to amortize an important part, estimated at 350 million francs, of its public debt... It would be a manifest exaggeration to admit that the payment (or the contracting of a loan for the payment) of the relatively small sum of 6 million francs due to the Russian claimants would have imperilled the existence of the Ottoman Empire or seriously endangered its internal or external situation.*⁴¹

In the case in point, therefore, the Court rejected the defence raised by the Ottoman Government, which, following the wording of the Turkish submission, it continued to call a plea "of *force majeure*" but which, in view of the language used by the Court, becomes even more a *typical example of the exception of "state of necessity"*. The Court based its decision on a finding that the necessary conditions for recognizing the applicability of such a defence were not fulfilled in that particular case. We can therefore say, according to the terminology we are now using, that the Court did accept the existence in international law of a "plea of necessity", but only within very strict limits. In its view, compliance with an international obligation must be "self-destructive" in order for the wrongfulness of the conduct not in conformity with the obligation to be precluded. Its concept of "state of necessity" is restrictive as to the interest protected. Only where compliance with an obligation would imperil the existence of the State or where it might *seriously jeopardize its internal situation* could the State be considered entitled not to comply.

23. In the arbitral award delivered on 29 March 1933 by arbitrator Ö. Undén in the case of the *Forests of Central Rhodope (Merits)*,⁴² Bulgaria was ordered to pay to Greece reparations totalling 475,000 gold leva, plus interest of 5 per cent from the date of the award. As Bulgaria failed to comply with the award within the specified time, Greece appealed to the Council of the League of Nations on 6 September

1943 to adopt against Bulgaria the measures provided for in Article 13, paragraph 4, of the Covenant of the League of Nations. In justification of its conduct not in conformity with the obligations imposed by the award, Bulgaria stated before the Council:

...it was not the Bulgarian Government's intention, as might perhaps be supposed from the Greek Government's action in asking for this question to be placed on the Council's agenda (Annex 1516), to evade the obligation imposed upon it by the arbitral award in question. He confirmed therefore the statement that his Government was prepared to discharge to Greece the payment stipulated in the award. The present situation of the national finances, however, prevented the Bulgarian Government from contemplating a payment in cash. His Government was nevertheless prepared to examine immediately, with the Greek Government, any other method of payment which might suit the latter. In particular, the Bulgarian Government would be able to discharge its debt by deliveries in kind.⁴³

Greece accepted Bulgaria's proposal. The representative of Greece to the Council stated:

The Greek Government, taking into consideration Bulgaria's financial difficulties, assented to that proposal and was prepared to settle immediately, in agreement with the Bulgarian Government, the nature and quantity of the deliveries which it could conveniently accept in payment of its claim.⁴³

Thus, the two Governments seem to have clearly recognized that a situation of *necessity* such as one consisting of *very serious financial difficulties* could justify, if not the repudiation by a State of an international debt, at least a recourse to means of fulfilling the obligation other than those actually envisaged by the obligation.

24. The question of the possibility of invoking very serious financial difficulties—and hence a situation which would fulfil the conditions for recognizing the existence of a state of necessity—as justification for repudiating or suspending payment of a State debt has often also been discussed in connection with debts contracted by the State not directly with another State but with foreign banks or other financial firms. Although the question whether there is an international obligation under customary law to honour debts contracted by the State with foreign "persons" is in dispute, some of the statements of position made in the discussions on the subject seem to us to be relevant, not only because such an obligation can in any event be imposed by conventional instruments, but also because the positions in question were often stated in broad terms whose implications went beyond the particular case involved.

25. One question put in the request for information submitted to States by the Preparatory Committee for the 1930 Codification Conference at the Hague was whether the State incurred international responsibility if, by a legislative act (point III, 4) or by an executive act (point V, 1(b)), it repudiated debts contracted with foreigners. A number of Governments maintained that

⁴¹ *Yearbook... 1978*, vol. II (Part One), p. 167, document A/CN.4/315, para. 394. Document A/CN.4/315 is hereinafter called "Secretariat Survey".

⁴² United Nations, *Reports of International Arbitral Awards*, vol. III (United Nations publication, Sales No. 1949.V.2), p. 1405.

⁴³ League of Nations, *Official Journal*, 15th year, No. 11 (Part I) (November 1934), p. 1432.

the answer to that question depended on the circumstances of the particular case; some of them expressly mentioned the case of necessity. For instance, the South African Government expressed the following view:

Such action would *prima facie* constitute a breach of its international duties and give rise to an international claim. It would certainly entail international responsibility if a State, able to meet its liabilities, in repudiating the debts it owes to foreigners, was prompted by lack of consideration for their rights.

The Union Government *would not*,* however, *exclude the possibility of such repudiation being a justifiable act*.* Foreigners lending money to a particular State can hardly expect not to be prejudicially affected under any circumstances by the vicissitudes of the State in question. If, through adverse circumstances beyond its control, a State is actually placed in *such a position that it cannot meet all its liabilities and obligations, it is virtually in a position of distress*.* It will then have to rank its obligations and make provisions for those which are *of a more vital interest first*. *A State cannot, for example, be expected to close its schools and universities and its courts, to disband its police force and to neglect its public services to such an extent as to expose its community to chaos and anarchy merely to provide the money wherewith to meet its moneylenders, foreign* or national*. There are *limits to what may be reasonably expected of a State** in the same manner as with an individual. If, in such a contingency, the hardships of misfortune are equitably divided over nationals as well as foreigners and the latter are not specially discriminated against, there should be no reason for complaint.⁴⁴

A similar position was adopted by the Austrian Government, which stated:

The dominant doctrine of international law does not seem to qualify the repudiation of debts by the State as a violation of that State's international obligations unless the State acts arbitrarily—for instance, diverts from their proper destination the securities earmarked for its creditors. On the other hand, this doctrine does not admit that States whose nationals have been injured by such repudiation may intervene on behalf of the injured persons in cases in which repudiation has not been arbitrary, but has been necessitated by *vis major*. It must be allowed that, in most cases, the risks involved in acquiring the securities of a State whose financial situation is unstable are already counterbalanced by the price of issue or rate of interest.⁴⁵

In the light of the replies received, the Preparatory Committee made a distinction, in the Bases of discussion drawn up for the Conference, between repudiation of debts and the suspending or modifying of the service of a debt. With regard to the latter, it stated:

A State incurs responsibility if, without repudiating a debt, it suspends or modifies the service, in whole or in part, by a legislative act, unless it is driven to this course by *financial necessity*.* [Basis of discussion No. 4, para. 2⁴⁶].

26. The same question has been considered on numerous occasions by international judicial bodies. In the *French Company of Venezuela Railroads* case, the French Government complained, *inter alia*, that

during the revolution of 1898–1899 the Venezuelan Government had not paid its debts to the company. The dispute was referred to the French/Venezuelan Mixed Claims Commission established under the Protocol of 19 February 1902. In his award, the umpire Plumley stated that, in view of the circumstances, the Venezuelan Government:

... cannot be charged with responsibility ... for its inability to pay its debts ... The umpire finds no purpose or intent on the part of the respondent Government to harm or injure the claimant company in any way or in any degree. Its acts and its neglects were caused and incited by entirely different reasons and motives. *Its first duty was to itself. Its own preservation was paramount*.* Its revenues were properly devoted to that end. The appeal of the company for funds came to an empty treasury, or to one only adequate to the demands of the war budget.⁴⁷

27. In the case concerning the payment of various *Serbian loans* issued in France, which was submitted to the Permanent Court of International Justice and on which the Court rendered its judgement on 12 July 1929, the Serb-Croat-Slovene State advanced two arguments in support of its contention that it was now entitled to regard its debts originally payable in gold francs as payable in paper francs. The first was that it was materially impossible for it to obtain from the Banque de France the gold francs needed to pay its debts according to the terms of the loan contracts. (As has already been noted,⁴⁸ the Court found itself unable to accept the plea of "*force majeure*" in this particular case, since the terms of the loans in no way prevented the debtor from discharging its debts by paying the creditors the equivalent in paper francs of the gold franc value of the debts.) The second and main argument was that the existence in the newly created State of a very serious situation due to the war made it impossible to place on the State's finances so heavy a burden as the payment in full of its external debts without very seriously jeopardizing its financial stability. A parallel was drawn with the fact that the French Government itself had forced an irreparable sacrifice upon its own creditors through the legislative measures it had had to take in order to stabilize its currency, that being the only way it could cope with the huge costs resulting from the war.⁴⁹ The French Government strongly maintained that those arguments did not apply in the case in question, although it did not deny that under other circumstances a serious situation might justify non-observance of the clauses stipulated in a loan contract.⁵⁰ The same view was

⁴⁷ United Nations, *Reports of International Arbitral Awards*, vol. X (United Nations publication, Sales No. 60.V.4), p. 353.

⁴⁸ See *Yearbook ... 1979*, vol. II (Part One), pp. 54–55, document A/CN.4/318 and Add.1–4, para. 118.

⁴⁹ See Secretariat Survey, para. 264. The respondent Government placed both the arguments it advanced in the context of the single concept of "*force majeure*" which it noted was recognized under the laws of both countries (*ibid.*, p. 470). See also the oral statement by the Counsel for the Serb-Croat-Slovene State, Mr. Devèze (*ibid.*, para. 266).

⁵⁰ See the oral reply of the agent of the French Government, Mr. Basdevant (*ibid.*, para. 267).

⁴⁴ Secretariat Survey, para. 64.

⁴⁵ *Ibid.* Needless to say, when the Austrian Government spoke of "*vis major*" it was referring to situations which, in our view, are more a matter of a "state of necessity".

⁴⁶ *Yearbook ... 1956*, vol. II, p. 223, document A/CN.4/96, annex 2. See also, to the same effect, Basis No. 9, concerning the repudiation or modification of debts by the executive power (*ibid.*).

taken by the Court, which, in ruling that it could not be held that the war and its economic consequences “affected the legal obligations of the contracts between the Serbian Government and the French bondholders”,⁵¹ seems to have considered that the debtor State’s financial situation would not, in this specific case, collapse as a result of its paying the debt in full. Apparently, however, the same Court entirely agreed in principle that a real state of necessity might, in some cases, be invoked as precluding the wrongfulness of conduct not in conformity with an international financial obligation.

28. Nonetheless, it was in particular the dispute between Belgium and Greece in the *Société Commerciale de Belgique* case that provided the occasion for lengthy debate on whether the existence of a situation of *very serious financial difficulties* could be invoked to justify non-payment of a State debt to a foreign financial firm. In the case in question, there had been two arbitral awards requiring the Greek Government to pay a sum of money to the Belgian company in repayment of a debt contracted with the company. As the Greek Government was tardy in complying with the award, the Belgian Government applied to the Permanent Court of International Justice for a declaration that the Greek Government, in refusing to carry out the awards, was in breach of its international obligations. The Greek Government, while not contesting the existence of such obligations, stated in its defence that its failure thus far to comply with the arbitral awards was due not to any unwillingness but to the country’s serious budgetary and monetary situation. In section 4 of this chapter,⁵² we quoted a passage from the Greek Government’s written submissions describing the conditions which made it *impossible* to “make the payments and transfer the foreign currency” which compliance with the award would entail “*without jeopardizing the country’s economic existence** and the normal functioning of its public services”. We pointed out then that, in speaking of “*force majeure*” and the “*impossibility*” of engaging in the conduct required by the obligation, the pleader for the Greek Government probably did not have in mind an actual *absolute impossibility*, but rather an impossibility of engaging in such conduct without thereby injuring a *fundamental interest of the State*, i.e. a situation which, in our opinion, might be subsumed under the hypothesis of a *state of necessity* rather than under that of *force majeure*. That is why we mention the case again here, since it really belongs, despite imprecisions of terminology, among the cases—indeed the most significant cases—of the application of the concept of “state of necessity”.

⁵¹ *Ibid.*, para. 268. See also the judgement rendered by the Court on the same date in the case concerning the payment in gold of the Brazilian Loans issued in France (*ibid.*, para. 273).

⁵² *Yearbook . . . 1979*, vol. II (Part One), pp. 55–56, document A/CN.4/318 and Add.1–4, para. 120.

29. In its counter-memorial of 14 September 1938, the Greek Government had already argued that it had been under an “imperative necessity”, stating:

The State has . . . the duty to suspend the execution of *res judicata* if its execution may disturb order and social peace,* of which it is the responsible guardian, or if the normal operation of its public services may be gravely jeopardized* or gravely hampered thereby.⁵³

It denied having “committed a wrongful act contrary to international law”, as alleged by the plaintiff, stating:

The Government of Greece, anxious for *the vital interests of the Hellenic people and for the administration, economic life, health situation and security,** both internal and external, of the country could not take any other course of action; any Government in its place would do the same.⁵⁴

This argument is again advanced in the Greek Government’s rejoinder of 15 December 1938, from which we took the passage quoted in section 4 and referred to in paragraph 28 above, where reference was made to the serious danger to *the country’s economic existence* that compliance with its international obligations would have entailed.⁵⁵ But it was in the oral statements made on 16 and 17 May 1939 by the Counsel for the Greek Government, Mr. Youpis, that the argument of necessity was particularly developed. After reaffirming the principle that contractual obligations and judgements must be executed in good faith, Mr. Youpis went on to say:

Nevertheless, there occur from time to time external circumstances beyond all human control which make it impossible for Governments to discharge their duty to creditors and their duty to the people; the country’s resources are insufficient to perform both duties at once. It is impossible to pay the debt in full and at the same time to provide the people with a fitting administration and to guarantee the conditions essential for its moral, social and economic development. *The painful problem arises of making a choice between the two duties; one must give way to the other in some measure: which?**

Doctrine and the decisions of the courts have therefore had occasion to concern themselves with the question: . . .

Doctrine recognizes in this matter that *the duty of a Government to ensure the proper functioning of its essential public services outweighs that of paying its debts.** No State is required to execute, or to execute in full, its pecuniary obligation if this jeopardizes the functioning of its public services and has the effect of disorganizing the administration of the country. In the case in which payment of its debt *endangers economic life or jeopardizes the administration,** the Government is, in the opinion of authors, *authorized to suspend or even to reduce the service of debt.**⁵⁶

The Counsel for the Greek Government then proceeded to a detailed analysis of the literature and of the judicial precedents, in which he found full confirmation of the principle he had stated. In the hope of making that principle more easily acceptable—although he may also have had other intentions—he first of all

⁵³ Secretariat Survey, para. 276.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, para. 278.

⁵⁶ *Ibid.*, para. 281.

referred to it as “the theory of *force majeure* expressed in another formulation”. Then, however, bowing to the obvious, he immediately added that “various schools and writers express the same idea in the term ‘state of [necessity]’”. He then said:

Although the terminology differs, everyone agrees on the significance and scope of the theory: everyone considers that *the debtor State does not incur responsibility if it is in such a situation*.⁵⁷

30. The respondent Government was thus enunciating, in a particularly well-documented manner and as having an absolutely general scope of application, the principle that a duly established state of “necessity” constituted in international law *a circumstance precluding the wrongfulness of State conduct not in conformity with an international financial obligation* and the responsibility which would otherwise derive therefrom. It is important to note that so far as recognition of that principle is concerned, the applicant Government declared itself fully in agreement. In his statement of 17 May 1939, the Counsel for the Belgian Government, Mr. Sand, said:

In a learned survey . . . Mr. Youpis stated yesterday that a State is not obliged to pay its debt if in order to pay it it would have to jeopardize its essential public services.*

*So far as the principle is concerned, the Belgian Government would no doubt be in agreement.*⁵⁸

As a matter of fact, the Belgian Counsel was not even contesting the point that the financial situation in which the Greek Government found itself at the time could have justified the tragic account given by its pleader. The points on which he sought reassurance were the following: (a) that that Government’s default on its debt was solely on factual grounds involving inability to pay and that no other reasons involving contestation of the right of the creditor entered into the matter; (b) that inability to pay could be recognized as justifying total or partial “suspension” of payment, but not a final discharge of even part of the debt. In other words, it must be recognized that the wrongfulness of the conduct of the debtor State not in conformity with its international obligation would cease to be precluded once the situation of necessity no longer existed, at which time the obligation would again take effect in respect of the entire debt.⁵⁹ From that standpoint, the position of the Belgian Government is particularly valuable for the purpose of determining the limit to the

admissibility of the ground of necessity to which attention was drawn above.⁶⁰

31. The Court, for its part, noted in its judgement of 15 June 1939⁶¹ that it was not within its mandate to declare whether, in the specific case, the Greek Government was justified in not executing the arbitral awards. However, by observing that in any event it could only have made such a declaration after having itself verified the financial situation alleged by the Greek Government and ascertained what the effects of the execution of the awards would have been, the Court showed that it implicitly accepted the basic principle on which the two parties were in agreement.

32. On this subject of international obligations “to do”, it should be noted that obligations relating to the repayment of international debts are not, in international practice, the only obligations in connection with which circumstances bearing the marks of a “state of necessity” have been invoked to justify State conduct not in conformity with what was required. The case of *properties of the Bulgarian minorities in Greece* is, in our opinion, a rather typical example. Here again, the case was mentioned in the preceding section of this chapter,⁶² because the League of Nations Commission of Enquiry used the term “*force majeure*” to justify the fact that the Greek Government, following the unfavourable outcome of the war between Greece and Turkey, had settled Greek refugees from Asia Minor on properties left temporarily vacant by their Bulgarian owners, to whom they should have remained available under the terms of the Treaty of Sévres with Bulgaria. However, a close scrutiny of the case shows that, as we have pointed out,⁶³ there was not for the Greek Government a “material impossibility” of complying with its international obligations concerning respect for the Bulgarian properties in its territory. It could not, therefore, be called a case of “*force majeure*”, at least according to the terminology we have adopted in this report. The plea accepted by the League of Nations Commission of Enquiry was actually more one of “necessity”. What had led the Greek Government to act in a manner not in conformity with its international obligations to Bulgaria was the need to safeguard an interest which it deemed essential, namely, the provision of immediate shelter for its nationals who were pouring into its territory in search of refuge. This conduct could thus be purged of the imputation of international wrongfulness which would otherwise have attached to it. From another standpoint, however, it still entailed the obligation to compensate the individuals whom the act committed in

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, para. 284.

⁵⁹ In stressing that the debt, payment of which could only be suspended, subsisted in full and would become payable as soon as the temporary situation of necessity no longer existed, the Belgian Government was, among other things, countering the confusion caused by the fact that in the argument presented by the Counsel for the Greek Government, the concept of “state of necessity” was virtually equated with that of “*force majeure*”, because the latter could have been used to infer that the debtor State was finally discharged of the debt. On this point, see the comments made in chap. V, sect 4 (*Yearbook . . . 1979*, vol. II (Part One), pp. 55–56, document A/CN.4/318 and Add.1–4, para. 120).

⁶⁰ See para. 14.

⁶¹ See Secretariat Survey, para. 288.

⁶² See *Yearbook . . . 1979*, vol. II (Part One), p. 53, document A/CN.4/318 and Add.1–4, para. 115.

⁶³ *Ibid.*, p. 53, footnote 239.

a state of necessity had deprived of their properties. The situation is therefore one of those to which we have referred specifically.⁶⁴

33. Having considered some cases in which the existence of a "state of necessity" was invoked by a State with the aim of justifying non-compliance with an international obligation "to do", we now turn to cases where the obligation at issue was an obligation "not to do", or, in other words, to refrain from certain conduct. Particularly relevant in this connection are cases where the "essential interest" of the State that was threatened by a "grave and imminent danger" and was safeguardable only through the adoption of conduct which in principle was prohibited by an international obligation was to ensure the survival of the fauna or vegetation of certain areas on land or at sea or to maintain the normal use of those areas, or, more generally, to ensure the ecological balance of a region. It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an "essential interest" of all States. Consequently, most statements of position proposing to preclude on that basis the wrongfulness of conduct not in conformity with an international obligation will be found to be contemporary ones. However, there are also a few precedents, perhaps the most recent being the position adopted in 1893 by the Russian Government in the case of *fur seal fisheries off the Russian coast*. In view of the alarming increase in sealing by British and North American fishermen near Russian territorial waters, and in view of the imminent opening of the hunting season, the Russian Government, in order to avert the danger of extermination of the seals, issued a decree prohibiting sealing in an area which was contiguous to its coast but was at the same time indisputably part of the high sea and therefore outside Russian jurisdiction. In a letter to the British Ambassador dated 12 (24) February 1893, the Russian Minister for Foreign Affairs, Chickline, explained that the action had been taken because of the "*absolute need*" for immediate provisional measures" in view of the imminence of the hunting season. He added that he considered it necessary to:

emphasize the essentially precautionary [*provisoire*] character of the above-mentioned measures, which were taken under the pressure of *exceptional circumstances* . . .⁶⁵

and declared his willingness to conclude an agreement with the British Government with a view to a permanent settlement of the question of sealing in the area. This position is therefore interesting as an affirmation of the validity of the plea of necessity in international law,⁶⁶ and also because it brings out

several of the conditions enumerated above⁶⁷ as having to be fulfilled before one can even consider whether a situation of "necessity" justifies action by a State which is not in conformity with an international obligation: namely, the absolutely exceptional nature of the alleged situation, the imminent character of the danger threatening a major interest of the State, the impossibility of averting such a danger by other means, and the necessarily temporary nature of this "justification", depending on the continuance of the feared danger. The agreement with the British Government was in fact concluded in May 1893.⁶⁸

34. It is interesting to compare this position of the Russian Government with the position adopted by the United States of America during the same period on the question of *the hunting of fur seals in the Bering Sea*. The United States Government claimed that it was entitled to extend the application of its own fishery regulations beyond its territorial waters. Its purpose was to put a stop to the operations of Canadian sealers who, it said, were taking fur seals on the high seas by methods of fishing which resulted in a massacre of the animals, to the detriment of the fur industry set up by the United States on one of the American islands in the Bering Sea frequented by seals. The British Government objected to such an application of United States fishery regulations, on the ground that the Canadian sealers were operating only on the high seas. On the basis of the Treaty of 29 February 1892, the dispute was submitted to a Tribunal of Arbitration. In his argument before the Tribunal, the agent of the United States observed:

The ground upon which the destruction of the seal is sought to be justified, is that the open sea is free, and that since this slaughter takes place there, it is done in the exercise of an indefeasible right . . .; that the nation injured can not defend itself on the sea, and therefore upon the circumstances of this case can not defend itself at all, let the consequences be what they may.

The United States Government denies this proposition. While conceding and interested to maintain the general rule of the freedom of the sea, as established by modern usage and *consensus* of opinion, it asserts that the sea is free only for innocent and inoffensive use, not injurious to the just interests of any nation which borders upon it; that the right of self-defense on the part of a nation is a perfect and paramount right to which all others are subordinate, and which upon no admitted theory of international law has ever been surrendered; that it extends to all the material interests of a nation important to be defended; . . . that it may, therefore, be exercised upon the high sea as well as upon the land, and even upon the territory of other and friendly nations, provided only that the necessity for it plainly appears; and that wherever an important and just national interest of any description is put in peril for the sake of individual profit by an act upon the high sea, . . . the right of the individual must give way, and the nation will be entitled to protect itself against the injury, by whatever force may be reasonably necessary, according to the the usages established in analogous cases.⁶⁹

⁶⁴ See para. 18 above.

⁶⁵ Secretariat Survey, para. 155.

⁶⁶ In describing these measures, the Tsarist Minister also referred to "*force majeure*" and "self-defence" (*légitime défense*), but it is clear that, according to the terminology which we have endeavoured to clarify in the present report, what we had here was a typical example of measures taken in a "state of necessity".

⁶⁷ See paras. 12, 13 and 14.

⁶⁸ J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C., U.S. Government Printing Office, 1898), vol. I, p. 826.

⁶⁹ *Ibid.*, pp. 839-840.

The agent of the British Government replied that the fallacy in the United States argument was that a State had a right in time of peace to do on the high seas, as an act of "self-defence" or "self-preservation", whatever it might conceive to be necessary to protect its property or its interests. He noted that by far the greatest number of instances recognized by international law of rights of self-defence or self-preservation against the laws of another State were cases of belligerent rights exercised in a situation of genuine "emergency", and that even then there were limitations.⁷⁰ The Tribunal of Arbitration made its award in 1893. It found that the United States had not "any right of protection or property in the fur seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit".⁷¹ In addition, the majority of the Tribunal rejected proposed amendments to the award submitted by the United States member of the Tribunal, the most important of which would have recognized the rights of all nations, under international law, in respect of self-protection and self-defence.⁷² Although the Russian and United States positions both related to the subject of sealing on the high seas, the similarity between them was actually only apparent. The United States Government, unlike the Russian Government, did not assert the existence of an exceptional circumstance of "necessity" as a ground for the temporary adoption, in order to deal with an imminent ecological danger which could not be averted by any other means, of measures not in conformity with the obligation to refrain from certain conduct in areas of the open sea. The United States Government did not approach the other Governments concerned, as the Russian Government did, with a request for the speedy conclusion of an agreement on joint action against a common danger, after which it would desist from activities incompatible with its international obligations. Washington actually relied on a different concept from that of "necessity", namely, the concept of "self-protection", meaning the right to take action anywhere for the protection of its own interests and those of its nationals. The Tribunal of Arbitration did not, therefore, allow itself to be influenced by the argument that there was a danger of the seals being massacred by Canadian sealers; it viewed the American measures as action taken primarily for the purpose of protecting the economic interests of a United States industry against competition from a foreign industry by giving it an impermissible monopoly to take fur-seals in certain areas of maritime space which must remain accessible to everyone. It would therefore be quite wrong to regard the Tribunal's award as a rejection of the concept of "necessity" and, in general, as a precedent for denying the admissibility of that concept in international law.

⁷⁰ *Ibid.*, p. 892.

⁷¹ *Ibid.*, p. 917.

⁷² *Ibid.*, pp. 919-920.

35. A case which occurred in our own times and which may be regarded as typical from the standpoint of fulfilment of the conditions we consider essential in order for the existence of a "state of necessity" to be recognized is the "*Torrey Canyon*" incident. On 18 March 1967, the *Torrey Canyon*, under Liberian flag, with a cargo of 117,000 tons of crude oil, went aground on submerged rocks off the coast of Cornwall but outside British territorial waters. A hole was torn in the hull, and after only two days nearly 30,000 tons of oil had spilt into the sea. This was the first time that so serious an incident had occurred, and no one knew how to avert the threatened disastrous effect on the English coast and its population. The British Government tried several means, beginning with the use of detergents to disperse the oil which had spread over the surface of the sea, but without appreciable results. In any event, the main problem was the oil remaining on board. In order to deal with that, it was first decided to assist a salvage firm engaged by the shipowner in its efforts to refloat the tanker, but on 26 and 27 March the *Torrey Canyon* broke into three pieces and 30,000 more tons of oil spilt into the sea. The salvage firm gave up, and the British Government then decided to bomb the ship in order to burn up the oil remaining on board. The bombing began on 28 March and succeeded in burning nearly all the oil. It should be noted that the British Government's action did not evoke any protests either from the private parties concerned or from their Governments. It is true that the bombing did not take place until after the ship had been reduced to a wreck and the owner seemed implicitly to have abandoned it, but even before that, when the action to be taken was under discussion, there was no adverse reaction to the idea of destroying the ship, which the Government was prepared to do against the wishes of the owner, if necessary. The British Government did not advance any legal justification for its conduct, but on several occasions it stressed the existence of a situation of extreme danger and the fact that the decision to bomb the ship had been taken only after all the other means employed had failed.⁷³ It therefore seems to us that, even if the shipowner had not abandoned the wreck, and even if he had tried to oppose its destruction, the action taken by the British Government outside the areas subject to its jurisdiction would have had to be recognized as internationally lawful, since the conditions for a "state of necessity" were clearly fulfilled.

36. The lesson of the *Torrey Canyon* incident did not go unheeded. In view of the fact that such incidents

⁷³ On this case, see the white paper issued by the British Government: *The "Torrey Canyon"*, Cmnd. 3246 (London, H.M. Stationery Office, 1967); and United Kingdom, *Parliamentary Debates (Hansard), House of Lords, Official Report* (London, H.M. Stationery Office), 5th series, vol. 281 (4 April 1967), cols. 874-883; and *ibid.*, *House of Commons, Official Report*, 5th series, vol. 743 (20 March 1967), cols. 1054-1060; vol. 744 (4 April 1967), cols. 38-54; and (10 April 1967), cols. 758-821 and 874-926.

might recur at any time, it seemed essential to ground the right of the coastal State to take protective measures on positive rules which would be more precise than the mere possibility of relying on "state of necessity" as a circumstance precluding the international wrongfulness of certain measures taken on the high seas. That possibility should remain as a kind of *ultima ratio* for exceptional circumstances, and not for situations that are foreseeable in the normal course of events. In 1969, therefore, IMCO convened a conference which adopted, on 29 November 1969, the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties. In accordance with article 1, paragraph 1, parties to the Convention may take:

such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.⁷⁴

Any measures taken must, of course, be proportionate to the actual or threatened damage.

Article 222 of the Informal Composite Negotiating Text drawn up by the President of the Third United Nations Conference on the Law of the Sea on 15 July 1977, which reads as follows:

Measures relating to maritime casualties to avoid pollution

1. Nothing in this Part of the present Convention shall affect the right of States to take measures, in accordance with international law, beyond the limits of the territorial sea for the protection of coastlines or related interests, including fishing, from grave and imminent danger from pollution or threat of pollution following upon a maritime casualty or acts related to such a casualty.

2. Measures taken in accordance with this article shall be proportionate to the actual or threatened damage.⁷⁵

is along the same lines.

37. However, despite the trend noted in the preceding paragraph, it is only logical that a state of necessity should still be invoked as a ground for State conduct not in conformity with international obligations in cases where such conduct proves necessary, by way of exception, in order to avert a serious and imminent danger which, even if not inevitable, is nevertheless a threat to a vital ecological interest, whether such conduct is adopted on the high seas, in outer space or—even this is not ruled out—in an area subject to the sovereignty of another State.⁷⁶ The latter would apply, for example, if extremely urgent action beyond its frontiers were the only means for a State to protect its territory from the spread of toxic fumes suddenly

escaping from a storage tank because, in that particular case, time and means were lacking for the organs of the neighbouring State to take the necessary measures. Other examples of the same kind can well be imagined.

38. There is another area in which it is particularly interesting to examine cases where a State, having engaged in conduct not in conformity with an obligation to refrain from precisely such conduct, has argued in its own defence (the terms used being of little importance, provided that the substance of the argument is plain to see) that it was faced with the "necessity" of averting a grave and imminent danger that would inevitably have resulted from its complying with the obligation. This is the area of international obligations concerning the treatment to be accorded, within the territory of the State, to foreign nationals, including both natural and artificial persons.

39. In these cases, the obligation at issue is more often a conventional one, since customary obligations in this respect are relatively few and there are differences of opinion as to their very existence and their scope. There is, however, one case, already old,⁷⁷ in which the parties to the dispute do seem to have taken for granted the existence of an obligation on the State, under general international law, to honour prospecting and exploitation concession contracts concluded with foreigners. In the *Company General of the Orinoco* case, that French company had obtained from the Venezuelan Government concessions to exploit minerals and develop a transport network in a large area over which Venezuela believed it had sovereignty. However, much of the area covered by the concession contracts was claimed by Colombia, which in fact had grounds for considering it part of its territory. Colombia therefore strongly protested against the granting of the concessions by the Venezuelan Government and demanded the return of the area concerned. Venezuela, wishing to avert the danger of armed conflict with the neighbouring republic, which was becoming imminent, felt obliged to rescind the concessions it had granted and return to Colombia the areas over which it had mistakenly exercised sovereign powers. This led to a dispute between the Venezuelan Government and the Company General of the Orinoco. The French Government having sided with the company, the case was referred to the French/Venezuelan Mixed Claims Commission established under the Protocol of 19 February 1902. The Commission, however, accepted the argument advanced by Venezuela, which had been forced to annul the concessions granted to the French Company because of the real danger of war they had created. Umpire Plumley therefore ruled that, in the exceptional circumstances of the case, it was lawful

⁷⁴ United Nations, *Juridical Yearbook 1969* (United Nations publication, Sales No. E.71.V.4), p. 166.

⁷⁵ *Official Records of the Third United Nations Conference on The Law of the Sea, Sixth Session*, vol. VIII, *Official Composite Negotiating Text* (United Nations publication, Sales No. E.78.V.4), document A/CONF.62/WP.10.

⁷⁶ See paras. 56 *et seq.* below.

⁷⁷ Not to mention, of course, the cases already discussed above (paras. 26 to 31) which may have involved the violation of some customary international obligation to honour debts contracted by the State with foreigners.

under international law for the Venezuelan Government to rescind the concessions, although he agreed that the company was entitled to compensation for the consequences of an act which had been internationally lawful but severely detrimental to its interests.⁷⁸

40. As regards cases where the obligation, non-compliance with which the party concerned sought to justify on the ground that it had acted in a "state of necessity", was an obligation arising out of an international convention, there are three that we think are important enough to be cited. The first is a very old case; it concerns an Anglo-Portuguese dispute dating from 1832. The Portuguese Government, which was bound to Great Britain by a treaty requiring it to respect the property of British subjects resident in Portugal, argued that the pressing necessity of providing for the subsistence of certain contingents engaged in quelling internal disturbances had justified its appropriation of property owned by British subjects. Upon receiving that answer to its protests, the British Government consulted its Law Officers on the matter. On 22 November 1832, Mr. Jenner replied with the following opinion:

... I have the honour to report that I agree with Mr. Hoppner in the opinion that in whatever point of view the present conflict in Portugal may be considered, it cannot affect the immunities of

⁷⁸ The umpire's reasoning was as follows:

"... As the Government of Venezuela, whose duty of self-preservation rose superior to any question of contract, it had the power to abrogate the contract in whole or in part. It exercised that power and cancelled the provision of unrestricted assignment. It considered the peril superior to the obligation and substituted therefor the duty of compensation.* Had there been no other troublesome question of State entangled with the contracts of the Company General of the Orinoco it is quite possible that this governmental surgery would not have taken the life of the claimant company. Such entanglements, however, existed.

"... Notwithstanding the pending litigation over the boundary, the Company General of Orinoco was permitted to enter into unquestioned and absolute possession of these litigated areas. From the viewpoint of nations the respondent Government had been led into grave error. This error it must repair. It could only repair by receding. It could only recede by compromise with the company or by annulment. Every day that the contract was continued it was more or less a menace to the peaceful relations then existing between those two countries. That which had been held as a valued enterprise, a boon to Venezuela, for the reasons stated had become a source of serious national danger.

"... Enough has been said, however, to suggest the ground upon which the umpire bases his judgment that the strait of Venezuela in regard to the Colombian incident was a potent cause of the position assumed by the respondent Government toward the Company General of the Orinoco in 1889, 1890 and 1891. It was a question of governmental policy, and that Venezuela decided upon this plan of action must be attributed to its solicitude for peace with a sister Republic." (United Nations, *Reports of International Arbitral Awards*, vol. X (op. cit.), pp. 280-281).

It is clear that, in referring to the "duty of self-preservation", the umpire meant to represent the rescission of the concessions by the Venezuelan Government as conduct adopted in a "state of necessity", since the so-called right or duty of "self-preservation" was at that time generally considered to constitute the basis of a "state of necessity".

British Subjects resident in that Kingdom, nor deprive them of the privileges granted to them by Treaty. But the real question here is, *whether the Privileges and Immunities so granted are, under all circumstances, and at whatever risk, to be respected,** and I humbly apprehend that *the proposition cannot be maintained to that extent.** Cases may be easily imagined in which the *strict observance of the Treaty would be altogether incompatible with the paramount duty which a Nation owes to itself.** When such a case occurs Vattel (Book II, chap. 12, Sect. 170) observes that it is 'tacitly and necessarily excepted in the Treaty'.

In a case, therefore, of *pressing necessity,** I think that it would be competent to the Portuguese Government to appropriate to the use of the Army such Articles of Provisions etc., etc., as may be *requisite for its subsistence,** even against the will of the Owners, whether British or Portuguese; for I do not apprehend, that the Treaties between this Country and Portugal are of so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or that their stipulations ought to be *so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, which may be absolutely and indispensably necessary to the safety, and even to the very existence of the State.**

The *extent of the necessity,** which will justify such an appropriation of the Property of British subjects, must depend upon the circumstances of the particular case, but it must be *imminent and urgent.**⁷⁹

Despite its age, this case is therefore a particularly sound precedent, mainly because the two parties were agreed on the principles enunciated and hence on express recognition of the validity of the plea of necessity where the conditions for it are fulfilled. But the case is also of interest because of the terminology used, which is unusually apt for those times, and because of its contribution to the definition of the two conditions—"imminence" and the "urgency" of the danger to be averted—which we have stressed.⁸⁰

41. The second case, a century closer to us and well known to writers who have dealt with the question of "state of necessity", is the *Oscar Chinn* case. In 1931, the Government of Belgium adopted measures concerning fluvial transport—designed to benefit the Belgian company Unatra—in what was then the Belgian Congo. According to the United Kingdom, one of whose subjects, Oscar Chinn, had been harmed by the measures in question, the latter had created a "*de facto* monopoly" of fluvial transport in the Congo, which in its view was contrary to the principles of "freedom of navigation", "freedom of trade" and "equality of treatment" provided for in articles 1 and 5 of the Convention of Saint-Germain-en-Laye of 10 September 1919.⁸¹ The question was submitted to the Permanent Court of International Justice, which gave its judgement on 12 December 1934. The Court held that the "*de facto* monopoly" of which the United Kingdom complained was not prohibited by the Convention of Saint-Germain.⁸² Having thus found

⁷⁹ A. D. McNair, *International Law Opinions* (Cambridge, University Press, 1956), vol. II, pp. 231 *et. seq.*

⁸⁰ See para. 13 above.

⁸¹ League of Nations, *Treaty Series*, vol. VIII, p. 25.

⁸² *P.C.I.J.*, Series A/B, No. 63, p. 89.

that the conduct of the Belgian Government was not in conflict with its international obligations towards the United Kingdom, the majority of the Court saw no reason to consider whether any wrongfulness in the conduct in question might have been precluded because the Belgian Government had perhaps acted in a state of necessity. The question was however, considered in depth in the individual opinion of Judge Anzilotto, who took the view that, if the facts alleged by the Government of the United Kingdom, namely, the creation of a fluvial transport monopoly in favour of Unatra, had been better substantiated, the Belgian Government would have been able to excuse its action only by itself substantiating a claim to have acted in a "state of necessity". The opinion stated as follows:

6. If, assuming the facts alleged by the Government of the United Kingdom to have been duly established, the measures adopted by the Belgian Government were contrary to the Convention of Saint-Germain, the circumstance that these measures were taken to meet the dangers of the economic depression cannot be admitted to consideration. It is clear that international law would be merely an empty phrase if it sufficed for a State to invoke the public interest in order to evade the fulfilment of its engagements. . . .

7. The situation would have been entirely different if the Belgian Government had been acting under the law of necessity, since necessity may excuse the non-observance of international obligations.*

The question whether the Belgian Government was acting, as the saying is, under the *law of necessity** is an issue of fact which would have had to be raised, if need be, and proved by the Belgian Government. I do not believe that that Government meant to raise the plea of necessity, if the Court had found that the measures were unlawful; it merely represented that the measures were taken for grave reasons of public interest in order to save the colony from the disastrous consequences of the collapse in prices.

It may be observed, moreover, that there are certain undisputed facts which appear *inconsistent with a plea of necessity*.*

To begin with, there is the fact that, when the Belgian Government took the decision of June 20th, 1931, it chose, from among several possible measures—and, it may be added, in a manner contrary to the views of the Leopoldville Chamber of Commerce—that which it regarded as the most appropriate in the circumstances. No one can, or does, dispute that it rested with the Belgian Government to say what were the measures best adapted to overcome the crisis: provided always that the measures selected were not inconsistent with its international obligations, for the Government's freedom of choice was indisputably limited by the duty of observing those obligations. On the other hand, the existence of that freedom is incompatible with the *plea of necessity*,* which, by definition, implies the *impossibility of proceeding by any other method than the one contrary to law*.*

Another undisputed fact which seems *irreconcilable with the plea of necessity** is the offer made by the Government to transporters other than Unatra on October 3rd, 1932. Whatever its practical value, that offer showed that it was possible to concede advantages to all enterprises, similar to those granted to Unatra, and hence to avoid creating that *de facto* monopoly which, in the submission of the Government of the United Kingdom, was the necessary consequence of the decision of June 20th, 1931.⁸³

Although it is only an *obiter dictum*, the verbal clarity and lucid reasoning of this opinion make it one of the

most famous statements of position on the question of necessity. The admissibility, as a principle, of the "plea of necessity" in international law emerges in a manner which leaves no room for doubt. At the same time, the concept of "state of necessity" accepted in international legal relations is very restrictive. It is restrictive as regards the determination of the *essential importance of the interest* of State which must be in jeopardy in order for the plea to be effective; it is also restrictive as regards the requirement that the conduct not in conformity with an international obligation of the State must really be, in the case in question, the *only means* of safeguarding the essential interest which is threatened.

42. The third case we believe is worth taking into account is the one involving the United States of America and France which came before the International Court of Justice in 1950 under the title *Rights of Nationals of the United States of America in Morocco*. The necessity of averting a grave danger to an essential interest of the State—i.e., of safeguarding its "fundamental economic balance"—was invoked in this case as a ground for non-compliance with an international obligation which fell within the area of the treatment of foreigners, since one of the points at issue was whether or not it was lawful to apply to United States nationals a 1948 decree by the Resident General of France in Morocco establishing a régime of import restrictions in the French zone of Morocco in a manner which the United States did not consider to be in conformity with obligations arising out of treaties concluded between the United States and Morocco. The treaties in question guaranteed to the United States the right freely to engage in trade in Morocco without any import restrictions save those specified in the treaties themselves.⁸⁴ In its defence, the French Government asserted, *inter alia*, that the import restrictions imposed by the decree were necessary for the enforcement of exchange controls, such controls being essential to safeguard the country's economic balance. It argued that that balance would have been seriously jeopardized by the removal of exchange controls in a situation which had been rendered critical by the fluctuation of the franc on the Paris black market and by the "dollar gap" of Morocco.

43. It is true that, in describing the situation characterized by the "necessity" of taking measures to avert the grave danger which would otherwise have jeopardized an essential interest of the country, the French Government and its pleader used the term "*force majeure*" rather than "state of necessity", which to our mind would have been more appropriate. However, we believe that their main reason for doing so was to enable them to invoke in support of their arguments the precedent, discussed above,⁸⁵ of the

⁸⁴ *I.C.J. Pleadings*, vol. I, p. 258 *et seq.* See Secretariat Survey, para. 310.

⁸⁵ Para. 22.

⁸³ *Ibid.*, pp. 112–114.

Russian indemnity case, where the same thing had occurred.⁸⁶ In any event, the substance of the matter is what counts for our purposes. The important point is that the assistant agent of the French Government, Professor Reuter, took care to draw special attention to the fact that, just as in the above-mentioned precedent the respondent Government had argued that payment of its debt would have seriously jeopardized the internal and external situation of the Ottoman Empire, in the present case between France and the United States the French Government was claiming that the removal of exchange controls would imperil France's "fundamental economic balance".⁸⁷ Thus, the basic condition for recognition of a "state of necessity", which is, as we have tried to show, the existence of a grave and imminent, and otherwise unavoidable danger to essential interests of the State if it were to comply with its international obligations, was clearly identified by the applicant. The agent of the United States Government for his part, denied that the danger feared by the other party actually existed or that, in any event, there was a connection of the kind established by that party between the necessity of averting such a danger and the restrictions imposed on American imports without the consent of the United States Government.⁸⁸ He did not, however, challenge outright the validity of the "plea" the characteristics of which had been described by the French Government, and its possible applicability to situations other than that involved in the particular case in question. It therefore appears to us that this case too provides considerable support for the recognition of the applicability of the plea of necessity in international law.⁸⁹

44. Lastly, the *S.S. "Wimbledon"* case is worthy of mention in an area related to that of the treatment accorded to foreigners within the territory of the State, namely, the area of obligations imposed on a State by either customary or conventional law to refrain from placing restrictions on or impediments to the free

passage of foreign vessels through certain areas of its maritime territory. During the Russo-Polish war of 1920-1921 the British vessel *Wimbledon*, chartered by a French company and carrying a cargo of munitions and other military material destined for Poland, was refused passage through the Kiel Canal by the German authorities on the ground that, in view of the nature of the cargo, its passage through German waters would be contrary to the neutrality orders issued by Germany in connection with the war between Poland and Russia. The French Government protested on the ground that Germany's conduct was not in conformity with article 380 of the Treaty of Versailles,⁹⁰ which stated that:

The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality.

The ensuing dispute was referred to the Permanent Court of International Justice, with the United Kingdom, Italy and Japan, as co-signatories to the Treaty, intervening before the Court on the side of France. The issue debated during the proceedings was essentially whether or not the action taken by the German authorities with regard to the *Wimbledon* was prohibited by article 380 of the Treaty of Versailles. In its judgement of 17 August 1923, the Court ruled that it was, and that such a prohibition in no way conflicted with the obligations of Germany as a neutral State.⁹¹ Consequently, the Court did not have occasion to rule on any "plea of necessity" which Germany might have made. However, the question was mentioned during the oral proceedings, both by the agents of two of the applicant Governments and by the agent of the respondent Government. For instance, the agent of the French Government, Mr Basevant, said:

Will not the principles of international law, the general rules of the law of nations,* furnish some grounds for frustrating the rule of free passage,* through the Kiel Canal in the case of a vessel carrying military material destined for a neutral State? First let me say, without otherwise dwelling on this point, that no arguments against the application of the rule of free passage have been advanced on the ground either of impossibility of compliance or of the danger which compliance with the provision might have created for Germany;* the plea of necessity* was not made at all. Indeed, any such arguments seem inconceivable in this case. I shall not labour the point.⁹²

Thus, the learned French internationalist, while declaring that any such "plea" could not apply in the case in question and pointing out that, in any event, none had

⁸⁶ In considering that case we noted that, at a time when terminology had not yet been refined, the Ottoman Government had used the term "*force majeure*" to describe its extremely difficult financial situation, in which not honouring its debt became a necessity in order to avert the danger of the country's economic collapse. We also saw that the Permanent Court of Arbitration, in contesting the Ottoman Government's argument, retained its terminology but brought out more clearly by its line of reasoning the fact that the situation alleged by the debtor Government would, if substantiated, have constituted a typical "plea of necessity".

⁸⁷ See Secretariat Survey, para. 311.

⁸⁸ *Ibid.*, para. 312.

⁸⁹ The Court did not have occasion to rule on the issue which had been debated at length in the oral arguments of the parties. It noted that:

"Even assuming the legality of exchange control, the fact nevertheless remains that the measures applied by virtue of the Decree of December 30th 1948 have involved a discrimination in favour of imports from France and other parts of the French Union. This discrimination can not be justified by considerations relating to exchange control". (*Ibid.*, para. 313.)

⁹⁰ *British and Foreign State Papers, 1919* (London, H.M. Stationery Office, 1922), vol. CXII, p. 189.

⁹¹ The Court noted:

"Germany not only did not, in consequence of her neutrality, incur the obligation to prohibit the passage of the 'Wimbledon' through the Kiel Canal, but, on the contrary, was entitled to permit it. Moreover, under Article 380 of the Treaty of Versailles, it was her definite duty to allow it. She could not advance her neutrality orders against the obligations which she had accepted under this Article." (*P.C.I.J., Series A, No. 1, p. 30.*)

⁹² *P.C.I.J., Series C, No. 3, vol. I, pp. 178-179.*

been made, revealed that in principle he recognized that both the concept of "*force majeure*" (implied in the reference to "impossibility of compliance") and the concept of "state of necessity", so well reflected in the idea of the "danger" which compliance with the obligation would create for the State bound by it, were established "grounds", under the general rules of international law, for "frustrating" compliance with international obligations.

45. The agent of the Italian Government, Mr. Pilotti, dwelt specifically on the question whether Germany's conduct could have been justified on grounds of "*force majeure*" or *status necessitatis*. In this connection, he observed:

... it is not conceivable that the bound subject should try to free itself from the duty of carrying out the obligation, unless it be to the extent that maxims of private law concerning the execution of obligations may be applicable to international law.

Here, however, there can be no question, either of a *material impossibility** which is quite excluded, or of a legal impossibility, which could not be justified by any argument. Indeed, the provision of the free passage through the Canal is stipulated, as has already been said, in favour of all Powers at peace with Germany, even in favour of non-signatory Powers, and consequently the provision cannot in itself allow Germany to take up an illicit attitude of partiality towards any Power whatsoever that might become a belligerent.

Neither would it be possible to speak of *force majeure** or more particularly of that concept which had been expressly sanctioned in the first book of the German Civil Code relating to the exercise of rights in general (sect. 227), and which, besides, lends itself to controversy; I mean the *status necessitatis*.

Indeed, there is no proof to show that the war between Poland and Russia, in consequence of the acts accomplished by the two belligerents, constituted for Germany that *immediate and imminent danger, against which she would have had no other means of protection** but the general prohibition of the transit of arms through her territory, and particularly that *such a danger should have continued to exist at the time** when the *Wimbledon* presented itself at the entrance of the Canal.⁹³

After responding to some of the other arguments put forward by Germany, Mr. Pilotti returned to the subject, concluding:

... the discussion is brought back to the simpler and safer ground of looking for some *juridical reason justifying the voluntary non-execution** on the part of Germany of her obligations, which reason could only be a *material impossibility** or the *status necessitatis*. Now surely from that standpoint it is not sufficient to invoke merely general ideas of sovereignty and neutrality.⁹⁴

This statement of position was therefore not only affirmative in substance with regard to the applicability in international law of the concept, derived from private law, of "state of necessity", but also contributed useful elements for the definition of the conditions under which it might be invoked.⁹⁵

46. Finally, the German Agent, Mr. Schiffer, denied that his Government had intended to plead a state of

necessity. To his mind, Germany had no need to make any "plea" in defence of its breach of an international obligation, for the simple reason that it had not committed any breach. His line of reasoning was as follows:

The representative of one of the applicant parties argued that Germany claimed that she acted under the *jus necessitatis*. This is not the case. There was no impossibility whatever for Germany to carry out the Treaty; nor has Germany contravened the Treaty.

I repeat that it is not the intention of the German Government to claim any *jus necessitatis*. On the contrary, Germany claims that she has remained true to her conventional obligations resulting from the Treaty of Versailles.⁹⁶

While denying in such clear terms that Germany needed the *ultima ratio* of the plea of necessity in order to justify its conduct here, Mr. Schiffer scrupulously refrained from contesting the validity in principle of such a plea. The "*Wimbledon*" case therefore shows a significant concurrence of views as to the admissibility in general international law of "state of necessity" as a circumstance precluding the wrongfulness of State conduct not in conformity with an international obligation and a no less significant contribution by some of the protagonists to the definition of the conditions to be fulfilled in order for the existence of such a circumstance to be recognized.⁹⁷

47. The State which, in a given case, acts in a manner not in conformity with an international obligation concerning the treatment to be accorded to the persons or property of nationals of another country may, at the time when it so acts, be at war with a third country. This in itself does not of course prevent the State in question from invoking in justification of its conduct a situation of necessity which it would invoke if it were at peace with everyone. On the other hand, the war in which it is engaged, and its consequences,

⁹⁶ *P.C.I.J., Series C, No. 3, vol. I, p. 314.*

⁹⁷ On the other hand, there are cases sometimes cited by writers as significant for the purpose of a study of "state of necessity" which we feel are not really relevant to that concept and therefore do not merit discussion here. One of them is the *Virginius* case, concerning the seizure on the high seas of a vessel improperly flying the American flag by a destroyer belonging to Spain, which was attempting to put down the Cuban insurrection (see J. B. Moore, *A Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), vol. II, pp. 895 *et seq.*). Despite a mention of the "right of self-preservation" during the oral proceedings, the case was really concerned only with the definition of the right of search and of the conditions for exercising it. Another is the *Armstrong Cork Company* case, where the Italian Government, which was about to enter the war, ordered an Italian ship carrying American-owned cargo to return immediately, like all other ships of its merchant marine, to an Italian port. This was nothing more than an entirely lawful precaution, and the fact that the United States of America/Italy Conciliation Commission (set up by the 1947 Treaty of Peace with Italy) mentioned, purely incidentally, that the "right of necessity" had sometimes been used as an expedient in order to legalize the arbitrary (United Nations, *Reports of International Arbitral Awards*, vol. XIV (United Nations publication, Sales No. 65.V.4, p. 163) did not actually justify any inference one way or the other.

⁹³ *Ibid.*, pp. 284–285.

⁹⁴ *Ibid.*, p. 288.

⁹⁵ Particularly the conditions to which attention was drawn in paras. 13 and 14 above.

may be the very reason for the state of necessity which caused it to act. Conduct not in conformity with the obligation to respect the ownership by foreign nationals of material (food-stuffs, for example) may be dictated by a total lack of provisions and the no less total impossibility of overcoming it by other means. The positions adopted in an old but very widely cited case—the “*Neptune*” case—remain significant in this regard.

48. In 1795, when Great Britain was at war with France, the American vessel *Neptune*, carrying a cargo of rice and other foodstuffs owned by citizens of the United States, was captured on the high seas by a British frigate. The ensuing dispute was brought before the Mixed Commission established under article VII of the Treaty of 19 November 1794 (the “Jay Treaty”). Great Britain argued, *inter alia*, that the action had been justified by necessity, the British nation having at that time been threatened with a scarcity of food as a result of the war. In its award, made in 1797, the Commission rejected the British argument; however, it did so, as the opinions written by some of the commissioners show, not because it meant to deny that “necessity” could constitute a circumstance precluding the wrongfulness of conduct not in conformity with an international obligation, but because in the case in question the conditions for that were not fulfilled. One of the American commissioners, Mr. Pinkney, expressed himself as follows:

I shall not deny that *extreme necessity* may justify such a measure [the seizure of neutral property]. It is only important to ascertain whether that *extreme necessity* existed on this occasion and upon what terms the right it communicated might be carried into exercise.

We are told by Grotius that the necessity must not be imaginary, that it must be real and pressing, and that even then it does not give a right of appropriating the goods of others until all other means of relief consistent with the necessity have been tried and found inadequate. Rutherford, Burlamaqui, and every other writer who considers this subject at all will be found to concur in this opinion.⁹⁸

Applying these principles to the facts stated by Great Britain, Mr Pinkney concluded that they were not sufficient to justify an inference that Great Britain “was pressed by a necessity like this”. Similarly, the other American commissioner, Col. Trumbull, after stating:

The necessity which can be admitted to supersede all laws and to dissolve the distinctions of property and right must be absolute and irresistible, and we cannot, until all other means of self-preservation shall have been exhausted, justify by the plea of necessity the seizure and application to our own use of that which belongs to others.⁹⁹

asked: “Did any such state of things exist in Great Britain in April 1795?”, and he too replied in the negative. The two commissioners thus refused to acknowledge any “necessity” in the case submitted to

them, but they did so only after first acknowledging that, if they had been presented with a case of truly “extreme” or “irresistible” necessity, they would have had to agree that that justified non-compliance with an international obligation, particularly the obligation to respect the property of foreign nationals.

49. There is therefore nothing to prevent a belligerent State from pleading “necessity”, even if it arises from the very fact that a state of war exists and from the resulting constraints, as a ground for not complying with a peacetime international obligation still binding on it, notwithstanding the supervention of a state of belligerence with another State, vis-à-vis a third country with which it remains at peace. In time of war, however, the idea of “necessity” materializes mainly in a form other than that of a circumstance precluding, by way of exception, the wrongfulness of an act of the State not in conformity with the requirements of an obligation imposed on it by a rule of international law. In making this statement, we have in mind the function assigned to the concept of necessity “of war” or “military necessity” as the basic underlying intention of the rules of the international law of war and neutrality. In this special sector of international law, the concept in question is not regarded, or at least not primarily, as a kind of subcategory of “state of necessity” in the sense in which we have tried to define it in the context of peacetime law and of which we have given many examples. As we say, this concept, about which there is for the best of reasons nothing exceptional in this other context, is mainly viewed as underlying the very existence of the rule, which is formulated precisely for cases where “necessity of war” exists and in such a way as to meet that necessity. In other words, “necessity of war” then constitutes the *ratio*, the *raison d’être*, of certain fundamental rules of the law of war and neutrality, namely, those which, in derogation of principles of peacetime law, confer on a belligerent State the legal right to resort, as against the enemy and its nationals or—which is even more important for our purposes—as against neutral States and their nationals, to acts which peacetime law would forbid.¹⁰⁰ The situation is therefore the opposite of that in peacetime law: the normal is that of the “lawfulness” of conduct imposed on the belligerent by the requirements of the conduct of hostilities and the success of military operations, and the exception is that of the “wrongfulness” of conduct of that sort when, in a particular case, such acts are seen to be without connection with the exigencies in question and are of no real utility in relation to them.

¹⁰⁰ Especially measures which the international law of neutrality allows belligerents to take against neutral private property, against commerce by neutrals with the enemy, against freedom of transit and navigation of neutral shipping, and so on. Also included are the powers which the law of war allows to be exercised with respect to the private property of enemy nationals, although in the case of the enemy the law of war allows the commission of a whole series of acts, whether or not based on “necessity of war”.

⁹⁸ J. B. Moore, *International Adjudications* (New York, Oxford University Press, 1931), vol. IV, pp. 398–399.

⁹⁹ *Ibid.*, p. 433.

That being so, what is involved is not, of course, "necessity" as a circumstance precluding the wrongfulness of conduct which the applicable rule does not prohibit, but rather "non-necessity" as a circumstance precluding the lawfulness of conduct which that rule normally allows. It is only when, in a particular case, the "necessity of war" whose existence constitutes the basis of the rule and of its applicability is clearly seen to be absent that this rule of the special law of war and neutrality does not apply and the general rule of peacetime law prohibiting certain acts resumes its ascendancy.

50. It is also true that a review of international practice brings to light many well-known statements of position by spokesmen for Governments asserting or acknowledging either the lawfulness in time of war (including civil war) of such acts as the unintentional, or even deliberate, destruction of neutral property for reasons of "military necessity", or the wrongfulness of acts of that kind because, in the particular case in question, no such necessity existed or the acts committed were "wanton", to use a term which is common in English law.¹⁰¹ However, these statements

of position are clearly concerned with determining the content, conditions and limits of applicability of a permissive rule of the law of war and neutrality and not with any alleged incidence, in the case in question, of the principle of the law of international responsibility which allows "state of necessity" to constitute a circumstance precluding, by way of exception, the wrongfulness of conduct not in conformity with an obligation imposed by a prohibitive rule. In other words, what Governments meant to affirm was certainly not the existence of an obligation which generally prohibited belligerent States from destroying neutral property in the course of military operations and which could be avoided only where non-compliance could be excused in exceptional cases of necessity created by war. On the contrary, what they have sought to maintain is that an obligation to refrain from causing the destruction of neutral property really exists only with respect to destruction which is entirely wilful and totally unrelated to the purposes of military operations. These conclusions are confirmed by some of the decisions rendered by arbitral or claims commissions.¹⁰² The foregoing

¹⁰¹ Among the best-known statements of position relating to the destruction of neutral property incidental to international wars, mention may be made of the opinions of the British Law Officers of the Crown on the Bombardment of Grey Town case (1854) (see Secretariat Survey, para. 247), of the Secretary-General of the Italian Ministry of Foreign Affairs in connection with the Bottaro case (1871) (S.I.O.I.-C.N.R., *La prassi italiana di diritto internazionale* (Dobbs Ferry, N.Y., Oceana, 1970), 1st series (1861-1887), vol. II, p. 1146); of the Russian Minister for Foreign Affairs on the *Aghios Nicolaos* case (1879) (*ibid.*, p. 1152); of the Italian Minister for Foreign Affairs in connection with damage caused to neutrals by the belligerents during the Chilean-Peruvian-Bolivian war (1882) (*ibid.*, pp. 1156-1157); of the British Law Officers of the Crown on the same subject (Secretariat Survey, para. 249); and of the United States Department of State in connection with the bombardment of Samsun (1922) (G.H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1943), vol. V, pp. 693-694).

Among the statements of position relating to the destruction of foreign property occurring, again incidentally, in the course of operations against insurgents or during a civil war, mention may be made of those of the British Secretary of State for Foreign Affairs on the bombardment of the warehouse at Antwerp (1830) (Secretariat Survey, para. 163); of the British Law Officers of the Crown in connection with the bombardment of Messina (1848) (*ibid.*, paras. 170 and 171) and with the insurrection in Santo Domingo (1861-1863) (*ibid.*, para. 179); of the Counsel for the United States of America in the Dutrieux case (1884) (Moore, *History and Digest* . . . , vol. IV, pp. 3702 *et seq.*); of the Italian Minister for Foreign Affairs in connection with the bombardment and occupation of Sfax (1881) (S.I.O.I.-C.N.R., *op. cit.*, pp. 1155-1156) and the Brazilian civil war of 1893-1894 (Secretariat Survey, para. 212); of the United States of America Department of State in connection with the bombardment of Almería (1937) (Hackworth, *op. cit.*, p. 694), etc.

In addition, the international lawfulness of the deliberate destruction of neutral property has been asserted and generally accepted when the purpose was claimed to be to prevent such property from falling into enemy hands and being used by the enemy or to protect troops against harm, for instance in the form of an epidemic. See in this connection point 8 of the principles applied by the Claims Commission created in 1901 by an act of the Congress of the United States of America to consider claims

regarding damage sustained as a result of the Cuban insurrection of 1895-1898 (Secretariat Survey, para. 226); and the replies of Great Britain to point VIII and of the United States of America to point XI of the request for information submitted to Governments by the Preparatory Committee for the 1930 Codification Conference (League of Nations, *Bases of discussion* . . . (*op. cit.*), p. 105, and *idem*, *Supplement to vol. III* (C.75(a). M.69(a).1929.V), p. 22, respectively. See also the statements of position of Governments in cases relating to the destruction of boats, for example in the Duclair case (1870), cited by B.C. Rodick, *The Doctrine of Necessity in International Law* (New York, Columbia University Press, 1928), p. 102, and in connection with the case Léontios et Nicolas Arakas v. Etat bulgare (1926) (see *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (Paris, Sirey, 1928), vol. VII, pp. 37-39); or relating to damage to submarine telegraph cables, e.g. in the case Eastern Extension, Australasia and China Telegraph Company Ltd. (Great Britain) v. United States (1923) (United Nations, *Reports of International Arbitral Awards*, vol. VI (United Nations publication, Sales No. 1955.V.3), pp. 115 *et seq.*), etc.

As regards the destruction of property in the interests of the army, see for example the positions expressed in the Hardman case (1913) concerning the destruction of housing to prevent an outbreak of disease among the troops (*ibid.*, pp. 25-26), and in the Faletich case (1929), where a house was destroyed in order to obtain material for the construction of trenches and barracks for the troops (Hackworth, *op. cit.*, pp. 697-698).

Recognition of the lawfulness of deliberate destruction of neutral property is, of course, without prejudice to the possibility of demanding indemnification from the State responsible for the act on some other ground than that of compensation for an internationally wrongful act.

¹⁰² See, *inter alia*, the decision of the Chile/United States of America Arbitral Commission set up by the Convention of 7 August 1892 in the Du Bois case (Secretariat Survey, para. 353); that of Umpire Plumley of the Netherlands/Venezuela Mixed Commission set up by the Protocol of 28 February 1903 in the Bembelista case (United Nations, *Reports of Arbitral Awards*, vol. X (*op. cit.*), p. 718); that of Commissioner Paul of the United States of America/Venezuela Mixed Commission set up by the Protocol of 17 February 1903, in the American Electric and Manufacturing Co. case (*ibid.*, vol. IX (United Nations pub-

(Continued on next page.)

comments also apply to the statements of position, of which again there are many, concerning the requisitioning of property of neutral nationals in case of international war or of foreign nationals in case of civil war.¹⁰³ In short, we may therefore conclude that there is no need to take all these statements of position and their application of the concept of "military necessity" into account in defining "state of necessity" for the purposes of this section.

51. Some writers have advocated an application of the concept of "military necessity" which would come close to that of "necessity" in the strict sense, in that it would actually give this particular type of necessity, the peculiar purpose of which is to safeguard the overriding interest in the success of the military operations against the enemy and, ultimately, in his defeat, sufficient scope to preclude, by way of exception, the wrongfulness of non-compliance with an obligation imposed on the belligerent State by a rule of the international law of war. This idea found favour in particular with many German writers before the First World War, and it is also the focus of the principle controversy, in the international-law literature, about whether the concept of "military necessity" should be accepted or rejected.¹⁰⁴

(Footnote 102 continued)

lication, Sales No. 59.V.5), p. 146); that of Umpire Gutiérrez Otero, of the Spain/Venezuela Mixed Commission set up by the Protocol of 2 April 1903, in the Mena case (*ibid.*, vol. X (*op. cit.*), pp. 74 *et seq.*); etc. Particularly worthy of note is the statement by Commissioner Paul, who described as a general principle of international law the principle that damages suffered by neutral property owing to "imperious necessities of military operations" were not wrongful.

¹⁰³ The lawfulness of such requisitioning where necessities of war required it (always without prejudice to the obligation to pay compensation to the owners) and, conversely, its wrongfulness where that circumstance does not obtain were affirmed, for example, by Umpire Thornton in the Bartlett and Barge case (1874) (Moore, *History and Digest . . . (op. cit.)*, vol. IV, p. 3721); by the decision of Umpire Alexander in his decision of 16 June 1900 in the Orr and Laubenheimer case between the United States of America and Nicaragua (United Nations, *Reports of International Arbitral Awards*, vol. XV (United Nations publication, Sales No. E/F.69.V.1), p. 40); by the decision of the United States of America/Venezuela Mixed Commission set up by the Protocol of 17 February 1903, in the Upton case (*ibid.*, vol. IX (*op. cit.*), p. 234); by the United States of America/Mexico Mixed Commission set up by the convention of 8 September 1923, in the Coleman case (*ibid.*, vol. IV (United Nations publication, Sales No. 1951.V.1), p. 364). See also, for a restrictive definition of necessities of war for the purposes under discussion here, the aide-mémoire of 4 March 1941 from the German Ambassador in Washington (Hackworth, *op. cit.* (1943), vol. VII, p. 539).

¹⁰⁴ Attention may be drawn, in connection with this controversy between opposing arguments, to the following works: C. Lüder, "Krieg und Kriegsrecht im Allgemeinen", *Handbuch des Völkerrechts*, ed. F.J. von Holtzendorff (Hamburg, Verlagsanstalt und Druckerei, 1889), vol. 4, pp. 253 *et seq.*; M. Huber, "Die Kriegsrechtlichen Verträge und die Kriegsraison", *Zeitschrift für Völkerrecht* (Breslau), vol. VII (1913), pp. 351 *et seq.*; D. Anzilotti, *Corso di diritto internazionale* (Rome, Athenaeum, 1915), vol. III, pp. 207 *et seq.*; U. Borsi, "Ragione di guerra e stato di necessità nel diritto internazionale", *Rivista di diritto internazionale* (Rome), series II, year X, vol. V, No. 2 (1916), pp. 157 *et seq.*; de Visscher, *loc. cit.*, pp. 74 *et seq.*; Vitta,

52. The fact is that there are rules of the international law of war which impose obligations on belligerents with regard to the means and methods of conducting hostilities with each other. On the basis of the implied premise that any conduct designed to inflict damage on an enemy belligerent is in principle licit under the international law of war unless specially prohibited by a particular rule of that law, these obligations impose some limitations on a belligerent State with regard to those means and methods, the general purpose being to mitigate the rigours of war. There are in this field what are called rules of humanitarian law applicable to armed conflict, most of which are actually codified in international conventions. The question has therefore arisen whether the existence of a state of "necessity", and more specifically of "military necessity", could or could not be invoked to justify the adoption of conduct not in conformity with what is required of the State by one of the obligations in question. Those writers who are inclined to answer this question in the affirmative have argued that, if observance of any of those obligations should prove to be incompatible with the success of the operations undertaken to defeat the enemy, *Kriegsraison* itself would require disregard of the obligation and would preclude any wrongfulness in the conduct of the State which acted accordingly.

53. However, it is clear that this argument cannot stand; in fact, nowadays it is generally rejected. One point which has been made in support of it is that there are, after all, some written rules of the humanitarian law of war which provide an express exception to the obligation to comply with their provisions in case of "urgent military necessity".¹⁰⁵ That is true, but in our

loc. cit., pp. 339 *et seq.*; P. Weiden, "Necessity in international law", *Transactions of the Grotius Society*, vol. 24, *Problems of Peace and War* (London, Sweet & Maxwell, 1939), pp. 105 *et seq.*; N.C.H. Dunbar, "Military necessity in war crimes trials", *The British Year Book of International Law, 1952* (London), vol. 29, pp. 442 *et seq.*; W.G. Downey, "The Law of War and Military Necessity", *The American Journal of International Law* (Washington, D.C.), vol. 47, No. 2 (April 1953), pp. 251 *et seq.*; W.V. O'Brien, "The meaning of military necessity in international law", *World Polity* (Utrecht, Spectrum, 1957), vol. 1, pp. 109 *et seq.*; Buza, *loc. cit.*, pp. 222 *et seq.*; Sereni, *op. cit.* (1965), vol. IV, pp. 1927 *et seq.*; G. Schwarzenberger, *International Law* (London, Stevens, 1968), vol. II, pp. 128 *et seq.*

¹⁰⁵ For example, article 33 of the Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field of 12 August 1949, which provides that:

"The material of mobile medical units of the armed forces which fall into the hands of the enemy, shall be reserved for the care of wounded and sick",

nevertheless goes on to state:

"The buildings, material and stores of fixed medical establishments of the armed forces shall remain subject to the laws of war, but may not be diverted from their purpose as long as they are required for the care of wounded and sick. Nevertheless, the commanders of forces in the field may make use of them, in case of *urgent military necessity*,* provided that they make previous arrangements for the welfare of the wounded and sick who are nursed in them." (United Nations, *Treaty Series*, vol. 75, pp. 52 and 54.)

view it proves exactly the opposite of what can allegedly be deduced from it. In the first place, if it had really been intended that the scope of an exception of this kind should extend to all the provisions of the convention or conventions in question, it would have been incorporated in a general clause placed at the end of each convention and therefore applicable to all its provisions, and not, as was actually done, in the text of a provision covering a particular matter in which the inclusion of the exception has its own *raison d'être*. Where the exception is not expressly mentioned, there is no justification for presuming it.¹⁰⁶ Secondly, when one thinks it over, the mere idea of generalizing the exception in question would have been completely at variance with the purposes of the instruments that were drawn up. The rules of humanitarian law relating to the conduct of military operations were adopted in full awareness of the fact that "military necessity" was the very criterion of that conduct. The representatives of States who formulated those rules intended, by so doing, to impose certain limits on States, to provide for some restrictions on the almost total freedom of action which belligerents claimed, in their reciprocal relations, by virtue of that criterion. And they surely did not intend to allow necessity of war to destroy retrospectively what they had so arduously achieved. They were also fully aware that compliance with the restrictions they were laying down might hinder the success of a military operation, but if they had wanted to allow those restrictions only where they would not hinder the success of a military operation, they would have said so expressly—or, more likely, would have abandoned their task, which would have become of relatively little value. The purpose of the humanitarian law conventions was to subordinate, in some fields, the interests of a belligerent to a higher interest; States subscribing to the conventions undertook to accept that subordination and not try to find pretexts for evading it. It would be absurd to invoke the idea of military necessity or necessity of war in order to evade the duty to comply with obligations designed precisely to prevent necessities of war from causing suffering which it was desired to proscribe once for all. The conclusion is that, apart from the provisions expressly inserted in certain rules, there is no "necessity of war" that constitutes a valid ground for State conduct not in conformity with the obligations imposed by conventions designed to humanize war.

¹⁰⁶ Several of the military manuals issued since the Second World War state that, in humanitarian law conventions, any exception on grounds of "military necessity" applies only with respect to the provisions in which it is expressly sanctioned. See, for example, United States of America, Department of the Army, *The Law of Land Warfare* (Field Manual, FM 27-10) (Washington, D.C., U.S. Government Printing Office, 1956); and United Kingdom, the War Office, *The Law of War on Land, being Part III of the Manual of Military Law* (London, H.M. Stationery Office, 1958). Where judicial practice is concerned, the war crimes tribunals rejected the argument of military necessity in the case of atrocities committed against wounded, prisoners, and so on. See in this connection the cases cited by Dunbar, *loc. cit.*, pp. 446-449, and by Sereni, *op. cit.*, vol. IV, pp. 1936 *et seq.*

54. It does not follow automatically from this conclusion that the international law of war is an absolutely closed area as regards any possible application of "state of necessity" as a circumstance precluding the wrongfulness of conduct not in conformity with one of the obligations imposed on belligerents by the rules, customary and other, of that special sector of international law. To draw so sweeping a conclusion would probably be going too far, even taking into the account the fact that the rules of the international law of war are already reduced to essentials and that some of them, it seems to us, are surely rules of *jus cogens*, so that any "plea of necessity" is entirely ruled out as a ground for failure to comply with them.¹⁰⁷ In any event, the admissibility of the plea of necessity in connection with the obligations laid down by the international law of war is obviously conceivable only where the situation alleged to constitute a state of necessity fulfils all the conditions we have enunciated,¹⁰⁸ and in particular if the "essential" interest to be safeguarded in a specific case at the expense of an *inferior* interest of another party is something other than merely that interest in ensuring the success of a military operation and defeating the enemy which is the hallmark of what is by general agreement called "necessity of war".

55. In our research aimed at identifying, through a study of international practice and international judicial decisions, the areas in which "state of necessity" has validly constituted, and in our view still constitutes a circumstance precluding, by way of exception, the wrongfulness of non-compliance, in certain specific conditions, with an international obligation, we have not thus far touched on the sector of the overall international obligations of States which concerns respect by every State for the territorial sovereignty of others. Yet history shows that on many occasions Governments have tried to give "necessity" a leading role as a ground for acts committed in breach of an obligation in that sector. This may seem to be a surprising omission on our part, especially since it is precisely the fact that States do in some cases plead necessity as a ground for non-compliance with what are indeed the most important of the obligations in question that has been at the heart of the argument concerning the admissibility in general of the plea of necessity, and that has done most to mobilize many internationalists against the very principle of such a plea. However, the omission for which we might be criticized is easily explained. The actual cases we looked into were cases in which the existence of a—usually spurious—"state of necessity" was asserted with the aim of justifying the annexation by a State of the territory, or part of the territory, of another State—whether or not the annexation was affected by

¹⁰⁷ See para. 16 above.

¹⁰⁸ See paras. 12 *et seq.* above.

starting a war or undertaking military operations—¹⁰⁹ or the occupation and use for military purposes of the territory of a State which had been neutralized by a treaty concluded before the outbreak of war between some of the parties to the treaty¹¹⁰ or had declared its neutrality in a war between other States:¹¹¹ in short,

¹⁰⁹ Among the most frequently cited historical cases in which necessity was invoked to justify annexations effected by recourse to war, mention may be made of that of the Free City of Krakow, annexed by Austria in 1846 (E. Hertslet, *Map of Europe by Treaty* (London, Butterworth, 1875), vol. II, pp. 1061 *et seq.*; G.F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dietrich, 1852), vol. X, pp. 111 and 125); the annexation of Rome by Italy in 1870 (S.I.O.I.—C.N.R., *op. cit.*, pp. 871 *et seq.*; V. Bruns, ed., *Fontes Juris Gentium*, series B, sect. 1, tome 1, part I (Berlin, Heymanns, 1932), pp. 960–961; and the annexation of Ethiopia by Italy in 1936 (League of Nations, *Official Journal*, 16th year, No. 11 (November 1935), p. 1137). “Necessity” was also invoked in 1908 by Austria–Hungary as justification for the annexation—effected by a show of force, but without war—of Bosnia–Hercegovina, province of the Ottoman Empire which had been placed under its administration by the Treaty of Berlin (13 July 1878), but sovereignty over which remained with Turkey. See the note sent by Austria–Hungary to the States signatories to the treaty in justification of the annexation, in *British Documents on the Origins of the War, 1889–1914* (London, H.M. Stationery Office, 1928), vol. V, pp. 398 *et seq.*

¹¹⁰ What may be considered the “classic” case was the occupation of Luxembourg and Belgium by Germany in 1914, which Germany sought to justify on the ground of the necessity of forestalling an attack on its territory by France through Luxembourg and Belgium. See, in particular, the note presented on 2 August 1914 by the German Minister in Brussels to the Belgian Minister for Foreign Affairs (J.B. Scott, ed., *Diplomatic Documents Relating to the Outbreak of the European War* (New York, Oxford University Press, 1916), part I, pp. 749–750) and the speech in the Reichstag by the German Chancellor, von Bethmann Hollweg, on 4 August 1914, containing the well-known words “*wir sind jetzt in der Notwehr; und Not kennt kein Gebot!*” (*Jahrbuch des Völkerrechts*, vol. III (special number), *Politische Urkunden zur Vorgeschichte des Weltkrieges* (Munich, 1916), p. 728).

¹¹¹ Such cases are very numerous; mention may be made of the occupation of Korea by Japanese troops during the Russo–Japanese war of 1904 (see the documents cited by E. T. Hazan in *L'état de nécessité en droit pénal interétatique et international* (Paris, Pedone, 1949), p. 53); the occupation of certain Greek territories or islands by the Entente Powers during the First World War for use as bases for their military operations against Turkey (see the documents cited by T. P. Ion in “The Hellenic crisis from the point of view of constitutional and international law—part IV”, *The American Journal of International Law* (New York), vol. 12, No. 3 (July 1918), pp. 564 *et seq.*); the occupation by Germany during the Second World War of Denmark, Norway, Belgium and Luxembourg, and by Germany and Italy of Yugoslavia and Greece (see *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946* (Nuremberg, 1949), vol. XXII, pp. 446 *et seq.*); the occupation, during the same war, of Iceland by the United Kingdom (*ibid.*, vol. XVIII, p. 415; of Iran by the United Kingdom and the Soviet Union (G. E. Kirk, “The Middle East”, in *Survey of International Affairs, 1939–1946: The World in March 1939*, ed. A. Toynbee and F. T. Ashton-Gwatkin (London, Oxford University Press, 1952), pp. 133 *et seq.*, and M. M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1965), vol. 5, pp. 1042 *et seq.*); and of Portuguese Timor by the Netherlands and Australia

actions all of which consist, in one way or another, of an assault on the very existence of another State, or on the integrity of its territory or the independent exercise of its sovereignty. Without going into the question as to what the situation in international law may have been at the time when these actions, especially the oldest ones, were taken,¹¹² we can say that in our own time any use by a State of armed force for any assault of the kind mentioned above on the sovereignty of another State is indisputably covered by the term “aggression” and, as such, is subject to a prohibition of *jus cogens*—the most typical and incontrovertible prohibition of *jus cogens*, both in general international law and in the United Nations system. Since the essential condition to which we have already referred¹¹³ is absent, invoking any “state of necessity” whatever cannot, in our opinion, have the effect of precluding the international wrongfulness of State conduct not in conformity with such a prohibition. It would be an absurd situation if the obligation prohibiting any use of force which constitutes aggression had the power, because of its peremptory nature, to render void any agreement to the contrary concluded between two States, so that prior consent by the State subjected to the use of force could not have the effect of constituting a ground, but that such an effect could be attributed to an assertion of necessity, even if genuine, by the State using force. It would be equally absurd if all that a State having committed an act which, under present-day international law, qualifies as an “international crime”¹¹⁴ needed to do in order to be absolved

(*Keesing's Contemporary Archives, 1940–1943* (Bristol), vol. IV, pp. 4943 *et seq.*). In so far as any “justification” of these actions was sought, “necessity” was always invoked, with varying degrees of candour.

¹¹² Actually, in those days, when “necessity” was invoked as a justification for such actions, this was often done mainly for political and moral reasons, because no State wanted to stand before the eyes of the world as the perpetrator of acts committed solely for purposes of crude expansionism and in pursuit of purely arbitrary interests. But from the strictly legal standpoint, apart from cases where the actions in question were specially prohibited by treaties, such appeals to “necessity” were only of *ad abundantiam* value, since the prohibition of the use of force had not yet been incorporated in general international law and the question did not therefore arise of precluding, by way of exception, the wrongfulness of an act which could not in itself be considered wrongful. In fact, it is interesting to note that, once the rule concerning the prohibition of armed force began to take root in international law, States became less and less inclined to invoke necessity as a justification for the use of force. At the time of the Chaco conflict between Paraguay and Bolivia (1928–1935), Paraguay contended that it was Bolivia's intention to argue “necessity” in justification of the march by its troops on River Paraguay and their invasion of the Chaco region (League of Nations, *Official Journal*, 13th year, No. 9 (September 1932), p. 1581). However, Bolivia firmly denied having ever had any such intention and argued that it was merely claiming effective possession of an area which had always been part of its national territory (*ibid.* p. 1583).

¹¹³ See para. 16 above.

¹¹⁴ See *Yearbook . . . 1976*, vol. II (Part Two), pp. 95–96, 118 *et seq.*, document A/31/10, chap. III, sect. B.2, art. 19 and paras. (59) *et seq.* of the commentary.

of any wrongfulness was to assert that it had acted in a "state of necessity"—even assuming it could prove that it had done so. It should also be noted that article 5, paragraph 1, of the Definition of Aggression adopted by the General Assembly on 14 December 1974¹¹⁵ provides that:

No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.

We can therefore state without a shadow of doubt that, however extensive or limited may be the effect as a ground which present-day international law attributes to "state of necessity", the latter can never constitute a circumstance precluding the wrongfulness of State conduct not in conformity with the obligation to refrain from any use of force constituting an act of aggression against another State.

56. However, that area of international obligations in which the basic principle that every State is required to respect the sovereignty of other States is reflected and spelt out is susceptible not only to the kind of breaches which warrant the description of acts of aggression and which, at least in the most serious cases, clearly constitute "international crimes". Consequently, while it may be taken for granted that assaults of such magnitude and flagrancy on the sovereignty of others can never, under international law as it now stands, be justified by any assertion of state of necessity, there remains the question whether or not the duly established existence of such a circumstance might have the effect of precluding, by way of exception, the wrongfulness of an assault which proved, especially when viewed in context, to be less serious. We are referring in particular to certain actions by States in the territory of other States which, although they may sometimes be coercive in nature, serve only limited intentions and purposes bearing no relation to the purposes characteristic of a true act of aggression. These would include, for instance, some incursions into foreign territory to forestall harmful operations by an armed group which was preparing to attack the territory of the State, or in pursuit of an armed band or gang of criminals who had crossed the frontier and perhaps had their bases in the

foreign territory, or to protect the lives of nationals or other persons attacked or detained by hostile forces or groups not under the authority and control of the State, or especially to eliminate or neutralize a source of troubles which threatened to occur or to spread across the frontier. The common feature of these cases is, first of all, the existence of a grave and imminent danger to the State, to some of its nationals or simply to people, a danger of which the territory of the foreign State is either the theatre or the place of origin, and which the foreign State in question has a duty to avert by its own action but which its unwillingness or inability to act allows to continue. Another common feature is the limited character of the actions in question, in terms both of duration and of the means employed, in keeping with the purpose, which is restricted to eliminating the perceived danger.

57. In the past, writers on international law have sometimes referred to precisely the kind of cases mentioned above as examples of situations in which a State could invoke necessity in justification of its actions not in conformity with the requirements of an international obligation.¹¹⁶ Nor has there been any dearth of actual cases in which "necessity" was invoked precisely to preclude the wrongfulness of an armed incursion into foreign territory for the purpose of carrying out one or another of the operations referred to above. To cite only a few examples out of the many involving situations of this kind, there was the celebrated "*Caroline*" case, in which British armed forces entered United States territory and attacked and destroyed (also causing loss of life) a vessel owned by American citizens which was carrying recruits and military and other material to the Canadian insurgents;¹¹⁷ there were the repeated violations of the

¹¹⁶ Anzilotti (*Corso . . .*, 4th ed. (*op. cit.*), p. 414), cites as a typical case of a State acting in a "state of necessity" the case where the State in question, learning that near the frontier, but in foreign territory, an intrusion which is about to be launched, with the aim of provoking a revolutionary or separatist movement in the country, is being organized by exiles, and being unable to notify the foreign authorities in time, sends in armed forces to seize the conspirators.

¹¹⁷ The action occurred during the night of 29 December 1837. Necessity was first mentioned as a ground, in reaction to the American protests, by the British Minister in Washington, Henry S. Fox, who referred in that connection to the "necessity of self defence and self preservation"; the same point was made by the counsel consulted by the British Government, who stated that "the conduct of the British Authorities" was justified because it was "*absolutely necessary as a measure of precaution*" (see respectively W.R. Manning, ed., *Diplomatic Correspondence of the United States: Canadian Relations 1784-1860* (Washington, D.C., Carnegie Endowment for International Peace, 1943), vol. III, pp. 422 *et seq.*, and McNair, *op. cit.*, pp. 221 *et seq.*). On the American side, Secretary of State Webster replied to Minister Fox that "*nothing less than a clear and absolute necessity can afford ground of justification*" for the commission "*of hostile acts within the territory of a Power at Peace*" and observed that the British Government must prove that the action of its forces had really been caused by "*a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for*

¹¹⁵ Resolution 3314 (XXIX), annex.

The impossibility of taking advantage—after the adoption of the Charter of the United Nations—of "state of necessity" to justify an aggression has been asserted by K.J. Partsch, "Selbsterhaltungsrecht", *Wörterbuch des Völkerrechts*, ed. K. Strupp, 2nd ed., rev. by H.J. Schlochauer (Berlin, de Gruyter, 1962), vol. III, p. 529; G. Dahm, *Völkerrecht* (Stuttgart, Kohlhammer, 1960), vol. II, p. 444; A. Favre, "Fault as an element of the illicit act", *The Georgetown Law Journal* (Washington, D.C.), vol. 52, No. 2 (Winter 1964), p. 566; and *Principes du droit des gens* (*op. cit.*), p. 644; W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), vol. I, pp. 390-391; P.A. Steiniger, "Die allgemeinen Voraussetzungen der Völkerrechtlichen Verantwortlichkeit der Staaten", *Wissenschaftliche Zeitschrift der Humboldt-Universität zu Berlin, Gesellschafts- und Sprachwissenschaftliche Reihe* (Berlin), vol. XXII, No. 6 (1973), p. 445; Graefrath, Oeser and Steiniger, *op. cit.*, p. 75; Lamberti Zanardi, "Necessità . . ." (*loc. cit.*), p. 898.

Mexican frontier from 1836 to 1896 by United States troops in pursuit of Indians who were making attacks into American territory from their bases in Mexican territory and then returning to that haven;¹¹⁸ there was the dispatch in 1876 of Italian and Austrian warships to the waters off Salonica to protect the lives of nationals of the two countries who, like other foreigners, were threatened by manifestations of xenophobia on the part of the mob after disorders broke out in the city;¹¹⁹ lastly, there were other cases of the dispatch to foreign territory of land or sea forces, both then and later, on similar grounds.¹²⁰ It therefore seems to us that, before the First World War and also during the period between the two World Wars, the legal conviction of States on the point we are dealing with was that a "state of necessity", if it was asserted in good faith and was duly established and evidenced by the *genuine existence of all the conditions enumerated*, could be regarded as a circumstance that might, by way of exception, preclude the wrongfulness, which would otherwise have been undeniable, of an intervention in foreign territory for any one of the

(Footnote 117 continued)

deliberation" (*British and Foreign State Papers, 1840-1841* (London, Ridgway), vol. 29 (1857), pp. 1129 *et seq.*). In his message to Congress of 7 December 1841, the President of the United States reiterated that "This Government can never concede to any foreign Government the power, *except in a case of the most urgent and extreme necessity*", of invading its territory, either to arrest the persons or destroy the property of those who may have violated the municipal laws of such foreign Government ..." (*ibid.*, 1841-1842, vol. 30 (1858), p. 194). Thus the divergence of views shifted from the plane of principle to that of fact. The incident was not closed until 1842, with an exchange of letters in which the two Governments found themselves in agreement both on the basic principle that the territory of an independent nation is inviolable and on the fact that "a strong overpowering necessity may arise when this great principle may and must be suspended.*" "It must be so" added Lord Ashburton, the British Government's *ad hoc* envoy to Washington, "for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity*" (*ibid.*, pp. 195 *et seq.*). For Secretary of State Webster's reply, *ibid.*, pp. 201 *et seq.* Thus the applicability in principle of the plea of necessity in the area under discussion here was expressly recognized by the two Powers between which the dispute had arisen.

¹¹⁸ For cases extending all the way from 1836 to 1896, see J. B. Moore, *A Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), vol. II, pp. 418 *et seq.* An end to the repeated incidents was signalled by the conclusion, on 4 June 1896, of an agreement between the United States of America and Mexico under which the armed forces of the two nations were reciprocally accorded the right to pursue bands of hostile Indians beyond the frontier, in desert areas and up to a specified depth.

¹¹⁹ However, the Italian Consul at Salonica received instructions stating that he was not authorized to bring armed detachments ashore except in case of *real and imminent danger* or unless the local authorities formally declared that they had not sufficient forces available. See S.I.O.I.-C.N.R., *op. cit.*, p. 939. The Rome Government adopted the same attitude on a number of other occasions (*ibid.*, pp. 931 *et seq.*).

¹²⁰ For cases culled from Japanese practice between the two World Wars, see League of Nations, *Official Journal*, 9th year, No. 6 (June 1928), pp. 792-793, and *ibid.*, 12th year, No. 12 (December 1931), pp. 2347 and 2376.

limited and temporary purposes to which we have referred. The doubts and misgivings of some writers on this subject were not in fact due to any opposition in principle to the idea, as such, of a justification of this kind, but rather to a perfectly understandable reaction to the flagrant way in which States often abused the justification they advanced and to a fear that the end-result of such repeated abuses would be the assertion that there existed an actual "right of intervention" in foreign territory.

58. Was there a change in the situation in this respect after the Second World War, especially as a result of the adoption of the Charter of the United Nations? As noted above,¹²¹ the most striking aspect of the evolution of international law during the period from the late 1920s to the late 1960s was the gradual formation, in the *opinio juris* of the members of the international community, of a conviction of the peremptory character, allowing of no derogation, of the principle prohibiting aggression. In the Charter, this prohibition was set forth as a written rule, embodied in the provision of Article 2, paragraph 4 (the key provision of the Charter), which requires Member States to refrain from the use of force "against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations". And it is primarily in consideration of the fact that this fundamental prohibition is today unquestionably a norm of *jus cogens* that we came to the conclusion that no plea of necessity could now have the effect of justifying the commission of an act of aggression. One problem which may then arise is whether, in Article 2, paragraph 4 of the Charter, the intention was simply to forbid aggression in all its possible aspects or whether the intention was to go beyond simply prohibiting aggression and also extend the obligation to "refrain" enunciated in that paragraph to other possible forms of use of force, except when it is used in exercise of the right of "self-defence" as provided in Article 51. The fact that the wording of Article 2, paragraph 4, of the Charter is almost identical with that of article 1 of the Definition of Aggression approved by the General Assembly¹²² might at first sight suggest that the authors of the Definition interpreted the prohibition in the Charter as relating only to "aggression". However, the enumeration in article 3 of the Definition of acts qualifying as an act of aggression¹²³ convinces us that the intention

¹²¹ Para. 55.

¹²² "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."

¹²³ This enumeration, in subparas. (a) to (g) of art. 3 of the Definition (see footnote 115 above), does not include a number of less serious acts which might be committed by a State in the territory of other States. It should also be noted in this connection that art. 2 of the Definition acknowledges that the Security Council may conclude that some acts involving the use of force in

of the drafters of Article 2, paragraph 4 of the Charter must have been also to include in the obligation to refrain, enunciated in that paragraph, other acts besides those which merit being classified as acts of aggression, and that no doubt should therefore remain as to the prohibition by the Charter—in keeping with general international law—of any kind of conduct involving any assault whatsoever on the territorial sovereignty of another State, irrespective of its magnitude, duration or purposes. It is equally beyond question that there can now no longer be any possibility of considering that there exists, as is sometimes spuriously argued, an actual “right of intervention” in foreign territory for any of the particular reasons or any of even the very limited purposes we have mentioned.¹²⁴ All this, however, still does not take us to the point where we can say that the wrongfulness, which in principle is incontestable in this case also, of an intervention by force in foreign territory, which nevertheless is manifestly less serious than a true act of aggression, cannot, by way of exception, be precluded because the State making the intervention acted in conditions which clearly proved the existence of a “state of necessity”—quite the contrary, since the question whether a certain “plea” may be applicable cannot logically arise unless the act to which the plea relates is to be regarded in the abstract as wrongful.

59. A negative conclusion as to whether the possibility of recognizing that wrongfulness might, by way of exception, be precluded in this case would, of course, be unavoidable if, in interpreting the rule of *jus cogens* prohibiting aggression, one adopted so broad a concept of aggression that it covered any form of act committed by force in foreign territory. However, to do that might be to expand, beyond what is at present accepted by the legal conviction of States, either the concept of “aggression”¹²⁵ or the concept of a “peremptory norm” as defined in article 53 of the Vienna Convention on the Law of Treaties.¹²⁶ But

violation of the Charter should not be considered acts of aggression because the acts concerned or their consequences were not of sufficient gravity. Moreover, a broad interpretation, although not by any means covering all the prohibitions comprised in Article 2, para. 4 of the Charter, appears to follow from principle 1 of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, approved by the General Assembly on 24 October 1970 (resolution 2625 (XXV), annex).

¹²⁴ See para. 56 above.

¹²⁵ Even if one remained within the already very broad terms of art. 3 of the Definition of Aggression, which enumerates a wide range of acts as constituting acts of aggression, one would probably be able to present as “aggression” all the kinds of actions for limited purposes concerning which we are here considering whether the plea of necessity can apply.

¹²⁶ *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.

without going as far as that, one could, more simply, note that Article 51 of the Charter mentions only self-defence as an admissible form of the use of force and infer from that fact that the drafters of the Charter might have had the intention of implicitly *excluding* the applicability of the plea of necessity, however well-founded such a plea might be in specific cases, to any conduct not in conformity with the obligation to refrain from the use of force. In other words, it might be supposed that they intended, in this specific area, to provide an exception to the otherwise possible exception to the rule that conduct not in conformity with an international obligation is wrongful. However apposite, especially because of its simplicity, such a supposition may be, it is still only a supposition, and it would be arbitrary for us, in pursuit of our present task, to regard it as anything else. From the fact that it was considered essential to safeguard specially and explicitly, contrary to the general prohibition of the use of force, the right to use force in “self-defence”, it does not logically or necessarily follow that the intention was to exclude absolutely the elimination of the wrongfulness of conduct not in conformity with the prohibition on the ground of the existence of other circumstances. In any case, since the Charter does not explicitly lay down such an exclusion, it is only by implication that the organs competent to interpret the Charter could have reached the conclusion, when considering specific cases, that such an exclusion existed.

60. However, an examination of the practical cases submitted either to the International Court of Justice or to the political organs of the United Nations does not seem to be of very much help for our purposes. With regard to the Court, all we can point out is that, in its judgement of 9 April 1949 in the *Corfu Channel* case,¹²⁷ it rejected the arguments presented by the United Kingdom in defence of the minesweeping operation carried out by the British Navy in the Albanian waters of the Channel following an incident in which two British warships had blown up after striking mines. However, where the Court took a negative position was on the assertion by the representatives of the British Government that a State which was the victim of a serious breach of international law had a *right to intervene by direct action in the territory of the State which had committed the breach*, or at least a *right to take countermeasures in that territory as a matter of self-help* in order to prevent the continuance of the wrongful action or to ensure that the offending State did not remove the evidence of its misconduct, all this despite the prohibition by the Charter of the United Nations of the use of force and as a limitation on that prohibition. The British Government accordingly maintained that it had acted in exercise of this *right* (we would say, rather, this *option*) directly to adopt measures of

¹²⁷ *I.C.J. Reports 1949*, p. 4.

constraint against the State caught in a breach of international law.¹²⁸ The Court, reflecting recent trends of opinion on the subject, denied that, whether limited or not, the “alleged right of intervention” had “a place in international law” or that a State could obtain redress by applying, as a matter of “self-help”, countermeasures of constraint against the State which had committed an international offence.¹²⁹ However, it seems clear that the legal question which the Court had to decide was whether or not, under the present-day international legal order, a State injured by an internationally wrongful act of another State had the option of reacting unilaterally by making an assault on the territorial sovereignty of that other State, as a coercive “countermeasure” for the offence from which it had suffered. However, the Court did not have any occasion to rule on the quite different question whether or not a State finding itself, irrespective of any wrongful act by others, in a material situation characterized by the absolute “necessity” of acting contrary to its obligations in order to safeguard an essential interest which, if it failed to act, would inevitably be threatened by an imminent danger, could invoke that “state of necessity” as a circumstance that might, by way of exception, preclude the otherwise undeniable wrongfulness of its conduct.¹³⁰ The terms of the dispute submitted for the Court’s judgement were quite different: the British Government asserted that it had acted in exercise of its right; thus it was in no way invoking, as a ground for an act otherwise wrongful on its part, a circumstance for the existence of which it was not in any event argued that all the conditions were fulfilled in the case in question. In our opinion, therefore, it would be stretching the meaning and scope of the judgement to try to draw conclusions from it, one way or the other, with regard to the applicability of the plea of necessity in the area with which we are dealing.

61. Nor does an analysis of State practice seem to permit sure and definitive conclusions on the precise

point we should like to elucidate. Our aim is not—to us repeat, so that there may be no misunderstanding—to seek ways of establishing whether or not the existence of a “state of necessity” might preclude the wrongfulness of an action involving the use of force against the territory of a foreign State which would jeopardize its territorial integrity or political independence or, at least, by reason of its purposes and its magnitude, would assume the aspect of an act of aggression; this has already been clearly answered in the negative. Nor is the aim to seek to establish whether or not actions, even involving some use of force but circumscribed in magnitude and duration, which are carried out, as mentioned above,¹³¹ for limited purposes and without any true aggressive intentions towards the State whose territory is affected, are also prohibited by present-day international law; for the purposes of our present research, we have taken this prohibition for granted in the context of the United Nations system. The only point on which we should like light to be shed, if possible, is whether or not the wrongfulness, which is in principle accepted as undeniable, of any such action might, by way of exception, be precluded where the State which committed it is able to show that it acted in a real “state of necessity”, with all the conditions for recognition of the existence of that circumstance being fulfilled.

62. A survey of practice shows that States engaging in some action involving the use of force have sometimes pleaded that they had a duty to protect, by such action, a vital interest which was threatened by a grave danger, but that they have not expressly invoked as a justification the ground of necessity, probably because they themselves realized that not all the conditions for doing so were fulfilled in the case in question and that, moreover, the magnitude and purposes of the action taken were not such that it could be described as limited and unaggressive.¹³²

¹²⁸ In the written proceedings, the British Government had maintained that there existed, without any limitation, a “right of intervention”. In the course of the oral arguments, Sir Eric Beckett, who presented the case for the British Government, claimed only a “limited right of self-help” or “self-redress” afforded by international law to any State which was the victim of a breach of an international obligation. See *I.C.J. Pleadings, Corfu Channel*, vol. II, pp. 282 *et seq.*, vol. III, pp. 295 *et seq.*, vol. IV, pp. 579 *et seq.*

¹²⁹ *I.C.J. Reports 1949*, p. 35.

¹³⁰ Even Judge Krylov, who, having stated in his dissenting opinion (*ibid.*, pp. 76–77) that the exercise of an “alleged right of self-help” was “nothing else but intervention”, was alone in mentioning the term “necessity”, did so only in order to deny the admissibility, under present-day international law, of a “law of necessity” in the sense of *Notrecht*, “which used to be upheld by a number of German authors”, i.e. in the sense of an alleged supreme right which would prevail over any other right of other parties. As we pointed out above (para. 9), the notion of this alleged right is not only false but has nothing to do with the notion of “state of necessity” as a factual circumstance accompanying the commission by a State of an otherwise wrongful act in no way constituting the exercise of a right.

¹³¹ See para. 56.

¹³² In connection with the action conducted on 30 October 1956 by British and French forces in the Suez Canal area, the two Governments argued in the Security Council and the General Assembly, as one of the grounds for their action, that the movement of hostilities towards the Canal Zone was endangering the free passage of ships through that water way. They consequently emphasized their intention of protecting, by their intervention, the interests of the countries using the Canal. In the course of the ensuing debates, most representatives of Member States who spoke maintained that the magnitude, purposes and scope of the action undertaken by the two Powers made it a true act of aggression. In addition, they pointed out: (a) that the ostensible purpose of the action—which some of them considered to be only a pretext—could not be attained by such means; (b) that the safeguarding of the vital interest of some parties could not be achieved at the sacrifice of a no less vital interest of others. See *Official Records of the Security Council, Eleventh Year, 749th–751st meetings*, and *Official Records of the General Assembly, First Emergency Special Session, 561st and 562nd meetings*. Thus, if the two Governments responsible for the action had invoked the ground of necessity, the absence in this case of the requisite conditions would have been argued against them.

63. In other cases—for example, interventions in foreign territory in “hot pursuit” of units of insurrectionary or national liberation movements operating from bases within that foreign territory¹³³—the Governments making the interventions have usually maintained that the State in whose territory they intervened was deliberately evading its duty to prevent the attacks emanating from its territory, or was incapable of preventing them. Apart from that, however, they have invoked as justification for their action—whether rightly or wrongly is immaterial—not the fact that they found themselves in a state of necessity, but in some cases that they acted in “self-defence” and in others that they were applying a “sanction”, a coercive countermeasure. In so doing, their intention was probably to emphasize that their action was in response to a wrongful attack by another party. The discussions which took place on such cases are therefore, for the most part, irrelevant so far as the applicability of the plea of necessity in this area is concerned.

64. In other cases again, particularly interventions in foreign territory for supposedly “humanitarian” purposes such as saving the lives of nationals or foreigners threatened by insurgents, hostile groups, and so on,¹³⁴ we can find an explicit, although not exclusive, appeal

¹³³ See, in addition to the works already mentioned in a footnote in section 3 of this chapter (*Yearbook... 1979*, vol. II (Part Two), p. 42, document A/CN.4/318 and Add.1-4, footnote 186); I. Brownlie, “International law and the activities of armed bands”, *International and Comparative Law Quarterly* (London), vol. 7, No. 4 (October 1958), pp. 731 *et seq.*; J. Charpentier, “Existe-t-il un droit de suite?” *Revue générale de droit international public* (Paris), 3rd series, vol. XXXII, No. 2 (April-June 1961), pp. 301 *et seq.*; M. R. Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons against Foreign States* (The Hague, Nijhoff, 1962), pp. 115 *et seq.*; F. Pocar, *L'esercizio non autorizzato del potere statale in territorio straniero* (Padua, CEDAM, 1974), pp. 27 *et seq.*, 87 *et seq.*; A. F. Panzera, *Attività terroristiche e diritto internazionale* (Naples, Jovene, 1978), pp. 96 *et seq.*

¹³⁴ On the general question of the lawfulness or wrongfulness of such interventions since the adoption of the Charter, see in particular H. Waldock, “The regulation of the use of force by individual States in international law”, *Recueil des cours... 1952-II*, (Paris, Sirey, 1953), vol. 81, p. 503; Bowett, *op. cit.*, pp. 87 *et seq.*; Brownlie, *International Law... (op. cit.)*, pp. 290 *et seq.*; J.L. Brierly, *The Law of Nations*, 6th ed., rev. by H. Waldock (Oxford, Clarendon Press, 1963), pp. 427 *et seq.*; A.J. Thomas and A. Van Wynen Thomas, *The Dominican Republic Crisis 1965: Background Paper and Proceedings of the Ninth Hammar skjöld Forum* (Dobbs Ferry, N.Y., Oceana, 1967), pp. 16 *et seq.*; C.G. Fenwick, “The Dominican Republic: intervention or collective self-defence?”, *The American Journal of International Law* (Washington, D.C.), vol. 60, No. 1 (January 1966), pp. 64 *et seq.*; R.T. Bohan, “The Dominican case: unilateral intervention”, *ibid.*, No. 4 (October 1966), pp. 809 *et seq.*; R. B. Lillich, “Forcible self-help by States to protect human rights”, *Iowa Law Review* (Iowa City, Iowa), vol. 53, No. 2 (October 1967), pp. 325 *et seq.*; P.C. Jessup, *A Modern Law of Nations: An Introduction*, 3rd ed. (New York, Macmillan, 1968), pp. 169 *et seq.*; Lamberti Zanardi, *La Legittima difesa... (op. cit.)*, pp. 74 *et seq.*

to the plea of “necessity” in the justification offered by the Belgian Government for its dispatch of paratroopers to the Congo in 1960 to protect the lives of Belgian nationals and other Europeans who, it claimed, were being held as hostages by Congolese army mutineers and insurgents. According to one author, the Prime Minister (Mr. Eyskens) told the Senate that the Government had found itself “in a situation of absolute necessity”.¹³⁵ The Minister of Foreign Affairs, Mr. Wigny, in a statement to the Security Council, said that Belgium had been “forced by necessity” to send troops to the Congo, and emphasized that the action taken had been “purely humanitarian”, had been limited in its scope by its objective, and had been conceived as a purely temporary action, pending an official intervention by the United Nations.¹³⁶ The Congolese Government, in its reply, maintained that the ground asserted by Belgium was a pretext, that its real objective was the secession of Katanga and that, consequently, an act of aggression had taken place.¹³⁷ The views expressed in the Security Council were divided between the two opposing positions; both sides, however, focused on determination and evaluation of the facts.¹³⁸ No one took any position of principle with regard to the possible validity of a “state of necessity” as a circumstance which, if the conditions for its existence were fulfilled, could preclude the wrongfulness of an action not in conformity with an international obligation. Suffice it to note—and this is not unimportant—that there was no denial of the principle of the plea of necessity as such.¹³⁹

65. However, for our purposes the Belgian intervention in the Congo remains an isolated case. In the various more recent cases in which armed action has been taken in foreign territory to free the hostages of

¹³⁵ D.W. McNemar, “The postindependence war in the Congo”, *The International Law of Civil War*, ed. R.A. Falk (Baltimore, Md., Johns Hopkins Press, 1971), p. 273. (For the original text of Mr. Eyskens’ statement, see W. J. Ganshof van der Meersch, *Fin de la souveraineté belge au Congo: Documents et réflexions* (Brussels, Institut royal des relations internationales, 1963), p. 457.)

¹³⁶ See *Official Records of the Security Council, Fifteenth Year*, 873rd meeting, paras. 182 *et seq.*, 192 *et seq.*; 877th meeting, p. 142; 879th meeting, para. 151.

¹³⁷ *Ibid.*, 877th meeting, paras. 31 *et seq.*

¹³⁸ *Ibid.*, 873rd meeting, para. 144; 878th meeting, paras. 23, 65, 118; 879th meeting, paras. 80 *et seq.*

¹³⁹ At the time of the second Belgian intervention in the Congo in 1964, on the other hand, the Belgian Government invoked as its ground the “consent” of the Congolese Government, which the latter disputed (*ibid.*, *Nineteenth Year, Supplement for October, November and December 1964*, documents S/6055 and S/6063). The operation was defined as an “emergency rescue mission”.

The justification advanced by the United States for intervening in the Dominican Republic to save endangered United States citizens and nationals of some other countries was simply the inability of the then Dominican Government to provide proper protection (see *Repertoire of the Practice of the Security Council, Supplement 1964-1965* (United Nations publication, Sales No. E.68.VII.1), pp. 149 *et seq.*)

terrorists who had hijacked aircraft,¹⁴⁰ the “justification” advanced by the Governments which mounted these raids has been either the consent of the State in whose territory the raid took place (Mogadishu, 1977; Larnaca, 1978) or “self-defence” (Entebbe, 1976). The concept of state of necessity was neither mentioned nor taken into consideration, even though some of the alleged facts stated by those who spoke of “self-defence” and who were contested on that point by their opponents¹⁴¹ may have borne more relation to state of necessity than to self-defence. Should this fact in itself be regarded as indirect proof of a conviction that it is impossible in principle to invoke “state of necessity” as a circumstance precluding wrongfulness, by way of exception, in connection with actions not in conformity with the obligation to refrain from committing any kind of assault on the territorial integrity of another State? Perhaps so, but it is also conceivable that the fact that States preferred to invoke other “grounds” rather than “necessity” was due, in some specific cases, to an intention of bringing out more clearly certain alleged aspects of the case in question (such as, for instance, the non-“innocence” of the State which was a victim of the attack) or to a belief that they could not prove that all the especially strict conditions for the existence of a genuine “state of necessity” were fulfilled in that case.¹⁴² In any event, while one can certainly discern in the discussions arising out of such cases in the Security Council a dominant tendency towards an attitude of the greatest severity to all forms of action which in one way or another constitute assaults on the territorial sovereignty of States, one cannot draw any conclusions from them, either for or against the admissibility in the abstract of the plea of necessity in such cases.¹⁴³

¹⁴⁰ On this point, see, in general, A.F. Panzera, “Raids e protezione dei cittadini all'estero”, *Rivista di diritto internazionale* (Milan), vol. 61, No. 4 (1978), pp. 759 *et seq.* See also U. Beyerlin, “Die israelische Befreiungsaktion von Entebbe in völkerrechtlicher Sicht”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart), vol. 37 (1977), No. 2, pp. 213 *et seq.*; H. Strebelt, “Nochmals zur Geiselnbefreiung in Entebbe”, *ibid.*, No. 3–4, pp. 691 *et seq.*; the articles by C. Zorgbibe, “La protection d'humanité”, and J. Schwoebel, “Le raid israélien et la Charte de l'ONU”, published in *Le Monde*, 7 July 1976, p. 2 and 9 July 1976, p. 2; of F. Pocar, “Soltanto il consenso della Somalia ha permesso l'operazione militare”, published in *Corriere della Sera* of 19 October 1977, p. 2, the note by E. Sciso, “Il raid egiziano a Larnaca”, *Rivista di diritto internazionale* (Milan), vol. 61, No. 4 (1978), pp. 945 *et seq.*

¹⁴¹ For the various statements of position concerning the Israeli raid at Entebbe, and for the draft resolutions, none of which was adopted, see *Official Records of the Security Council, Thirty-first Year, Supplement for July, August and September 1976*, documents S/12123, 12124, 12132, 12135, 12136 and 12139, and *ibid.*, *Thirty-first Year*, 1939th, 1941st and 1942nd meetings.

¹⁴² We refer in particular to the conditions that there must be absolutely no other means of safeguarding the “essential” interest threatened in the case in question and that the action taken to protect that interest must not damage an equally essential interest of the State against which the action is directed.

¹⁴³ To Wengler as well (*op. cit.*, pp. 390–391), this question remains open. The case of the violation of the territory of a State

66. The practice of the United Nations itself does not, therefore, seem to us at present to be sufficiently copious and conclusive on this point to enable us to base on it a sure and definitive answer to the question posed earlier.¹⁴⁴ Having made that finding, we do not feel that we should pursue this research and venture ourselves to assume responsibility for taking a position on this specific point. What we have been considering is whether or not the wrongfulness of conduct not in conformity with the prohibition of certain limited actions involving the use of force in foreign territory—a prohibition which we believe is firmly established under the Charter system but to which, as indicated above,¹⁴⁵ we hesitate to ascribe the same force of *jus cogens* as must, in our view, be accorded to the prohibition of aggression—might be precluded in exceptional cases where all the strict conditions we have spelt out for recognition of a “state of necessity” really existed. As also noted above,¹⁴⁶ the answer to this question depends primarily on the interpretation to be placed on certain provisions of the Charter, an instrument of conventional origin, or, in other words, on certain primary rules enunciated in that instrument. The task of deciding what that answer will be therefore rests with the various organs responsible for such interpretation, and not with a draft concerning the definition of “secondary” rules on international responsibility on which the Commission is working. It will be quite sufficient, for our present purposes, to indicate clearly in the draft article which we shall formulate that whatever admissibility we decide is warranted, on certain conditions and within certain limits, in general international law for “state of necessity” as a circumstance precluding the wrongfulness of conduct not in conformity with an international obligation should always be understood as being subject to any different conclusion that might be necessitated in a given area, not only by the existence of a rule of *jus cogens*, but also by any explicit provisions of a treaty or other international instrument or the deductions to be drawn from them by implication.

67. What we have just said logically leads us to consider expressly and in greater depth than we have been able to do so far a side issue, but one the importance of which will be apparent to all. The question is, what kind of impact the existence, in a

carried out to prevent a natural catastrophe is perhaps that which is least open to argument. Even those writers who do not admit the plea of necessity find that the prohibition of the use of force set forth in Article 2, para. 4 of the Charter does not apply to the case where intervention in foreign territory is the only way of avoiding a natural catastrophe. See, for example, Brownlie, *International Law...* (*op. cit.*), p. 370, and K. Skubiszewski, “Use of force by States. Collective security. Law of war and neutrality”, *Manual of Public International Law*, ed. M. Sørensen (London, Macmillan, 1968), p. 775.

¹⁴⁴ Para. 57 above.

¹⁴⁵ Para. 58.

¹⁴⁶ *Idem.*

given sector of international law, of conventional provisions referring in one way or another to situations of necessity can have on the consequences which would otherwise follow from the general principle we shall have occasion to recognize as belonging to present-day international law with regard to the "plea of necessity". We have mentioned from time to time the possibility that, in imposing on the States parties obligations with regard to a certain object, a convention, whether multilateral or bilateral, may expressly provide in one of its general clauses that the States in question are not bound to comply with such obligations when a special situation of "necessity" prevents them from doing so. In such a case, there are various possibilities. First of all, it is possible that the area of international law to which the obligations laid down by the convention belong is one of those in relation to which we have been able to note that State practice is revealing of the existence, in general international law, of a principle recognizing—admittedly under extremely strict conditions—that "state of necessity" has the force of a circumstance precluding the wrongfulness of conduct not in conformity with an international obligation. In that case, the special clause in the convention may have no other *raison d'être* and no other effect than to make explicit and, if you will, to protect against any possible challenge consequences identical with those which would follow from simply applying the principle of general international law. More often, however, the purpose of including in the convention a clause which explicitly mentions "necessity" will be more specific. The parties to the convention may have wanted to prescribe less rigid conditions for the recognition of a situation of necessity as a ground for a State party to the convention not to comply with its obligations, or at least conditions other than those which must be fulfilled in order for there to be a "state of necessity" as provided for in general international law. The parties may also have wanted to spell out the essential interests the "necessary" safeguarding of which may be invoked to justify an exception to compliance with the obligations laid down by the convention,¹⁴⁷ since

¹⁴⁷ For instance, with regard to the protection of human rights, art. 4, para. 1, of the International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI) of 16 December 1966, annex) provides that:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

Similar provisions are contained in art. 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (See United Nations, *Treaty Series*, vol. 213, p. 233) and art. 27 of the American Convention on Human Rights of 22 November 1969 (OAS, *American Convention on Human Rights: "Pact of San José, Costa Rica"*, *Treaty Series*, No. 36 (Washington, D.C.), p. 9.

the requirements peculiar to the specific subject-matter of the convention and the special nature of the obligations laid down may necessitate such an adaptation of the general principle.¹⁴⁸ In that case, the special rule will obviously prevail, and the existence of a situation of necessity such as to justify non-compliance with an obligation will have to be appraised in accordance with the terms of that special rule, and not those of the principle of general international law.

68. The logically opposite case to the one considered in the preceding paragraph is where the multilateral or bilateral convention in question contains a clause *expressly precluding* any possibility of invoking any "necessity" whatever to justify the adoption by a State of conduct not in conformity with one of the obligations laid down in the convention. In such cases, which certainly occur less often (examples are to be found in the area of international conventions on the humanization of warfare), the principle of general international law relating to the plea of necessity will, of course, be automatically set aside so far as obligations under the convention are concerned. Even the fact that, in the specific case, all the varied and strict conditions required by that principle are unquestionably fulfilled will be unable to change this negative conclusion in any way.

69. However, examples can also be found of a third case. The plea of necessity may be explicitly provided for, not in a general clause of a convention covering all

¹⁴⁸ With regard to freedom of transit, for instance, art. 12 of the Convention on Transit Trade of Land-locked States of 8 July 1965 permits an exception to the rules laid down by the convention in case of an "emergency" endangering the "political existence or safety" of the transit State (see United Nations, *Treaty Series*, vol. 597, p. 56). Similar provisions are contained in art. 7 of the Statute on Freedom of Transit (League of Nations, *Treaty Series*, vol. VII, p. 28) and art. 19 of the Statute concerning the Regime of Navigable Waterways of International Concern (*ibid.*, p. 60). The Convention on Transit Trade of Land-locked States and the Convention on Facilitation of International Maritime Traffic of 9 April 1965 (United Nations, *Treaty Series*, vol. 591, p. 265) also provide for the possibility of applying, in derogation from the obligations laid down, such temporary measures as may be necessary to protect public morals, public health or security. In economic and commercial matters, multilateral agreements often permit member States to deviate from the obligations contained in them if this is necessary to protect human, animal or plant health, or the artistic or cultural heritage, or to prevent disorder, etc. (see, for instance, art. XX of the General Agreement on GATT (GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1, pp. 37-38) and art. 12 of the convention establishing the European Free Trade Association (United Nations, *Treaty Series*, vol. 370, pp. 13-14). Sometimes the special rule goes so far as to provide that an appropriate body may relieve a State party to a general agreement of an international obligation where this is necessary on account of exceptional circumstances or emergency or *force majeure* (see International Sugar Agreement of 1968, art. 56, para. 1 (*ibid.*, vol. 654, p. 88); International Coffee Agreement of 1968, art. 57, para. 1 (*ibid.*, vol. 647, p. 74); International Cocoa Agreement of 1975, art. 60, para. 1 (*United Nations Cocoa Conference, 1975* (United Nations publication, Sales No. E.76.II.D.9), pp. 23-24).

the obligations laid down in the convention, but as part of a particular clause imposing a certain specified obligation on the States parties. This kind of explicit provision indicating that "necessity" may or may not constitute a ground for non-compliance, by way of exception, with the obligation laid down in the same article, can be either positive¹⁴⁹ or negative.¹⁵⁰ In both cases, there will then arise the question what conclusion is to be drawn by implication from that special provision, relating only to one specified obligation, with respect to the other obligations laid down by the convention. It will be possible to give a definitive answer in each case only by an interpretation of the convention in question. However, it would seem natural to us to recognize in principle that the fact that necessity has been acknowledged by way of exception as a possible ground for non-compliance with an obligation specially singled out can only imply a negative conclusion as to whether the same ground may be invoked for conduct not in conformity with any other obligation under the convention. Conversely, the fact that necessity has been explicitly ruled out as a ground for deviating from an obligation specially singled out must lead *a contrario* to the conclusion that necessity can still be invoked when the obligations called in question by the conduct of the State are other than the one in respect of which it has been ruled out.

70. A detailed review of the positions taken by authors of scholarly works from the time when the question of the admissibility of the plea of necessity in international law first arose might require too much space in a report which has already gone far beyond the usual bounds for research of this kind. Moreover, we have had occasion to refer to the views expressed by the various writers who, in successive eras, have made the greatest contribution to the definition of the concept of "state of necessity", or simply "necessity", including (a) the arguments they have advanced in the discussion on whether or not such a circumstance is admissible as a ground for precluding the wrongfulness of State conduct not in conformity with an international obligation; (b) the "theoretical" basis they have sought to provide for the concept they adopted and the thesis they espoused; (c) the conditions which they believe must be fulfilled in order for a specific situation to merit the legal description of a "state of necessity" and thus have the effect of precluding the wrongfulness, otherwise established, of

¹⁴⁹ See footnote 105 above.

¹⁵⁰ In art. 4 of the International Covenant on Civil and Political Rights, para. 1, quoted in footnote 147 above, is followed by a paragraph specifying that "no derogation" may be made under the provisions of para. 1 from certain articles of the Covenant, such as art. 7, which prohibits any inhuman or degrading treatment, and art. 8, which prohibits slavery, servitude, and so on. In this case, the fact that necessity is ruled out as a ground for non-compliance with certain provisions of the Covenant obviously implies that it may be invoked as a ground for non-compliance with any other provision, subject, however, to the terms and limits laid down in art. 4, para. 1, rather than those prescribed by the principle of general international law.

State conduct.¹⁵¹ There is therefore every reason to avoid unnecessary repetition and confine ourselves here to describing the broad lines of the historical course of the legal literature on the basic question of the recognition by general international law of "state of necessity" as one of the circumstances which may by way of exception, justify conduct by a State different from that which it ought to have adopted. We shall consider in greater detail only the trends discernible among twentieth-century writers, particularly those who have dealt with the subject since the Second World War.

71. The idea that necessity may, by way of exception, constitute a ground for State conduct not in conformity with an international obligation was explicitly accepted—in the context, however, of research in which the study of internal law and of international law was intermingled—by the "classical" writers in our field, such as B. Ayala, A. Gentili, and especially H. Grotius, in the sixteenth and seventeenth centuries, and S. Pufendorf, C. Wolff and E. de Vattel in the eighteenth century.¹⁵² It should be noted that, while this acceptance was uncontested, very restrictive conditions were attached to it. During the nineteenth century, the first attempts were made by some of the champions of this idea¹⁵³ to clothe recognition of the ground of necessity with a "justification" in principle, which was as ineffectual as it was unnecessary. As we have seen, the problem with these attempts is that they seriously complicated and obscured the issue. They were accompanied by the first signs of resistance by

¹⁵¹ On all these points, see above, para. 4 and footnote 7; para. 7 and footnotes 9 and 10; para. 8 and footnotes 12–14; para. 9 and footnotes 16–19; para. 11 and footnotes 20 and 21; para. 12 and footnotes 22–24; para. 13 and footnotes 25 and 26; para. 14 and footnote 27; para. 15 and footnotes 29–31; para. 16 and footnote 32; para. 17 and footnote 34; para. 18 and footnotes 35 and 36.

In addition, a truly exhaustive analysis of the views of writers on "state of necessity", from the time when this question was first studied up to the present, has been made by the Secretariat: "State of necessity (*état de nécessité*) as a circumstance precluding wrongfulness: A survey of doctrinal views" (unpublished study prepared in 1979).

¹⁵² B. Ayala, *De jure et officii bellicis et disciplina militari, libri tres* (1582), *The Classics of International Law* (Washington, D.C., Carnegie Institution of Washington, 1912), vol. II (English trans.), p. 135; A. Gentili, *De iure belli, libri tres* (1612), *The Classics of International Law* (Oxford, Clarendon Press, 1933), vol. II (English trans.), p. 351; H. Grotius, *De jure belli ac pacis, libri tres* (1646), *The Classics of International Law* (Oxford, Clarendon Press, 1925), vol. II (English trans.), pp. 193 *et seq.*; S. Pufendorf, *De jure naturae et gentium, libri octo* (1688), *The Classics of International Law* (Oxford, Clarendon Press, 1934), vol. II (English trans.), pp. 295–296; C. Wolff, *Jus gentium methodo scientifica pertractatum* (1764), *The Classics of International Law* (Oxford, Clarendon Press, 1934), vol. II (English trans.), pp. 173–174; de Vattel, *op. cit.*, p. 149.

¹⁵³ Among others, Klüber, *op. cit.*, pp. 75–76; Hall, *op. cit.*, pp. 332 *et seq.*; Wheaton, *op. cit.*, pp. 150 *et seq.*; Heffter, *op. cit.*, pp. 53 *et seq.*; Rivier, *op. cit.*, pp. 277–278; Twiss, *op. cit.*, pp. 178 *et seq.*, 184–185.

some writers¹⁵⁴ to the previously uncontested principle. It is worth mentioning once again, however, that the arguments advanced by these first opponents and repeated by nearly all those who took the same view did not really constitute a rejection of the actual idea of "necessity" as a ground, acceptable by way of exception, for certain conduct by States. Rather, they represented a dual reaction: (a) on the theoretical plane, to the impediments of "bases" and "justifications" which the champions of the idea of "necessity" were now trying to attach to it, and (b) on the practical plane, to the outright abuses of it by some Governments. To put it bluntly, it was, firstly, the idea of the existence of a "fundamental" and "natural right" to "self-preservation"¹⁵⁵ that was the target of the supporters of this critical reappraisal, and it was, secondly, the concern aroused by the quite inadmissible use made by States of that idea of self-preservation or of the idea of *Not* for purposes of expansion and domination¹⁵⁶ that caused these writers to entrench themselves in a position of hostility on principle to the acceptance of the concept of "state of necessity" in the international legal order. However, it must be noted that some writers who were particularly sensitive to the realities of international life, such as Westlake,¹⁵⁷ while indicating their opposition to any general recognition of the ground of necessity in international law, did not feel obligated to press their opposition to the point of denying the applicability of that ground to conduct not in conformity with certain categories of obligations. In other words, what began vaguely to take shape was primarily opposition to allowing necessity to be invoked in justification of unlawful actions involving the use of force against the sovereignty of others; greater precision in terminology and in demarcation could not, of course, come until later. On the other hand, in cases which still involved the adoption by a State of conduct not in conformity with an international obligation but in which the obligation related to a less essential area and one less dangerous to international life, one has the impression that the opposition to regarding state of necessity as a circumstance which might preclude the wrongfulness of the conduct in question could find no justification and was not maintained.

¹⁵⁴ See P. Fiore, *Droit international public*, French trans. by P. Pradier-Fodéré (Paris, Durand, 1868), pp. 344 *et seq.*; R. Piédelièvre, *Précis de droit international public* (Paris, Librairie Cotillon, 1894), vol. I, p. 175; P. Pradier-Fodéré, *Traité de droit international public européen et américain* (Paris, Pedone-Lauriel, 1885), vol. I, pp. 374 and 381; J. Westlake, *Chapters on the Principles of International Law* (Cambridge, University Press, 1894), pp. 113–114 and pp. 257 *et seq.*

¹⁵⁵ In para 7, we specifically criticized the idea of this so-called "right" and the idea of other equally spurious "fundamental rights", both being the result of mere abstract speculation.

¹⁵⁶ In addition to which there was the fact that States, in asserting their inalienable right to self-preservation, also showed a marked tendency to set themselves up as sole judges of the "necessity" invoked to justify their conduct.

¹⁵⁷ Westlake, *op. cit.*, p. 115.

72. During the first part of the twentieth century, and more specifically during the period preceding the Second World War, most writers still clearly shared the view that "necessity" constituted, in international law, a justification precluding, at least in some cases, the wrongfulness of an act committed in breach of international law by a State impelled to that course by a "state of necessity." Among them were Anzilotti, von Liszt, Kohler, Schoen, Faatz, Strupp, Hershey, Fenwick, Le Fur, Baty, Potter, Wolff, Spiropoulos, Vitta, Weiden, François, Cohn, Ago and Sperduti¹⁵⁸. Only a few of these writers¹⁵⁹ were still advancing the idea of the right to self-preservation as the theoretical basis for the plea of necessity, but this was now rejected by most writers, who fully realized that the idea of this spurious "basis" was downright injurious to the thesis they were defending.¹⁶⁰ The concept of "state of necessity" gradually came to mean a factual situation forming the setting in which a certain State act was committed, a situation which could be taken into consideration by the law as an exceptional ground precluding the otherwise undeniable wrongfulness of that act.¹⁶¹ In formulating the concept which they respectively proposed, some writers, particularly German, Italian and French writers, emphasized the influence of the corresponding concept in internal law, that concept having been codified in their countries at the turn of the

¹⁵⁸ Anzilotti, "La responsabilité internationale des Etats..." (*loc. cit.*), pp. 303 *et seq.*, and Corso ..., 4th ed. (*op. cit.*), pp. 414 *et seq.*; von Liszt, *op. cit.*, pp. 201–202; J. Kohler, *Not kennt kein Gebot—Die Theorie des Notrechtes und Ereignisse unserer Zeit* (Berlin, Rotschild, 1915); P. Schoen, "Die völkerrechtliche Haftung der Staaten aus unterlaubten Handlungen", *Zeitschrift für Völkerrecht* (Breslau, Kern's, 1917), Supplement 2 to vol. X, pp. 110 *et seq.*; Faatz, *op. cit.*; Strupp, "Das völkerrechtliche Delikt" (*loc. cit.*), pp. 122 *et seq.*, and "Les règles générales..." (*loc. cit.*), pp. 567–568; Hershey, *op. cit.*, pp. 230 *et seq.*; Fenwick, *op. cit.*, pp. 142–143; L. Le Fur, "La théorie du droit naturel depuis le XVIIe siècle et al doctrine moderne", *Recueil des cours...*, 1927-III (Paris, Hachette, 1928), vol. 18, pp. 429 *et seq.*; T. Baty, *The Canons of International Law* (London, Murray, 1930), pp. 95 *et seq.*; K. Wolff, "Les principes généraux du droit applicables dans les rapports internationaux", *Recueil des cours...*, 1931-II (Paris, Sirey, 1932), vol. 36, pp. 519 *et seq.*; J. Spiropoulos, *Traité théorique et pratique de droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1933), pp. 287–288; Vitta, *loc. cit.*, pp. 288 *et seq.*; Weiden, *loc. cit.*, pp. 105 *et seq.*; François, *loc. cit.*, pp. 182–183; Cohn, *loc. cit.*, p. 318; Ago, *loc. cit.*, pp. 540 *et seq.*

¹⁵⁹ For example, Liszt, Hershey, Faatz, Fenwick, Baty and Vitta.

¹⁶⁰ There were some, like Strupp, who still referred to a "right" of necessity, but, as we have seen, this was a lonely position. On all these points, see paras. 7 to 9 above.

¹⁶¹ The definition of "state of necessity" given by Anzilotti may be considered characteristic of this period. According to Anzilotti, the case referred to when this concept is invoked is one where "a State, constrained by the necessity of saving itself from a grave and imminent peril which it did not deliberately cause and which it cannot otherwise avert, commits an act in contravention of the right of another State" (Anzilotti, *Corso...*, 4th ed. (*op. cit.*), p. 414.

century.¹⁶² However, most of the writers in question, while pointing out the analogies with the corresponding concept in internal law, were at pains to emphasize that it was not simply by analogy that they saw “state of necessity” as an inherent concept of international law as well. They did so because their belief was confirmed by a study of State practice, to which some of them devoted renewed attention. These writers, like those holding the opposite view, were not unaware that abuses had been and were being committed on the basis of the concept of “necessity”, but they were careful to point out that other legal principles had also lent themselves to abuses in interpretation and application and that to deny, in the abstract, the existence of principles which were clearly operative in the real world of international law would not check the abuses committed under the pretext of applying the principles in question. What such writers were more concerned to highlight was, therefore, the inherent limits to the applicability of the ground of necessity, and it was precisely during this period that the first attempt was made to define the conditions set out above.¹⁶³

73. During the same period, the number of writers arguing against the applicability in international law of the concept of “state of necessity” increased. Among the names which come to mind are those of Fauchille, Borsi, Cavaglieri, de Visscher, Stowell, Brierly, Kraus, van Hill, Bourquin, Kelsen and Basdevant.¹⁶⁴ The school of thought which they represented remained, however, in the minority. Apart from some attempts—not always justifiable—to dispute the interpretation of State practice made by their opponents, the arguments

¹⁶² This is probably why writers like Wolff, Spiropoulos and Cohn regarded the principle that the ground of necessity was admissible in international law as one of the “general principles of law” referred to in the Statute of the Permanent Court of International Justice (art. 38) (*P.C.I.J., series D, No. 1, p. 22*).

¹⁶³ See paras. 12–18.

¹⁶⁴ P. Fauchille, *Traité de droit international public* (8th ed. of *Manuel de droit international public* by M.H. Bonfils) (Paris, Rousseau, 1922), vol. I, part 1, pp. 418 *et seq.*; Borsi, *loc. cit.*, pp. 170 *et seq.*; A Cavaglieri, “Lo stato di necessità nel diritto internazionale”, *Rivista italiana per le scienze giuridiche* (Rome), vol. LX (1917), No. 1, pp. 89 *et seq.*, and No. 2, pp. 171 *et seq.*; C. de Visscher, “Les lois de la guerre...” (*loc. cit.*), pp. 74 *et seq.*, and “La responsabilité des Etats”, *Bibliotheca Visseriana* (Leyden, Brill, 1924), vol. II, pp. 111–112; E.C. Stowell, *Intervention in International Law* (Washington, D.C., Byrne, 1921), pp. 399 *et seq.*; J.L. Brierly, “The shortcomings of international law”, *The British Year Book of International Law*, 1924 (London), vol. 5, pp. 10–11; H. Kraus, “La morale internationale”, *Recueil des cours... 1927–I* (Paris, Hachette, 1928), vol. 16, pp. 523–524; W. van Hille, “Etude sur la responsabilité internationale de l’Etat”, *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. X, No. 3 (1929), pp. 567 *et seq.*; M. Bourquin, “Règles générales du droit de la paix”, *Recueil des cours... 1931–I* (Paris, Sirey, 1932), vol. 35, p. 220; H. Kelsen, “Unrecht und Unrechtsfolgen im Völkerrecht”, *Zeitschrift für öffentliches Recht* (Vienna), vol. XII, No. 4 (October 1932), pp. 564 *et seq.*; J. Basdevant, “Règles générales du droit de la paix”, *Recueil des cours... 1936–IV* (Paris, Sirey, 1937), vol. 58, pp. 551 *et seq.*

advanced by these writers in support of their thesis differed little from the ones formulated by those who had taken the same position in the nineteenth century. In their writings, we again find the polemics—no doubt well-founded, but irrelevant to the question before us—against the so-called fundamental rights of States, particularly the “right of self-preservation”.¹⁶⁵ We also find the usual references to the dangers of abuse of the contested concept, an attendant drawback being that there was, in international law, no judicial organ having compulsory jurisdiction which would determine, in case of dispute, whether or not there existed a state of necessity constituting a ground for non-compliance with an international obligation. Here again, however, the drawback is simply one that is inherent in the entire international legal system and one cannot, because of it, call in question the validity of all the principles of the system. Moreover, one is struck, on close examination, by the fact that in this school of thought the opposition to “state of necessity” and the warnings against its dangers focused on these cases in which the concept had been invoked as a pretext to legalize a patently illegitimate use of violence, namely, the flagrant breach by a State of an international obligation to respect the territorial sovereignty and independence of another State; the invasion of neutralized Belgium and Luxembourg was at that time the most recent and most painful example of such a breach. In other areas, where the fear of abuses is obviously not so great, it can be seen once again that the objections to the applicability of the ground of necessity were much less strenuous, and that some writers who were generally reluctant to agree to any mention of “state of necessity in international law” nevertheless recognized the applicability of this concept in other areas, provided that certain conditions were fulfilled and certain safeguards were afforded.¹⁶⁶

74. After the Second World War, opinions in the literature on the subject of concern to us continued to be divided. Most writers of the time again favoured recognizing necessity as a circumstance precluding wrongfulness. Among them were Ross,¹⁶⁷ Redlslob,¹⁶⁸

¹⁶⁵ It is primarily as an expression of opposition to the theory of the State’s fundamental right to self-preservation that one should read the Declaration of the Rights and Duties of Nations adopted in 1916 by the American Institute of International Law, art. I of which reads:

“Every nation has the right to exist, and to protect and to conserve its existence; but this right neither implies the right nor justifies the act of the state to protect itself or to conserve its existence by the commission of unlawful acts against innocent and unoffending states.” (Carnegie Endowment for International Peace, *Recommendations on International Law and Official Commentary thereon of the Second Pan American Scientific Congress, held in Washington December 27, 1915–January 8, 1916*, ed. J. B. Scott (New York, Oxford University Press, 1916), p. 46.)

¹⁶⁶ See for example Verdross, “Règles générales...” (*loc. cit.*), pp. 489 *et seq.*; and Rodick, *op. cit.*, pp. 119 *et seq.*

¹⁶⁷ Ross, *op. cit.*, pp. 247 *et seq.*

¹⁶⁸ Redlslob, *op. cit.*, pp. 248 *et seq.*

Bin Cheng,¹⁶⁹ Schwarzenberger,¹⁷⁰ Oppenheim-Lauterpacht,¹⁷¹ Morelli,¹⁷² Balladore Pallieri,¹⁷³ Garcia Amador,¹⁷⁴ von der Heydte,¹⁷⁵ Buza,¹⁷⁶ Sereni,¹⁷⁷ Monaco,¹⁷⁸ Sørensen,¹⁷⁹ Favre,¹⁸⁰ Wengler,¹⁸¹ Schlochauer,¹⁸² Graefrath, Oeser and Steiniger¹⁸³ and Zourek.¹⁸⁴ These writers all accepted a restrictive concept of state of necessity. Some of them maintained, like others before them, that in order to avoid abuses it would be wise to limit the applicability of the plea of necessity solely to cases of a threat to the

¹⁶⁹ Cheng, *op. cit.*, pp. 31, 69 *et seq.*

¹⁷⁰ Schwarzenberger, "The fundamental principles..." (*loc. cit.*), p. 343.

¹⁷¹ L. Oppenheim, *International Law: A Treatise*, 8th ed., rev. by H. Lauterpacht (London, Longmans, Green, 1955), vol. I, pp. 297 *et seq.*

¹⁷² Morelli, *op. cit.*, pp. 338–339.

¹⁷³ Balladore Pallieri, *op. cit.*, pp. 247–248.

¹⁷⁴ F.V. Garcia Amador, "Third report on State responsibility", *Yearbook... 1958*, vol. II, pp. 47 *et seq.*, document A/CN.4/111. A text in the preliminary draft articles prepared in 1958 by the Commission's first rapporteur on State responsibility was worded as follows:

"Notwithstanding the provisions of the article last preceding, the State shall not be responsible for injuries caused to an alien if the measures taken are the consequence of 'force majeure' or of a state of necessity due to a grave and imminent peril threatening some vital interest of the State, provided that the State did not provoke the peril and was unable to counteract it by other means." (*Ibid.*, p. 72, document A/CN.4/111, annex, art. 13, para. 1.)

In the revision of the preliminary draft articles prepared by Garcia Amador in 1961, the case of state of necessity was separated from *force majeure*. The paragraph relating to state of necessity was worded as follows:

"Likewise, an act shall not be imputable to the State if it is the consequence of a state of necessity involving a grave and imminent peril threatening some vital interest of the State, provided that the State did not provoke that peril and was unable to counteract it by other means and so to prevent the injury." (*Yearbook... 1961*, vol. II, p. 48, document A/CN.4/134 and Add.1, addendum, art. 17, para. 2.)

¹⁷⁵ F. A. von der Heydte, *Völkerrecht, Ein Lehrbuch* (Cologne, Verlag für Politik und Wirtschaft, 1958), vol. I, p. 314.

¹⁷⁶ Buza, *loc. cit.*, pp. 205 *et seq.*

¹⁷⁷ Sereni, *op. cit.*, vol. III, pp. 1528 *et seq.*

¹⁷⁸ R. Monaco, *Manuale di diritto internazionale pubblico*, 2nd ed., rev. (Turin, Unione tipografico-editrice torinese, 1971), p. 574.

¹⁷⁹ Sørensen, *loc. cit.*, pp. 219 *et seq.*

¹⁸⁰ Favre, "Fault as an element..." *loc. cit.*, pp. 565 *et seq.*, and *Principes du droit des gens (op. cit.)*, pp. 643–644.

¹⁸¹ Wengler, *op. cit.*, pp. 387 *et seq.*

¹⁸² H.J. Schlochauer, "Die Entwicklung des völkerrechtlichen Deliktsrechts", *Archiv des Völkerrechts* (Tübingen), vol. 16 (1975), No. 3, pp. 270 *et seq.*

¹⁸³ Graefrath, Oeser and Steiniger, *op. cit.*, pp. 74–75. See also Steiniger, *loc. cit.*, p. 45; and art. 10, para. 6 of the draft convention on international responsibility prepared by B. Graefrath and P. A. Steiniger, which states:

"Die Entschädigungspflicht entfällt bei höherer Gewalt sowie im Falle eines Staatsnotstandes." [The obligation to make reparation does not apply in cases of *force majeure* or state of emergency.] (Graefrath, Oeser et Steiniger, *op. cit.*, p. 234.)

¹⁸⁴ Zourek, *loc. cit.*, pp. 66 *et seq.*

"existence" of the State. Others, however, considered highly inopportune the very idea of such a limitation, which was the result of reasoning abstractly on the basis of internal law, in view of the fact that cases where States invoked a threat to their existence as justification for their actions were precisely the ones in which the most serious abuses have been committed. They therefore argued, in accordance with practice, that the ground of necessity should apply in cases where the essential interests jeopardized were interests other than the State's concern for its "existence". A point frequently emphasized was that, in any event, there must be a clear difference in magnitude between the "essential" interest of a State which was safeguarded by the "necessitated" action in breach of international law and the sacrificed interest of another, innocent State, which must perforce be of less importance. There gradually emerged the question whether the applicability of the ground of necessity should not be ruled out entirely in the case of conduct not in conformity with the obligation to refrain from the use of force against other State or, at the very least, in the most serious cases of such conduct.

75. Many present-day writers are also opposed, at least in principle, to acceptance of the plea of necessity. Mention may be made of Hazan,¹⁸⁵ Glaser,¹⁸⁶ Guggenheim,¹⁸⁷ once again de Visscher,¹⁸⁸ Sibert¹⁸⁹ Bowett,¹⁹⁰ Dahm,¹⁹¹ Quadri,¹⁹² Delbez,¹⁹³ Cavaré,¹⁹⁴ Jiménez de Aréchega,¹⁹⁵ Ténékidès,¹⁹⁶ Brownlie,¹⁹⁷ Combacau,¹⁹⁸ Taoka,¹⁹⁹ Lamberti Zanardi.²⁰⁰ The

¹⁸⁵ Hazan, *op. cit.*

¹⁸⁶ S. Glaser, "Quelques remarques sur l'état de nécessité en droit international", *Revue de droit pénal et de criminologie* (Brussels), No. 6 (March 1952), pp. 599 *et seq.*

¹⁸⁷ P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1954), vol. II, pp. 60 *et seq.*

¹⁸⁸ C. de Visscher, *Théories et réalités en droit international public*, 4th ed. (Paris, Pedone, 1970), pp. 314 *et seq.*

¹⁸⁹ M. Sibert, *Traité de droit international public* (Paris, Dalloz, 1951), vol. I, pp. 236–237.

¹⁹⁰ Bowett, *op. cit.*, p. 10.

¹⁹¹ Dahm, *op. cit.*, pp. 438 *et seq.* This writer, while denying the existence of a general law of necessity, recognizes that the state of necessity may represent a circumstance precluding wrongfulness in a whole series of special cases.

¹⁹² R. Quadri, *Diritto internazionale pubblico*, 5th ed. (Naples, Liguori, 1968), pp. 226 *et seq.*

¹⁹³ L. Delbez, *Les principes généraux du droit international public*, 3rd ed. (Paris, Librairie générale de droit et de jurisprudence, 1964), pp. 371–372.

¹⁹⁴ L. Cavaré, *Le droit international public positif*, 3rd ed., rev. by J.-P. Quéneudec (Paris, Pedone, 1969), vol. II, pp. 499–500.

¹⁹⁵ E. Jiménez de Aréchega, "International responsibility", *Manual of Public International Law*, ed. M. Sørensen (London, Macmillan, 1968), pp. 542–543.

¹⁹⁶ G. Ténékidès, "Responsabilité internationale", *Répertoire de droit international* (Paris, Dalloz, 1969), vol. II, p. 786.

¹⁹⁷ Brownlie, *International Law... (op. cit.)*, pp. 428 *et seq.*

¹⁹⁸ Combacau, *loc. cit.*, pp. 658–659.

¹⁹⁹ R. Taoka, *The Right of Self-defence in International Law* (Osaka, Osaka University of Economics and Law, 1978), pp. 82 *et seq.*

²⁰⁰ Lamberti Zanardi, "Necessità..." (*loc. cit.*), pp. 898 *et seq.*

main reason for their opposition is still the old fear of abuses, a fear further increased as a result of the use made of this "plea" in the 1920s and 1930s, for example, by Japan in 1933. However, if the writings of these authors are analysed more thoroughly, two things quickly become apparent. Firstly, some of them (Glaser and Taoka in particular) are at pains to point out explicitly that "state of necessity" could play a very useful role were it not for this danger of abuse. Secondly, it becomes increasingly clear that so far as the possibility of abuses of the concept of state of necessity is concerned, the fears of the writers we have named relate primarily to breaches of the obligation which was most solemnly proclaimed in the Charter of the United Nations—and which has unquestionably acquired the force of *jus cogens* in present-day international law. Apart from that, it is particularly interesting to note that a good many of these authors (such as Glaser, Quadri and Jiménez de Aréchaga) accept the possibility of invoking a state of necessity in cases in which there are fewer and less serious possibilities of abuse, and in particular where the need to protect a "humanitarian" interest of the population is involved.²⁰¹ It should be noted that other writers, while objecting to the idea of "necessity" as a separate plea, at the same time adopt broad concepts of "self-defence"²⁰² and "*force majeure*",²⁰³ thus making it possible to include under these other accepted "pleas" acts of a State not in conformity with international obligations which should be more correctly be regarded as acts committed in a "state of necessity".

76. Where the subject with which we are dealing is concerned, a general criticism that may in our opinion be levelled against much of the legal literature, erudite as it is, is that the conclusions formulated were reached too much on the basis of theoretical reasoning or considerations of expediency, rather than as a result of a direct and exhaustive examination of what practice shows to be the *opinio juris* of the members of the international community. Apart from this, on thorough reflection, the divergence of views which seems to divide the latest generation of writers, like their predecessors, into two opposing camps is in fact much less radical than it appears to be at first sight and than some vehement assertions would have us believe. In the final analysis, the "negative" position towards state of necessity amounts to this: we are opposed to recognizing the ground of necessity as a principle of general international law because States use and abuse that so-called principle for inadmissible and often unadmittable purposes; but we are ultimately prepared

to grant it a limited function in certain specific areas of international law less sensitive than those in which the abuses we deplore usually occur. The "affirmative" position, reduced to essentials, is: we accept the plea of necessity as constituting a recognized principle of existing general international law, and we cannot overlook the function which this concept performs in legal relations between States, as in all other legal systems; but we are careful to lay down very restrictive conditions for the application of this principle so as to prevent it from becoming an all-purpose "plea" for too easy breaches of international law; we especially want to make it impossible for it to operate in those areas where abuses have traditionally occurred in the past. Thus, it is easy to see that the gap separating the most "reasoned" positions of the two camps is a narrow one, and we do not really think that theoretical differences, the importance of which has often been exaggerated, are a serious obstacle to the completion of the task assigned to us.

77. The time has come to sum up this lengthy discussion of the subject-matter of the present section. We attempted first of all to analyse the concept of "state of necessity" (or simply "necessity"), separating it from the other concepts dealt with in chapter V, and in particular stripping it of the veneer, inimical to a proper understanding of the concept, superimposed on it by the natural law theory of the fundamental rights of States. We especially tried to show that, for our purposes, "state of necessity" should be understood to mean not just any "right" exercised by a State, but rather a factual situation accompanying the commission by the State in question of an act contrary to law, the question being whether or not there may, in international law, be ascribed to that situation the force of a circumstance precluding the wrongfulness of the act. We then proceeded to determine, one by one, the various strict conditions failing the fulfilment of all of which it would, in our view, be impossible to recognize the existence of a true "state of necessity", irrespective of the force one wished to ascribe to the latter.

78. Next, in keeping with our fundamental criterion of basing our conclusions solely on an inductive method and rejecting in advance any which are arrived at purely in the abstract, we considered the realities of international life, as reflected in judicial or arbitral decisions and in State practice. We carried out this investigation in all areas where the question of a plea of necessity has arisen. This meant reviewing cases in which economic survival, the feeding of the population and the protection of the ecological order were presented as essential interests of a State, the safeguarding of which was deemed "necessary". We took into consideration cases in which a state of necessity was invoked as a ground for non-compliance with international financial obligations, obligations to refrain from certain acts of jurisdiction on the high seas, obligations concerning the treatment of foreigners and their property, and so on. We examined cases in which the ground of necessity was invoked both in time of

²⁰¹ Quadri (*op. cit.*, p. 226) and Jiménez de Aréchaga (*loc. cit.*, p. 543) give the example of the requisitioning of cargo of foreign ships in case of famine in a country; Brownlie (*International Law... (op. cit.)*, p. 370) mentions actions necessary to avert a natural disaster, the collapse of a dam, and so on.

²⁰² For example, de Visscher ("*La responsabilité des Etats*" (*loc. cit.*), pp. 108–109) and Bowett (*op. cit.*).

²⁰³ For example, Delbez (*op. cit.*, p. 372).

peace and in time of war, in connection with obligations under peacetime law or under the law of war and of neutrality. And we were compelled to recognize that, in the areas considered, state of necessity could play a role as a circumstance precluding the wrongfulness of State conduct not in conformity with an international obligation.

79. When, on the other hand, we came last of all to the question of the present-day reactions of the *opinio juris* of the international society to any appeals which might be made to the idea of "necessity" in the area on which the arguments concerning the uses and abuses of that concept have traditionally centred, namely, the area of obligations prohibiting the use of force, we were able to observe an outright rejection of the idea that a "plea of necessity" could absolve a State of the wrongfulness attaching to an act of aggression committed by that State. We have also noted that the exclusion of this "plea" should logically extend to any other violation of an obligation arising out of a rule of *jus cogens*, out of a peremptory norm of international law. Finally, we saw what a very strict attitude the members of the international community nowadays display towards actions which, while lacking the full gravity of a true act of aggression, nevertheless involve an assault by a State on the territorial sovereignty of another State; and we noted that it remained an open question whether the interpretation of the Charter of the United Nations or of other international instruments would entail the total exclusion of the applicability of the plea of necessity to such acts or whether all that was required in connection with them was greater strictness in determining if a true "state of necessity" existed, with the aim of avoiding any abuses that might be committed under cover of "humanitarian" or other purposes. It now remains to reflect in a draft article the results of the study summarized above.

80. One last comment needs to be made. It may be that someone, taking an erroneous view of "progressive development", will suggest that the concept of "necessity" should be deleted entirely from among the possible circumstances precluding the wrongfulness of State conduct. We cannot agree. The application of the concept must, of course, be ruled out wherever it is actually dangerous, but not where it has been and continues to be useful as a "safety-valve", to relieve the inevitably untoward consequences of a concern for adhering at all costs to the letter of the law. We must ensure that the fundamental requirement of respect for the law does not ultimately lead to the kind of situation that is perfectly described by the adage *summum jus, summa injuria*. Moreover, the concept of "state of necessity" is far too deeply rooted in the consciousness of the members of the international community and of individuals within States. If driven out of the door it would return through the window, if need be in other forms; in that case, the only result would be the unhappy one of distorting and obscuring other concepts, the precise delimitation of which is no less essential.

81. In the light of the foregoing, we propose that the Commission should adopt, for the article on the subject, the following text:

Article 33. State of necessity

1. The international wrongfulness of an act of a State not in conformity with what is required of it by an international obligation is precluded if the State had no other means of safeguarding an essential State interest threatened by a grave and imminent peril. This applies only in so far as failure to comply with the obligation towards another State does not entail the sacrifice of an interest of that other State comparable or superior to the interest which it was intended to safeguard.

2. Paragraph 1 does not apply if the occurrence of the situation of "necessity" was caused by the State claiming to invoke it as a ground for its conduct.

3. Similarly, paragraph 1 does not apply:

(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law, and in particular if that act involves non-compliance with the prohibition of aggression;

(b) if the international obligation with which the act of the State is not in conformity is laid down by a conventional instrument which, explicitly or implicitly, precludes the applicability of any plea of "necessity" in respect of non-compliance with the said obligation.

6. SELF-DEFENCE

82. Not until relatively recent times did the international legal order adopt a concept of "self-defence" comparable, in essential respects, to that current in national legal systems. This does not mean that publicists had not already employed, in earlier centuries, a terminology evocative of similar ideas, but in reality they were thinking of something else. The distinction drawn by Grotius and by those writing before him, which was subsequently perpetuated by the doctrine of natural law, between "just war" and "unjust war" relied on ideas akin to ethics rather than to law. Even disregarding this aspect, when an author like Emmerich de Vattel, for example, proposed a concept of "just causes of war", which conceded to nations the right to employ force only in their own defence and for the maintenance of their rights,²⁰⁴ he included among these "just causes" not only defence against armed attack or against the threat of such an attack but also the reaction deemed to be "legitimate" as such, even if it took the form of an offensive war, in response to an *iniuria* or *the threat of an iniuria*—that

²⁰⁴ De Vattel, *op. cit.*, book III, chap. III, para. 26, *The Classics of International Law (op. cit.)*, vol. III, pp. 243–244.

is, the actual or imminent impairment of a substantial right. Neither his ideas nor those of the authors who followed his line of thinking had much chance of developing and evolving, for in consequence of the triumph, at a certain time, of the ideas of legal positivism and of the voluntarist State, any thought of differentiating between forms of recourse to force, including war, on the basis of the legitimate or illegitimate nature of this recourse in law was inevitably dropped. The fact that States blamed each other for a war, their oft-repeated assertions of the allegedly "defensive" character of the wars started by them and the implied lip-service paid to the idea of the moral superiority of the defender's position vis-à-vis the attacker's, reflected merely the need to give world public opinion, and above all their own citizens, a prestige opinion of themselves; but it would be wrong to regard this as reflecting any realization of the need for a "legal" justification of their comportment. Logically, in such a context the idea of "self-defence", properly so called, could have no place.²⁰⁵ Consequently, it was not until the legal conscience of States had to react to the horrors and disastrous consequences of the First and Second World Wars that the preconditions for the admission of the notion of "self-defence" *stricto sensu* into international law were created.

83. The absolutely indispensable premise for the admission of the idea of self-defence, with its intrinsic meaning, into a particular system of law is that the system must have contemplated, as a general rule, the prohibition of the indiscriminate use of force by private subjects, and hence admits the use of force only in cases where it would have purely and strictly defensive objectives, in other words, in cases where the use of force would take the form of resistance to a violent attack by another. Accordingly, if self-defence is to be

regarded as an exceptional circumstance precluding the wrongfulness of conduct inconsistent with a general obligation to refrain from the use of force, it would be meaningless to think of it in the context of a system of law to which this obligation is unknown.

84. In national systems of law, there is another premise governing the application of the notion of "self-defence", a premise which in logic is not so indispensable as the one mentioned above but which has been confirmed in the course of history as its necessary complement. In these legal systems, the use of force, even for strictly defensive purposes, is likewise not admitted as a general rule, but also only as an exception to a rule under which a central authority has the monopoly or virtual monopoly of the use of force for guaranteeing everyone's respect for the integrity of others. Only in specific situations where, by its very nature, the use of force by the agencies of the central authority cannot be resorted to promptly and efficiently enough to protect a subject against an attack by another does the use of means of defence involving force by the subject in question remain legitimate.²⁰⁶

85. As the present author has mentioned above and will explain in greater detail below, the international legal order did not really begin until relatively recently to contemplate a limitation for the use of force as a means employed by States to safeguard their rights and their interests. Only about fifty years ago did international law reach the position where it could outlaw war as an instrument of international policy. Only since then, therefore, after the fulfilment of this paramount condition, which in essence is reflected in the prohibition of armed aggression and offensive war, has there come to be recognized in international relations the fundamental principle that the only recourse to war compatible with the law is that which takes place as a *defence* against an attack by another subject in breach of the prohibition.

86. Again, the world had to wait until after the Second World War for international law to experience a first attempt (ambitious in its intentions but for the time being hardly very effective) to centralize the power to use force. By virtue of agreed provisions, recourse to armed force, even by the State suffering an attack by another, was no longer to be admissible except in these exceptional, limited and temporary circumstances characterizing specifically the notion of "self-defence" as it finally crystallized in the general theory of domestic law. Not wishing to comment retrospectively on the progress reached in this further stage, this author would not for the moment go further than to say that the prohibition, which at present is undeniably imposed on every State from engaging in

²⁰⁵ Nor is the present writer convinced by the idea advanced by some authors that a true notion of "self-defence" evolved in the nineteenth century, not in connection with recourse to war but in connection with enforcement action other than war. Among modern Italian publicists, Lamberti Zanardi cites this idea. In his view, international customary law in the second half of the nineteenth century already prohibited the use of force in forms other than war, but at the same time considered lawful the use of force by a State in response to the wrongful use of force by another State. Lamberti Zanardi cites, in this regard, positions taken by State organs where the lawfulness of acts involving the use of force was affirmed so long as those acts had been committed in "self-defence". He concludes that, in the latter part of the nineteenth century, a customary law had developed "which made self-defence the condition for justification of normally wrongful acts" (Lamberti Zanardi, *La legittima difesa...* (*op. cit.*), p. 119). In our opinion, owing to the vagueness of the terminology employed by foreign ministries, the term "self-defence" tended to be used to describe acts that were more in the nature of counter-measures (sanctions or enforcement measures) taken precisely in response to the internationally wrongful act of another (art. 30 (for the text of all the draft articles adopted so far by the Commission, see *Yearbook ... 1979*, vol. II (Part Two), pp. 91 *et seq.*, document A/34/10, chap. III, sect. B.1) or else, on occasion, action taken in a "state of necessity" (draft art. 33 (see para. 81 above)).

²⁰⁶ On the concept of "self-defence" in national legal systems see C.W. Jenks, *The Common Law of Mankind* (London, Stevens, 1958), pp. 140 *et seq.*; Zourek, *loc. cit.*, pp. 5 *et seq.*; and Taoka, *op. cit.*, pp. 1 *et seq.*

any violent infringement of the integrity or independence of another State represents in itself both the necessary and the sufficient condition for the validity of the concept of self-defence in the international legal order.

87. Accordingly, at the present time it is proper to regard self-defence as the form—or better, the only form—of “armed self-protection” that is still conceded to a State by the international law now in force. It should be pointed out straightaway, however, that this idea is mentioned solely for descriptive purposes; we are envisaging an accurate understanding of the meaning of the term “self-defence”. On the other hand, we will not make the mistake, which has been amply criticized in the context of “state of necessity”,²⁰⁷ of looking to another concept, or to the supposed existence of a “fundamental right” of the State, the definition of which purportedly comprises that other concept, for a “justification” or “basis” of self-defence as a circumstance exceptionally precluding the wrongfulness of conduct inconsistent with the general obligation to refrain from the use of armed force. The sole justification in law of the effect attributed to the situation described as “self-defence” is, as in all the other situations discussed in this chapter, the existence of a rule of general international law specifically contemplating that effect, a rule which the present author is proposing to formulate in written form. Once again, we think it wrong to treat self-defence, any more than state of necessity, as a “right”, and hence to speak of a “right of self-defence”, even though the expression is a current one, which is used in the Charter of the United Nations itself. Both “self-defence” and “state of necessity” are expressions that connote a situation or *de facto* conditions, not a subjective right.²⁰⁸ The State finds itself in a position of self-defence when it is confronted by an armed attack against itself in breach of international law. It is by reason of such a state of affairs that, in a particular case, the State is exonerated from the duty to respect, *vis-à-vis* the aggressor, the general obligation to refrain from the use of force. It goes without saying that this recognition of liberty for the State acting in self-defence would likewise disappear, under the system contemplated by the Charter, as soon as the Security Council took it upon itself to employ the enforcement measures necessary for ensuring the full respect of a situation jeopardized by the aggression.

²⁰⁷ See the comments above on the supposed right of “self-preservation” (“*Selbsterhaltung*”, “*auto-conservazione*”) as “justification” of the plea of necessity (paras. 7 and 8 above).

²⁰⁸ See, by analogy, critical remarks on the alleged existence of a veritable “right of necessity” (para. 9 above). Bowett (*Self-Defence...* (op. cit.) pp. 8–9) defines “self-defence” as “in itself a ‘privilege’ or ‘liberty’ which justifies conduct otherwise illegal which is necessary for the protection of certain rights *stricto sensu*”. In that author’s opinion, therefore, the “right” *stricto sensu* is not the right to act in self-defence, but the “essential substantive right” of the State—notably the right to territorial integrity—injured by the aggression to which that State reacts in self-defence.

88. This having been said, and in the light of the considerations set out in the preceding section in connection with the study of the features that distinguish the state of necessity from the other circumstances precluding wrongfulness, it is not now necessary to spend much time on determining the aspects in which in theory self-defence resembles state of necessity or the aspects which, by contrast, clearly differentiate the two “circumstances”. Admittedly, as was explained earlier,²⁰⁹ a State acting in self-defence, like a State acting in a state of necessity, acts in response to an imminent danger—which must in both cases be serious, immediate and incapable of being countered by other means. However, as we have stressed, the State *vis-à-vis* which another State adopts a form of conduct inconsistent with an international obligation without having any excuse other than “necessity” is a State which has committed no international wrong against the State taking the action. It was in no way responsible, by any of its own actions, for the danger threatening the other State.²¹⁰ By contrast, the State against which another State acts in “self-defence” is itself responsible for the threat to that other State. It was the first State which created the danger, and created it by conduct which is not only wrongful in international law²¹¹ but which constitutes

²⁰⁹ See para. 4 above.

²¹⁰ As has been stressed more than once by the writer, he does not by any means intend to imply that the imminent peril cannot originate in the State’s own territory—for example, from actions carried out in that territory by private persons not acting on behalf of the local State or not under that State’s control. Examples of such cases were cited in para. 57 above. The test for deciding that a case comes within the scope of “state of necessity” and not within the scope of “self-defence” is that the cause of the serious and imminent danger must not be an event attributable to the State and constituting a non-performance *by that State* of an international obligation it owes to the State which reacts out of “necessity”. Accordingly, in this writer’s opinion, authors like Cheng (op. cit., p. 87) and Schwarzenberger (“The fundamental principles ...” (loc. cit.) p. 332), who are influenced by an old official but now obsolete terminology, are wrong to include under the notion of “self-defence” measures taken against individuals, merchant ships or private aircraft, in circumstances not implying any international responsibility on the part of the State of the nationality of those individuals, ships or aircraft. For a correct view, see Bowett (op. cit., pp. 56 *et seq.*, 89 *et seq.*), G. Arangio-Ruiz (“Difesa legittima (Diritto internazionale)” *Novissimo Digesto Italiano* (Turin), vol. VI (1960), pp. 632–633), Dahm (op. cit., pp. 442–443), and Quadri (op. cit., p. 265). See also, on this topic, para. 106 below.

²¹¹ It is of course the first condition that this conduct must be wrongful in order that the plea of “self-defence” should be admissible in exoneration of liability for what would otherwise be wrongful action taken with respect to the party which first resorted to such conduct. Most learned writers agree that, in so far as it is permissible to speak of self-defence in international law as well, the action taken in self-defence must have been preceded by an international wrong committed, or at least planned, by the subject against which this action is taken. See among those who have written on the subject since the Second World War: Ross, op. cit., p. 244; Redflood, op. cit., pp. 243–244; Bowett, op. cit., p. 9; Arangio-Ruiz, loc. cit., p. 623; Dahm, op. cit., p. 409; Sørensen, loc. cit., p. 219; H. Kelsen, *Principles of International Law*, 2nd ed., rev. by R. W. Tucker (New York, Holt, Rinehart

the most serious and unmistakable international offence of recourse to armed force in breach of the existing general prohibition of such recourse. Acting in self-defence means responding by force to forcible wrongful action carried out by another; and the only reason why such a response is not itself wrongful is that the action which provoked it was wrongful.

89. It was also in section 5 of this chapter²¹² that we referred to the question of the resemblances and contrasts between self-defence, as a circumstance precluding the wrongfulness of an act of State, and the circumstance which takes the form of the legitimate application of a sanction or, in other words, of one of the "enforcement" measures of repression or commission taken by a State against another State responsible for an internationally wrongful act, measures which we have already discussed.²¹³ Various authors have in particular compared action taken by a State in the guise of "self-defence" with action in the form of "reprisals". In this writer's opinion, there is undeniably a common element, in that in both cases the State takes action after having suffered an international wrong, namely, the non-respect of one of its rights by the State against which the action in question is directed or at least in the face of such a danger. But any possible resemblance or true analogy stops at this point. The international wrongs which, exceptionally, make it permissible for the State suffering them to adopt, in the form of sanctions or enforcement counter-measures against the responsible State, a comportment inconsistent with an international obligation may be extremely varied; by contrast, the only international wrong which, exceptionally, makes it permissible for the State to react against another State by recourse to force, despite the general ban on force, is an offence which itself constitutes a violation of the ban.²¹⁴ Hence the offence is not only an extremely serious one but is also of a very specific kind.

90. However, that is not the essence of the question. It would be quite wrong to think that self-defence can

also be defined as a kind of sanction, even if it were described as a sanction applicable to a specific kind of wrong. "Self-defence" and "sanction" are reactions relevant to different moments and, above all, are distinct in logic. Besides, action in a situation of self-defence is, as its name indicates, action taken by a State in order to defend its territorial integrity or its independence against violent attack; it is action whereby "defensive" use of force is opposed to an "offensive" use of comparable force, with the object—and this is the core of the matter—of preventing another's wrongful action from proceeding, succeeding and achieving its purpose. Action taking the form of a sanction on the other hand involves the application *ex post facto* to the State committing the international wrong of one of the possible consequences that international law attaches to the commission of an act of this nature. The peculiarity of a sanction is that its object is essentially punitive or repressive; this punitive purpose may in its turn be exclusive and as such represent an objective *per se*, or else it may be accompanied by the intention to give a warning against a possible repetition of conduct like that which is being punished, or again it might constitute a means of exerting pressure in order to obtain compensation for a prejudice suffered, etc.²¹⁵ Be that as it may, the

²¹⁵ Even though sometimes expressed in different and often vague terms, such ideas occur in the publications of the most authoritative writers on international law who have discussed this point.

According to Waldock (*loc. cit.*, p. 464) "self-defence belongs to preventive justice" and, unlike reprisals, "does not include a right to exact reparation for injury done to the State which takes measures of self-defence." In the same vein, R. Quadri (*op. cit.*, p. 271) considers that "in reprisals, the invasion of another's legal sphere is justified by the wrong suffered, whereas "in self-defence the action taken in self-protection is designed to prevent the consummation of the wrong... reprisals are an *ex post facto* defence of the legal order, whereas self-defence is preventive". For D. W. Bowett ("Reprisals involving recourse to armed force" *The American Journal of International Law* (Washington, D.C.), vol. 66, No. 1 (January 1972), p. 3),

"The difference between the two forms of self-help lies essentially in their aim or purpose. Self-defence is permissible for the purpose of protecting the security of the state and the essential rights—in particular the rights of territorial integrity and political independence—upon which that security depends. In contrast, reprisals are punitive in character: they seek to impose reparation for the harm done, or to compel a satisfactory settlement of the dispute created by the initial illegal act, or to compel the delinquent state to abide by the law in the future. But, coming after the event and when the harm has already been inflicted, reprisals cannot be characterized as a means of protection."

According to Lamberti Zanardi (*La legittima difesa... (op. cit.)*, pp. 133–134),

"the object of reprisals goes far beyond mere defence against a wrongful act about to be committed or in fact committed, for they are meant to punish the party responsible for the wrongful act or to constrain that party to make good the act committed. Self-defence, on the other hand, has a purely defensive object: to react to the wrong already committed or to prevent its commission, and has no other punitive purpose, nor for that matter is it solely designed to enforce a claim for compensation."

(Footnote 211 continued)

and Winston, 1966), pp. 60–61; Morelli, *op. cit.*, p. 353; E. I. Skakunov, "Samooborona i vopros o sanktsiakh v mejdunarodnom prave", *Pravovedenie* (Leningrad), No. 3 (May/June 1970), pp. 107 *et seq.*; J. Delivanis, *La légitime défense en droit international public moderne* (Paris, Librairie générale de droit et de jurisprudence, 1971), pp. 69–70; Lamberti Zanardi, *La legittima difesa... (op. cit.)*, p. 120; Žourek, *loc. cit.*, pp. 59–60; Schlochauer, *loc. cit.*, p. 269; Graefrath, Oeser and Steiniger, *op. cit.*, pp. 73–74.

²¹² See para. 4 above.

²¹³ See *Yearbook... 1979*, vol. II (Part One), pp. 39 *et seq.*, document A/CN.4/318 and Add. 1–4, paras. 78 *et seq.*

²¹⁴ According to Lamberti Zanardi (*La legittima difesa... (op. cit.)*, p. 131), "self-defence can be pleaded only in the case of a reaction to a special kind of wrongful act, namely, the wrongful use of force", whereas "reprisals may be justifiable as a reaction to any kind of wrongful act". In the opinion of Žourek (*loc. cit.*, p. 60), "any unlawful act, whether of *commission... or of omission... may provoke reprisals, whereas only a wrongful armed attack can justify recourse to measures of self-defence*".

material point here is that self-defence is a reaction to the commission of an international wrong of the kind discussed in this chapter, whereas sanctions, including reprisals, are reactions that belong to the context of the operation of the consequences of the international wrong in the field of international responsibility. It may also be noted that there is nothing to stop a State which, in the circumstances and for the purposes mentioned, uses force against another State in self-defence against a wrongful attack made by the latter, from later adopting sanctions in respect of the offence suffered.²¹⁶ In the light of what has been said above, however, these measures manifestly do not form part of the action taken in self-defence, their purpose is different, and if they are justifiable, the reasons for their justification are different.

91. In order that no point should be overlooked, it should be added that self-defence normally, and almost axiomatically, involves the use of armed force. On the other hand, in consequence of the evolution which apparently occurred in the legal thinking of States after the Second World War and which was described in

Žourek (*loc. cit.*, p. 60) says that:

"The object of reprisals is to cause the injurious activity or action to cease and, as the case may be, to require the State committing the wrong to make good the damage caused, whereas the sole purpose of self-defence is to repel the armed aggression and, in some cases, to forestall its repetition."

Some authors, such as Strupp, see (successive) self-defence as a form of reprisals, but recognize that "profound differences exist between reprisals and self-defence, in respect of the aim, the measures and the conditions" (Strupp, "Les règles générales..." (*loc. cit.*), p. 570). In regard to the first of these conditions, to Strupp "the aim of self-defence is to repulse an ongoing, wrongful attack; it ends there." To reprisals, however, the same author attributes a "repressive aim", sometimes accompanied by a "preventive element" with the aim of avoiding, in future, "new international delicts" (*ibid.*). More recently, a conception related to Strupp's has been expressed by Wengler (*op. cit.*, pp. 515 *et seq.*, 520 *et seq.*). Wengler subdivides the kinds of reprisal into two categories: the "Abwehrrepräsentation" and the "Selbsthilferepressalie", each having a distinctive aim and distinctive conditions, of which the single common element is that they are both measures that would be wrongful if they did not represent a reaction to a wrongful act of the State toward which they were adopted.

Most Soviet writers (Levin, Petrovski) likewise do not admit self-defence as coming within the meaning of the "sanctions" that are recognized as legitimate countermeasures in response to an internationally wrongful act. Skakunov (*loc. cit.*, pp. 107 *et seq.*), expresses a different opinion and criticizes the prevailing view, on the grounds that it ascribes a purely "punitive" notion to sanction. In his opinion, the meaning of sanction should be enlarged so as to comprise also measures intended to uphold the law, and hence he regards self-defence as a kind of sanction. This same conclusion has been reached by Graefrath, Oeser and Steiniger (*op. cit.*, pp. 73–74).

²¹⁶ Quadri (*op. cit.*, p. 269) points out that action taken in the form of reprisals is sometimes confused with action taken in a situation of self-defence, particularly in cases where it is a reaction to a wrongful act that is both violent and continuing, and where the response of the State suffering the wrong has several objectives simultaneously, Quadri adds, however, that reprisals and self-defence are two quite distinct legal concepts.

section 3 of this chapter,²¹⁷ it seems to be settled law that "sanctions" and the other counter-measures capable of being applied directly against the State committing an international wrong by the State suffering the wrong can no longer nowadays—as they formerly used to do—involve the use of armed force. As is stated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations:²¹⁸ "States have a duty to refrain from acts of reprisal involving the use of force". Armed reprisals can no longer be considered as legitimate. Hence this is further proof, if further evidence was needed, of yet another difference between the two concepts compared above.

92. Lastly, the practical importance of differentiating self-defence from reprisals—an importance enhanced precisely by the current view that armed reprisals are not admissible—was forcefully illustrated by the discussions in the Security Council in connection with the attack carried out by the British Royal Air Force against the Yemen Arab Republic on 28 March 1964. On that occasion, the United Kingdom argued that its action should be construed as "self-defence" within the meaning of Article 51 of the Charter, inasmuch as its sole purpose had been defensive and to ward off a future repetition of the acts of aggression and provocation committed by Yemen against the Federation of South Arabia.²¹⁹ It was argued by Czechoslovakia, Iraq, Morocco and the United Arab Republic that the United Kingdom had committed "premeditated" and illegitimate acts of reprisals.²²⁰ While not taking sides in this difference of opinions about the events, it is of interest to note, so far as principles are concerned, the clear distinction drawn by the British representative between "the two forms of self-help", one of which he described as punitive or retributive, called reprisals, and the other, called self-defence, the resisting of an armed attack.²²¹

The discussions which took place in the Security Council in connection with the attack launched against two American destroyers by North-Vietnamese torpedo boats in the Gulf of Tonkin on 4 August 1964, and the American aerial counter-attack against the North-Vietnamese torpedo boats and support vessels is likewise interesting. The representative of the United States of America and of the United Kingdom held

²¹⁷ See *Yearbook . . . 1979*, vol. II (Part One), p. 42, document A/CN.4/318 and Add.1–4, para. 89.

²¹⁸ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

²¹⁹ *Official Records of the Security Council, Nineteenth year*, 1106th meeting, para. 51; 1109th meeting, paras. 25–31; 1111th meeting, paras. 29 and 30.

²²⁰ *Ibid.*, 1106th meeting, paras. 64–68 (Iraq); 1107th meeting, paras. 14–17 (Iraq), 47–51 (United Arab Republic); 1109th meeting, paras. 57–58 (Iraq), 76–77 (Syria), 99–100 (Morocco); 1110th meeting, paras. 23–24 (Czechoslovakia).

²²¹ *Ibid.*, 1109th meeting, paras. 25–31.

that the limited action of the American navy constituted the application of a measure of self-defence authorized by the Charter,²²² whereas the representatives of Czechoslovakia and the Soviet Union argued that the action constituted an act of reprisal that was *ipso jure* inadmissible by the fact that Article 51 of the Charter recognized solely the right of self-defence.²²³

93. The point has already been made²²⁴ that self-defence should be regarded as the only form of “armed self-protection” or “self-help” still open to a State under modern international law. Some further reflections would seem to be in order for the purpose of spelling out the present writer’s opinion on the actual concept of “self-help” or “self-protection” and its connection with the concept of “self-defence”. It is that the expression “self-help” (“*autoprotection*”, “*Selbsthilfe*”, “*autotutela*”, etc.) generally means the mode of action whereby the guaranteed exercise of a right is provided for in a strictly egalitarian, non-institutionalized and non-hierarchical society, like the international community. The term accurately reflects the fact that in international law—in any case, in general international law—it is the rightful holder of a particular subjective right who is at the same time given the faculty of taking measures for the purpose of safeguarding the right in question, to see to it that the right is respected and to exercise it.

94. In this context, it is of course possible that, for the purpose of safeguarding its own right, a State resorts only to measures that are normally lawful, such as simple measures of retorsion, or to other forms of conduct which, while harming the interests of the subject that infringed that State’s right, yet do not conflict with an international obligation towards that other subject. In such a situation, there is no need to “excuse” the measures—to preclude, as an exception, their unlawfulness, for in any case they are not unlawful. The situation is different, however, if the State in question, for the purpose of protecting its own right, resorts to measures which would normally be unlawful and which, exceptionally, become lawful by reason of the fact that the State applying them has suffered an infringement of the right in question. In such a situation, international law regards these measures as justifiable, as sanctions for an international wrong previously committed by the subject against which these measures are taken, or, more generally, as counter-measures taken in reaction to the wrongful act; the object may be purely punitive (sanctions properly so-called) or their purpose may be to take enforcement action, to prevent the recurrence of the event, to press a claim for compensation, etc. As

was shown in section 3 of this chapter,²²⁵ according to the criteria at present in force in international law, sanctions applied, under certain conditions and with certain limitations, by a State one of whose rights has been infringed against the State which committed the infringement, are permissible even though they take the form of conduct inconsistent with some other international obligation. At the same time, however, it was pointed out in that context that such measures may not nowadays involve the use of armed force, for armed reprisals—the typical and traditional form of sanctions applied by one State to another seriously delinquent with regard to the first State in the matter of an international obligation—are now no longer admissible among the “justifiable” measures. In other words, for the purpose of safeguarding its right a State may employ only peaceful reprisals.

95. In the same context and in keeping with the same system, a State which suffers an armed attack and is consequently placed in a situation of “self-defence” is permitted, exceptionally, to resort to the use of armed force in order to halt the aggression and to frustrate its objectives, independently of any punitive intention. This is the meaning of the statement made earlier in this report that self-defence is now the only form of “armed self-help” still admissible under international law, the sole exception to the general prohibition embodied in that law of the use of weapons for self-protection. Hence, by contradistinction with the opinion of certain authors,²²⁶ the term “self-protection” or “self-help” does not denote a separate and distinct circumstance producing effects in a separate sector that would make it comparable to and *eiusdem generis* as the other circumstances capable of precluding the wrongfulness of an act of State that were described earlier in this chapter. “Self-protection” or “self-help” should be construed to mean what legal theory describes as, and comprises under, all the different forms taken by the system which in principle grants to the State, as the holder of a subjective right, the faculty

²²⁵ See *Yearbook . . . 1979*, vol. II (Part One), pp. 39 *et seq.*, document A/CN.4/318 and Add.1–4, para. 78 *et seq.*

²²⁶ Reference has already been made (see footnote 14 above) to the views of Morelli (*op. cit.*, p. 352) and of Sereni (*op. cit.*, pp. 1524 *et seq.*). In the opinion of these authors, what distinguishes self-help from the other circumstances precluding wrongfulness, and particularly from the application of a sanction, is that self-help takes the form of enforcement action for the purpose of exerting pressure on the State that is bound by an international obligation, with the object of securing the performance of that obligation, or the form of action whereby the State holding a subjective right exercises this right directly by substituting itself for the State that owes the obligation. This would mean that self-help could be resorted to even in the absence of any internationally wrongful act on the part of the State forming the object of the action. The same footnote cites some English-language authors (e.g., Schwarzenberger, “The fundamental principles . . .” (*loc. cit.*), pp. 342–343, and Bowett, *Self-defence . . .* (*op. cit.*), pp. 11 *et seq.*) who employ the term “self-help”—by contrast to “self-defence”, to which they ascribe a purely defensive meaning—to describe the application of punitive or enforcement measures against a State that has committed an international delinquency.

²²² *Ibid.*, 1140th meeting, paras. 44–46 (United States), 78–79 (United Kingdom); 1141st meeting, para. 52 (United States).

²²³ *Ibid.*, 1141st meeting, para. 31 (Czechoslovakia), 77–84 (USSR).

²²⁴ See para. 87 above.

of acting in order to protect and safeguard that right in certain circumstances.²²⁷ Self-defence, like the lawful application of a sanction—provided that they are exercised within the limitations now governing them—are permitted forms of self-help, and not concepts that are distinct from, although somewhat similar to it.

96. It is considered necessary to spell out these distinctions and details in order to explain the features peculiar to the notion of “self-defence” on the basis of which the present writer proposes to continue his research, in order to discern what, in modern international law, is the precise content of the rule concerning this special ground for precluding the wrongfulness of a State’s behaviour. This seems to be the right point for resuming the discussion, which was barely begun in the early paragraphs of this section, and for inquiring into the historic evidence which, it is hoped, will confirm the soundness of the statement made above.²²⁸ Already in that paragraph the idea was advanced that, as from about the mid-1920s, both the principle prohibiting the use of armed force, even in order to safeguard a right, and the principle which allows an exception to the first principle for the benefit of the State that resorts to armed force in a situation of self-defence gradually crystallized in international legal relations. Accordingly, the passages which follow will discuss what has been achieved in international law since that period and will inquire into the practice of States, international case law and the work of learned authors.

97. From the practice of States in the period between the two wars it is evident that at that time, in connection with the adoption in various major instruments of clauses designed to restrict progressively, and eventually to outlaw, the freedom of States to resort to war (and occasionally, in a more general way, their freedom to use armed force in any manner whatsoever), there was at the same time a tendency to limit the scope of those clauses. The limitation is reflected in an exception, the effect of which is to rule as not wrongful conduct involving recourse to war in the case where a State would do so only in order to defend itself against armed attack.²²⁹ Several of the instruments

²²⁷ The defects inherent in the system of self-help as it is traditionally recognized by general international law are rectified in private international law by the various forms of “associated” or “collective” protection by virtue of which a number of subjects pledge themselves to co-operate for the purpose of protecting and safeguarding the right of each of them against possible infringements by third parties. What is commonly known as “collective self-defence” is precisely an example of this kind of protection. But for the purpose of going beyond the generalized system of self-help, the decisive step can only be the centralization of the power to take enforcement action, mentioned above (para. 86), which is reflected in the first attempt to centralize the power in the system of the United Nations.

²²⁸ See para. 85.

²²⁹ For a detailed discussion, from the point of view relevant here, of the agreements entered into and, more generally, of the practice of States in the period 1920–1940, see, *inter alia*, Lamberti Zanardi, *La legittima difesa . . .* (*op. cit.*), pp. 79 *et seq.* See also Brownlie, *International Law . . .* (*op. cit.*), pp. 231 *et seq.*; Zourek, *loc. cit.*, pp. 25 *et seq.*; Taoka, *op. cit.*, pp. 88 *et seq.*

adopted at that time which provide for a general or special prohibition of recourse to war for the settlement of international disputes contain, at the same time, an express clause stating the exception in question. The prototype of this kind of instrument is the Protocol for the Pacific Settlement of International Disputes, commonly known as the “Geneva Protocol”, adopted by the Fifth Assembly of the League of Nations on 2 October 1924.²³⁰ The Protocol, which admittedly never entered into force, provided in its article 2 that the signatory States agreed not to resort to war, but admitted an exception to this commitment in the case of “resistance to acts of aggression”. The expression “self-defence” was not itself used in the text, but there is no doubt that a reference to self-defence was intended.²³¹ The expression “self-defence”, and not just the notion, made its appearance the following year in the Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy, which constitutes annex A to the Final Protocol signed at Locarno on 16 October 1925, and is known also by the name of “Rhine Pact”.²³² Under article 2 of the Pact, France and Belgium, on the one hand, and Germany, on the other, undertook “that they will in no case attack or invade each other or resort to war against each other”. The article then proceeded to state:

This stipulation shall not, however, apply in the case of:

- (1) The exercise of the right of *legitimate defence**, that is to say, resistance to a violation of the undertaking contained in the previous paragraph or to a flagrant breach of Articles 42 or 43 of the said Treaty of Versailles, if such breach constitutes an unprovoked act of aggression and by reason of the assembly of armed forces in the demilitarized zone, immediate action is necessary²³³

²³⁰ League of Nations, *Official Journal, Special Supplement No. 21*, p. 21.

²³¹ The general report on the Protocol, submitted to the Fifth Assembly of the League of Nations by Mr. Politis (Greece) and Mr. Beneš (Czechoslovakia), states that the prohibition laid down in article 2:

“affects only aggressive war. It does not, of course, extend to defensive war. The right of *legitimate self-defence** continues, as it must, to be respected. The State attacked retains complete liberty to resist by all means in its power any acts of aggression of which it may be the victim.” (League of Nations, *Official Journal, Special Supplement No. 23*, p. 483.)

At the same time the Protocol provided another express exception to the obligation not to resort to war, in the case where States resorted to war “with the consent of the Council or the Assembly of the League of Nations under provisions of the Covenant and the Protocol”.

²³² League of Nations, *Treaty Series*, vol. LIV, p. 289.

²³³ Accordingly, the notion of “self-defence” endorsed by the Rhine Pact was not limited to a State’s resistance to an act of aggression directed against its own territory but extended also to resistance to an occupation of the demilitarized zone of the neighbouring State’s territory. The Pact likewise provided for a further exception to the obligation laid down in art. 2, para. 1 in the case of action in pursuance of Article 16 of the Covenant of the League of Nations or, more generally, in the case of action as the result of a decision taken by the Assembly or the Council of the League. For comments made on these points at the time, see

Language similar to that used in the Rhine Pact recurs in bilateral treaties signed between 1926 and 1929.²³⁴ Similar terms occur also in the model treaties of mutual assistance and of non-aggression prepared in 1928 by the League of Nations Committee on Arbitration and Security.²³⁵ On 8 July 1937, Afghanistan, Iraq, Iran and Turkey signed a treaty of non-aggression. After having noted, in article 4 of the treaty, that declaration of war, invasion by the armed forces of one State of the territory of another State, attack by the armed forces of one State on the territory, ships or aircraft of another State, and aid or assistance to the aggressor were considered to be acts of aggression, it was stated that:

The following shall not constitute acts of aggression:

1. The exercise of the right of legitimate self-defence, that is to say, resistance to an act of aggression as defined above; . . .²³⁶

98. The soundness of the remark made at the beginning of the preceding paragraph is fully confirmed by the attitude observed and by the conviction expressed by the States in connection with the scope of the treaties intended to limit to extreme situations the possibility of resorting to armed force, or designed even to outlaw this possibility altogether, though the relevant clauses in these treaties do not contain an express provision concerning the lawfulness of the use of armed force by a State that meant only to defend itself against an unlawful attack. At first sight, the existence of international instruments using such terms might seem to be a rebuttal of the virtually necessary affirmation of the principle whereby armed self-defence is not wrongful—whereas generally recourse to armed force is wrongful—under those instruments. Actually, it is precisely these instruments and their application which offer the most reliable evidence of the indisputable existence of the principle that self-defence is a situation the effect of which is to preclude, exceptionally, the wrongfulness of conduct involving the use of

armed force. The attitudes of States with respect to the treaties in question show beyond the shadow of a doubt that these States regarded as perfectly lawful the use of armed force in a situation of self-defence. Nor did the absence of an express clause to that effect in any way shake their conviction, which is most significantly reflected in the Covenant of the League of Nations and in the General Treaty for Renunciation of War as an Instrument of National Policy, signed at Paris on 27 August 1928 (commonly known as the Briand-Kellogg Pact, or Pact of Paris).²³⁷

99. So far as the Covenant is concerned, the discussions regarding the precise scope of the limitations which it placed on recourse to armed force were long and numerous. The principle issues in those discussions were: (1) was the prohibition laid down in the Covenant deemed to apply only in the cases expressly contemplated in Articles 12, 13 and 15.²³⁸ or in any situation? and (2) did the prohibition affect only recourse to war *stricto sensu*, or also other forms of the use of armed force? This is not the context for expressing an opinion on the precise content of the obligations imposed by the Covenant on the States Members of the League of Nations. It will suffice to note at this point that, in certain situations at least, recourse to armed force was definitely prohibited by the Covenant, even though the Covenant contained no express proviso concerning the case where recourse to armed force by a Member State was a reaction to the need to cope with an armed attack committed against it by another State in breach of that same prohibition. Both the Member States and the bodies of the League of Nations at all times expressed the conviction that nevertheless recourse to armed force in a situation of self-defence remained perfectly lawful. When they were implicated in armed conflicts and, more generally, in connection with actions involving the use of armed force which they had undertaken, the States concerned often pleaded—a claim that may or may not have been justified—that they had acted in self-defence. What is even more important is that the States against which those other States had taken action, as well as the organs of the League of Nations, never challenged the principle of the validity of the “plea of self-defence”; they tended, rather, to go no further than to query the admissibility of the plea in the particular case.²³⁹

(Footnote 233 continued)

inter alia K. Strupp (*Das Werk von Locarno* (Berlin, de Gruyter, 1926) and G. Salvioi (“Gli accordi di Locarno”, *Rivista di diritto internazionale* (Rome), XVIIIrd year, IIIrd series, vol. V (1926), pp. 427 *et seq.*). Salvioi, in page 433 of his text, uses the expression “*stato di legittima difesa*” (“state of self-defence”).

²³⁴ For example, the treaties between France and Romania dated 10 June 1926 (League of Nations, *Treaty Series*, vol. LVIII, p. 225), art. 1; between France and the Kingdom of the Serbs, Croats and Slovenes dated 11 November 1927 (*ibid.*, vol. LXVIII, p. 373), art. 1; between Greece and the Kingdom of the Serbs, Croats and Slovenes dated 27 March 1929 (*ibid.*, vol. CVIII, p. 201), art. 2; between Greece and Romania dated 21 March 1928 (*ibid.*, p. 187), art. 1.

²³⁵ All the model treaties contained a clause like the following:

“Each of the High Contracting Parties undertakes, in regard to each of the other Parties, not to attack or invade the territory of another Contracting Party and in no case to resort to war against another Contracting Party.”

That stipulation did not, however, apply in the case of the exercise of the right of *legitimate defence*, that is to say, resistance to a violation of the undertaking. (League of Nations, *Official Journal*, *Special Supplement No. 64*, p. 182 *et seq.*)

²³⁶ League of Nations, *Treaty Series*, vol. CXC, p. 25.

²³⁷ *Ibid.*, vol. XCIV, p. 57.

²³⁸ i.e., (a) before the State concerned has submitted the dispute to arbitration or judicial settlement or to the Council and before the expiry of three months after the adoption of the decision or the Council's report; and (b) in any case never against a Member State of the League of Nations which has complied with the arbitral award or with the judgement of the Permanent Court of International Justice or with a unanimous report by the Council.

²³⁹ This is what happened in the cases of the Graeco-Bulgarian dispute of 1925 concerning a frontier incident, the dispute of 1932-1934 between Paraguay and Bolivia concerning the Chaco territory, the dispute between Japan and China in 1931-1934 concerning Manchuria, the Italo-Ethiopian dispute of 1935, and the Sino-Japanese dispute of 1937. In this connection, see once again the analysis of practice in Lamberti Zanardi (*La legittima difesa . . . (op. cit.)*, pp. 90 *et seq.*)

100. In concluding the Briand–Kellogg Pact, the signatory Powers took what was then the most decisive step towards the outlawing of recourse to war. Article I states:

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article II contained the following provision:

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

The treaty prohibited expressly only recourse to war, and it would probably be straining the meaning of its terms to claim to infer from it that the prohibition it contained was to extend also to recourse to force other than war. That is not the issue, however. What matters in the present context is that the treaty did not make provision for any express exception as regards the case of a war undertaken and conducted in a situation of self-defence. Yet the diplomatic correspondence which preceded the conclusion of the treaty²⁴⁰ shows clearly that the contracting parties obviously had this problem in their minds and that they were fully in agreement in recognizing that the renunciation of war which they were about to proclaim would in no way debar the signatories from the exercise of self-defence. The French and British Governments stressed this point. The reason why the contracting parties eventually, after the interpretative statements made by the Department of State of the United States of America, recognized that it was not necessary to include in the treaty an express proviso for the case of self defence, was, first, that they wished to accede to the opinion of the American Secretary of State, who argued that the value of the treaty depended largely on its simplicity, and secondly, that they agreed with him that such a clause was superfluous. In their view, it was a self-evident truth that war waged in a situation of self-defence was not wrongful; this principle could, they thought, be regarded as implied in any treaty instrument designed to limit or to ban recourse to war—a principle which, in the final analysis, was bound to clash with the terms of the treaty in such a situation.²⁴¹ By the views which they expressed, the

contracting parties even gave the impression that they frankly admitted the existence of an unwritten principle of international law, which was absolutely binding and did not admit of any derogation by a treaty, even a multilateral treaty, and which had the effect of removing any wrongfulness from conduct adopted by a State in a situation of self-defence—even conduct in the form of warlike action.

101. A like conviction regarding the exercise of an absolute or even peremptory principle pursuant to which recourse to war—henceforth undeniably regarded as wrongful—ceases to be wrongful in a situation of self-defence is reflected also in the replies given by States to a questionnaire prepared by the Secretariat of the League of Nations concerning amendments to be made in the League Covenant in order to bring it into harmony with the terms of the more recent Briand–Kellogg Pact. These replies, and also the statements made in the course of the debate on the question in the First Committee of the Assembly during the Assembly's eleventh and twelfth sessions by many States, were to the effect that the addition to the Covenant of a clause proclaiming the total prohibition, without “loopholes”, of recourse to war would not affect the faculty to resort to war in cases where the conditions of a situation of self-defence were fulfilled. The Italian Government, for example, answered:

... it is not in the least necessary to include in the amendments a clause relating to self-defence, since it is obvious that a State which had disregarded the clause forbidding war could not demand that the State attacked by it should observe that clause.²⁴²

For his part, the German representative stated in the course of the discussion:

Though mentioned neither in the Covenant nor the Pact, the right of a nation to defend itself against attack was indisputable. It derived from a natural law which had *greater force than any convention*.²⁴³

Much the same ideas can be found in the report written at the close of the proceedings in the First Committee and submitted to the Assembly at its twelfth session.²⁴⁴

102. For the purpose of making a more complete list of the occasions on which States were able to comment on the plea of self-defence in the period between the two wars, reference should be made also to the answers given by the governments which replied to the request for information of the Preparatory Committee of the Hague Conference of 1930 on the responsibility

²⁴⁰ See the documents reproduced in A. Lysen, ed., *Le pacte Kellogg: Documents concernant le traité multilatéral contre la guerre signé à Paris le 27 août 1928* (Leyden, Sijthoff, 1928), and, as regards the point under discussion, the note (probably by T. Perassi) “Trattato di rinuncia alla guerra”, which was published with the text of the Pact in *Rivista di diritto internazionale* (Rome), XXIst year, IIIrd Series, vol. VIII (1929), pp. 429 *et seq.*

²⁴¹ To reassure the other partners, the United States Government stated explicitly in its note of 23 June 1928 that what it called “the right of self-defence” was, in its opinion, “inherent in every sovereign State and ... implicit in every treaty. Every nation is free at all times and *regardless of treaty provisions** to defend its territory from attack or invasion” (Lysen, *op. cit.*, p. 54). Many other States (including Belgium, Czechoslovakia, France, United

Kingdom, Ireland, Italy, Japan, Poland and South Africa) referred to that statement at the time of signing or acceding to the Pact (*ibid.*, pp. 62 *et seq.*; see also Brownlie, *International Law* ... (*op. cit.*), pp. 235 *et seq.*; Lamberti Zanardi, *La legittima difesa* ... (*op. cit.*), pp. 84 *et seq.*; Žourek, *loc. cit.*, pp. 32 *et seq.*).

²⁴² League of Nations, *Official Journal*, 12th year, No. 8 (August 1931), p. 1602.

²⁴³ *Idem*, *Official Journal, Special Supplement No. 94*, p. 41.

For the views of other States, see Lamberti Zanardi, *La legittima difesa* ... (*op. cit.*), pp. 99–100.

²⁴⁴ League of Nations, *Official Journal, Special Supplement No. 93*, pp. 220 *et seq.*

of States for damage caused to the person or property of foreigners. The questionnaire contained the following point XI (a):

XI. Circumstances in which a State is entitled to disclaim responsibility. What are the conditions which must be fulfilled in such cases:

(a) When the State claims to have acted in self-defence?²⁴⁵

It was, however, a potential source of error to ask the question about self-defence as a circumstance precluding the wrongfulness of State conduct in the context of a topic like that of responsibility, not for acts committed directly against a foreign State, but for actions harming foreign private persons. The result was that the replies of Governments were not generally as significant as were those given to other points in the questionnaire and cited in earlier reports of the present writer. All the Governments which answered were, of course, agreed on the principle that the situation of self-defence constituted a circumstance allowing a State to repudiate its responsibility—or rather, could exonerate the State from liability—for an act which otherwise would definitely have been wrongful. But the idea of self-defence as such which various Governments were thinking of was very different from that we have given as the most correct, and also very different from that reflected in the legal thinking of States as it evolved *pari passu* with the gradual affirmation of the principle of the prohibition of recourse to war and as a necessary exception to that principle. What happened, therefore, was that, when referring to self-defence, Governments cited the case of measures taken by a State in defence against a threat emanating, not from another State but from private persons,²⁴⁶ in other words a case which, as was mentioned earlier, is in our opinion wholly outside the present context. A further consequence was that, in reliance on these answers, the authors of the questionnaire eventually drafted a Basis of discussion patently remote from the idea of “self-defence” properly so-called.²⁴⁷ This is no reason, however, why the answers given by other Governments should not be used here; such as that of Belgium, which stated that “the State is justified in disclaiming responsibility in the case of self-defence against an aggressor State”,²⁴⁸ and that of Switzerland which said that “the situation of self-defence exists where a State suffers an *unjust aggression, contrary to law*.”²⁴⁹

²⁴⁵ *Idem, Bases of discussion . . . (op. cit.)*, p. 161.

²⁴⁶ See the replies of Denmark (*ibid.*, p. 126), United Kingdom (*ibid.*), South Africa (*ibid.*, p. 125), and the United States of America (League of Nations, *Supplement to vol. III (op. cit.)*, p. 22).

²⁴⁷ It reads:

“A State is not responsible for damage caused to a foreigner if it proves that its act was occasioned by the immediate necessity of self-defence against a danger with which the foreigner threatened the State or other persons.” (Basis No. 24 (League of Nations, *Bases of discussion . . . (op. cit.)*, p. 128).)

²⁴⁸ *Ibid.*, p. 125.

²⁴⁹ *Ibid.*, p. 127.

103. Evidence of the evolution which occurred in the reality of international relations in the period 1920–1939 materialized later. The International Military Tribunals of Nuremberg and Tokyo, established respectively by the Agreements of 8 August 1945 and 19 January 1946, virtually took it for granted that during that period there had come into being in international law an unwritten principle of law the effect of which was to rebut the wrongfulness of the use of armed force in the case of self-defence; the Tribunals regarded this as an exception to an *indefeasible limitation* of the general ban on the use of armed force laid down by international instruments like the Briand–Kellogg Pact. The particular issue to be adjudicated by the Nuremberg Tribunal was whether the invasion by Nazi Germany of Denmark and Norway, and later Belgium, the Netherlands and Luxembourg, and also its attack on the USSR, could be justified as acts committed in a situation of self-defence. The same issue came before the Tokyo Tribunal in connection with the conduct of Japan, on the one hand, and the Netherlands on the other (the question of the declaration of war by the Netherlands on Japan). In the judgements of both tribunals, the principle that conduct involving recourse to armed force in the form of self-defence was lawful was not challenged in any way whatsoever. What was challenged was the *de facto* existence of conditions typical of a situation of self-defence, and it was solely on that basis that the plea of self-defence was rejected. Another point considered [by the Nuremberg Tribunal] was whether preventive self-defence was lawful or not, and also the admissibility of the claim by the State which argued that it had acted in self-defence that it alone was competent to determine whether the conditions of self-defence were fulfilled in the particular circumstances.²⁵⁰ Such questions obviously are relevant to the delimitation of the legal concept of self-defence, and the concept will be considered from this angle below. The material point of interest in the present context is that the deliberations of the Tribunals themselves necessarily presupposed the recognition of self-defence as a circumstance precluding the wrongfulness of conduct involving the use of armed force which would, in other circumstances, be wrongful. For that matter the Tokyo Tribunal said so expressly in an *obiter dictum*, for in its judgement dated 1 November 1948, it stated:

The Contracting Powers [of the Briand–Kellogg Pact], including Japan, declared that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another. The Contracting Powers then agreed that the settlement or solution of all disputes or conflicts of whatever nature or of

²⁵⁰ As regards the Nuremberg Tribunal, see the passages in the judgement of 1 October 1946 reproduced in *Trial of The Major War Criminals . . . (op. cit.)*, (1947), vol. I, pp. 204 *et seq.*

As regards the Tokyo Tribunal, see the passages in the judgements reproduced in: B. V. A. Röling and C. F. Rüter, eds. *The Tokyo Judgement* (Amsterdam, APA-University Press, 1977), vol. 1, pp. 46 *et seq.* and 382.

whatever origin they may be, which might arise among them, would never be sought except by pacific means.

Prior to the ratification of the Pact, some of the signatory Powers made declarations reserving the right to wage war in self-defence . . . *Any law, international or municipal, which prohibits recourse to force is necessarily limited by the right of self-defence.*²⁵¹

104. The process aimed at outlawing the use of armed force in international relations, a process the stages of which have been described in this report, reached its culmination at the end of the Second World War. Under the impact of that tragedy, the principle once and for all condemning such use of force as utterly wrongful became, in this writer's opinion, part of the legal thinking of States and therefore a peremptory unwritten principle of general international law even before it was spelt out in the Charter of the United Nations in written form. It is in fact laid down in the Charter in much stricter terms than those employed in the Covenant of the League of Nations or even in the Briand-Kellogg Pact. Under Article 2, paragraph 4, not only recourse to war but any "use of force" and even the "threat of force" are prohibited. In keeping with the categorical character of this prohibition, the Charter also vests in the Security Council much wider powers than those which were vested by the Covenant in the Council of the League of Nations for the adoption of suitable measures to prevent and, where necessary, suppress any breach of the obligations set forth in this key provision of the constituent instrument of the Organization. Nevertheless, the Charter does not fail to specify *expressis verbis* in Article 51 that conduct adopted in self-defence is to be deemed internationally lawful even if, in other circumstances, like conduct should be considered as internationally wrongful because in breach of Article 2, paragraph 4. The essential terms of Article 51 provide:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. . . .²⁵²

In confirmation of what was said earlier, it should be noted that none of the States which took part in the adoption of this text at San Francisco questioned the validity, in general international law, of the exception

²⁵¹ *Ibid.*, pp. 46 and 47.

²⁵² All the collective defence agreements concluded since the adoption of the Charter make an explicit or implicit reference to Article 51. Some of them reproduce textually the principle laid down in the article. Examples are art. 3, para. 1, of the Inter-American Treaty of Reciprocal Assistance (1947) (United Nations, *Treaty Series*, vol. 21, p. 77); art. 5, para. 1, of the North Atlantic Treaty (1949) (*ibid.*, vol. 34, p. 243); art. 4, para. 1 of the Treaty of Friendship, Co-operation and Mutual Assistance between Albania, Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR (1955) (*ibid.*, vol. 219, p. 3). See the list of such agreements in L.M. Goodrich, E. Hambro and A.P. Simons, *Charter of the United Nations: Commentary and Documents*, 3rd ed., rev. (New York, Columbia University Press, 1969), pp. 349 *et seq.*

whereby conduct not in conformity with the obligation to refrain from the use of force is not wrongful if adopted in self-defence. Since the adoption of the Charter, there has been no known case where it was argued that self-defence was admissible, as a plea in justification of conduct involving the use of force, solely by virtue of the rule in Article 51 of the Charter and not—primarily—by virtue of an absolute rule previously recognized by general international law. The reason why some have claimed to be able to discern a difference in content between the principle set forth in Article 51 and the corresponding principle of general international law is not that they wished to ascribe to the Charter provision any innovatory intention but, at most, that they wished to restrict to some extent the scope of the principle of general international law. It is thus confirmed that the existence of the principle of self-defence in general international law antedates the adoption of the Charter.

105. As in the discussion of State practice, it is possible, for the same reasons, to confine the study of learned opinion to the works published after 1920. The writings of scholars published in the period between the two World Wars likewise support the conclusion that that was the period when the principle that the situation of self-defence justifies, exceptionally, conduct which would otherwise be internationally wrongful by reason of the intervening ban on the use of armed force began to assume its modern shape.

106. Nevertheless, not all the opinions of theoretical writers of that time are genuinely helpful for the purposes of this report. For example, as was indicated earlier, a number of writers rely on a notion of self-defence that is in fact much closer to that which we have characterized as "state of necessity" than to the notion designated here by the term "self-defence". The writers in question, mostly from the English-speaking world, speak of "self-defence" to indicate the circumstances in which a form of conduct occurs that is designed to ward off a danger, a threat emanating, in many cases, not from the State against which the particular conduct is adopted but from individuals or groups that are private, or at any rate are unrelated to the organization of that State. As has been seen, this school of thought treats as a typical example of self-defence in international law the celebrated case of the steamer *Caroline*.²⁵³ Needless to say, in the opinion

²⁵³ See para. 57 above. The danger which, as an exception, justifies conduct involving the use of armed force is generally said to be a threat of armed attack from *the territory* of the State which is the victim of the action purportedly taken in self-defence. But no distinction is drawn as to the fundamental issue whether the threat comes from the foreign State itself, or from mere private individuals, or even insurgents or organs of a third State, without any wrongful act, and still less aggression, being committed by the foreign State. See, for example, J.L. Briery, "Règles générales du droit de la paix", *Recueil des cours* . . . , 1936-IV (Paris, Sirey, 1937), vol. 58, pp. 126 *et seq.*; cf. also Fauchille, *op. cit.*, pp. 421-422, and de Visscher, "La respon-

of those who share such a point of view, the conduct adopted by a State against another State in order to resist a wrongful attack by the latter is likewise to be regarded as conduct justifiable on grounds of self-defence. In the present writer's opinion, however, the confusion between so very different situations hampers the task of arriving at an accurate definition of self-defence. It confuses cases in which the conduct adopted against a State constitutes a reaction to an internationally wrongful act committed by that State (and to so serious a wrongful act as aggression) with cases in which such conduct is excusable—if excusable at all—solely by reason of the need to ward off a danger that simply originates in the territory of a State, the latter not being guilty of any aggression or of any wrongful act.

107. In the light of the foregoing, it is far more interesting to look at the opinions of the many writers who discern a logically indispensable connection between the progress made, at the time when they were writing, by the trend in favour of the prohibition of the use of armed force and the concurrent acceptance in international law of the concept of self-defence as the necessary limitation of that prohibition. They recognize of course that, in the context of the general international law then prevailing, action by a State that resorts to armed force in order to repel an attack of like force is always lawful by virtue of the traditional principle that permits recourse to self-help in all its forms, a principle therefore that far transcends the bounds of the idea of legitimate "defence". But they also acknowledge that the situation is different in the context of a system of international law that is special, that is established by treaty, and rejects the generalized acceptance of self-help—particularly armed self-help—either in consequence of a virtual centralization of the use of enforcement measures in order to safeguard the law or in consequence of an outright total or partial ban on the use of force by an individual State, even for the purpose of safeguarding its rights (the systems embodied in the Covenant of the League of Nations or the Briand-Kellogg Pact). In such a

context, these writers concede, it is no longer improper to speak of "self-defence" in order to characterize the exceptional circumstances in which the use of armed force by a State ceases to be wrongful.²⁵⁴ The value of the contribution made by the school of thought dominant at that time is, then, that it realized and demonstrated that where the individual State is forbidden, in one way or another, to resort to the use of armed force, there is also necessarily an overriding reason for precluding the wrongfulness of such action if genuinely taken in self-defence. It is relatively immaterial that, where such wrongfulness is not explicitly precluded by the written texts establishing the prohibition, the rule precluding it is commonly held—in keeping with the precedent set by the protagonists of the Briand-Kellogg Pact—to be implicit in the text in question, rather than to be a rule imposed by a pre-existing principle of general international law from which those texts could not have derogated. In the final analysis, the practical result is the same. The conviction that there exists in customary general international law a principle specifically removing the wrongfulness normally attaching to an action involving the use of armed force if the action in question is taken in self-defence became part and parcel of the thinking of publicists at the time when the principle of such wrongfulness itself passed from international treaty law to customary general international law. As we have said before, this evolution occurred even before these principles were embodied in the Charter of the United Nations. It is significant, furthermore, that the authors of works published since the Second World War all recognize that the use of armed force by a State in order to repel an aggression is to be considered

²⁵⁴ Cavaglieri affirms in principle that:

"The concept of self-defence, excluded from ordinary international law by the recognition of the State's wider power of self-help, still has its *raison d'être* and validity in smaller groupings in which that power is limited or even entirely abolished." (A. Cavaglieri, "Règles générales du droit de la paix", *Recueil des cours* . . ., 1929-I (Paris, Hachette, 1930), vol. 26, pp. 555-556.)

He adds, specifically, that the Covenant of the League of Nations, the Locarno Treaties and the Pact of Paris (or Briand-Kellogg Pact) have opened the way to the application of the concept of self-defence in international relations. See also, by the same author, *Corso di diritto internazionale*, 3rd ed. (Naples, Rindinella, 1934), pp. 530 *et seq.*

In a course of lectures given in the same year as Cavaglieri's, Verdross ("Règles générales du droit international de la paix" (*loc. cit.*), pp. 481 *et seq.*) says, first, that "self-defence means the right to resist by force an unjust aggression, that is, an aggression contrary to a rule of law", and then proceeds to enumerate the treaties which limited or ruled out the freedom of member States to wage war against the other member States. Accordingly, he too was of the view that self-defence became relevant in international law once the prohibition of the use of force had entered the law, even if purely by treaty provisions. The same ideas are to be found in Anzilotti (*Corso* . . ., 4th ed. (*op. cit.*), pp. 413-414), Kelsen ("Unrecht und Unrechtsfolgen . . ." (*loc. cit.*), pp. 562 *et seq.*), E. Giraud ("La théorie de la légitime défense", *Recueil des cours* . . ., 1934-III (Paris, Sirey, 1934), vol. 49, p. 715), Ago (*loc. cit.*, pp. 538 *et seq.*).

(Footnote 253 continued)

sabilité des Etats" (*loc. cit.*), pp. 107 *et seq.* Actually, these latter writers state that self-defence presupposes an "unjust aggression", but this does not prevent them from citing as examples of self-defence instances in which a State reacted to attacks from private individuals.

Other writers also take the view that the concept of self-defence can justify reactions to conduct other than armed attack or a threat of armed attack. Basdevant (*loc. cit.* pp. 545 *et seq.*), discusses the question whether armed intervention by a State in foreign territory in order to protect its nationals, or the employment of enforcement measures in response to acts, even lawful acts, by another State that jeopardize the vital interests of the State resorting to such measures ought not to be justified as being in the nature of self-defence. He does not answer the question; he was not sure that international law then admitted that the nature of such measures precluded their wrongfulness, but was clearly of the opinion that, if the measures were justifiable, they would be justified on the grounds of self-defence.

as lawful notwithstanding the general prohibition on the use of such force, and they hold this view irrespective of the way in which they visualize the relationship between the customary law and the provisions of the Charter of the United Nations concerning the subject.²⁵⁵

108. The foregoing considerations all seem to lead to the following conclusion: the formative process begun in the 1920s and completed at the end of the Second World War culminated in the existence in international law of an imperative rule imposing on all States the duty to refrain from all recourse to armed force in their reciprocal relations. The same process created the conditions for the materialization of another, parallel and equally imperative rule whereby self-defence is the sole limitation on the ban imposed by the first rule. These two rules which, in this writer's opinion, are part of the legal order of the international community as a whole, occur also in written form in the legal system of that special community of a universal character and virtually coterminous with the international community—the United Nations. The fact that these rules exist both in international law and in the Charter is the characteristic which distinguishes the situation of “self-defence” from the other circumstances which, like it, have the effect of precluding the wrongfulness of conduct that would otherwise be unlawful but which, unlike it, are not expressly spelt out in a provision of the Charter. The question may arise, therefore, whether or not one ought to presume a complete identity of content between the rule that evolved spontaneously in general international law regarding self-defence and the rule which by treaty was embodied in Article 51 of the Charter. It should be noted that this Article not only cautions against any

misinterpretation of what it calls the “inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations”, but in addition subordinates recourse to this “right” to certain restrictions and to specific rules. Hence, for the purpose of the question under discussion here, account should be taken of the intrinsic nature of the fact that the rule in question was inserted in a system which contemplates an active role for the Organization in the settlement of disputes and in the maintenance of peace and security and which envisages a measure of centralization of the use of enforcement action and, above all, of the decision-making power with regard to recourse to such action. Independently of this somewhat extraneous aspect, however, it would be hard to believe that there can be any difference whatsoever in content between the notion of self-defence in general international law and the notion of self-defence endorsed in the Charter. The evolution of the rule in force in the legal order of the world-wide international community and that of the rule in force in the United Nations system of law were virtually contemporaneous, as has been noted earlier. It is almost inconceivable that, at the same moment in history and in consequence of the same historic events, nearly all Governments should have been able to sign a treaty instrument binding them reciprocally on the basis of a specific notion and that, at the same time, they should have been able to retain in their legal thinking the conviction of being reciprocally bound on the basis of a different notion.

109. Consequently, while it is right to dismiss at the outset so unconvincing an idea as that two really divergent notions of self-defence, based respectively on general international law and on the United Nations system of law, could co-exist, nevertheless some comments seem to be necessary. A codification carried on in the framework and under the auspices of the United Nations cannot be guided by criteria that in any manner whatsoever are not fully consistent with those forming the basis of the Charter at the risk, moreover, of giving rise to dangerous uncertainties in a subject concerning so delicate a sector as that of the maintenance of international peace and security. If, therefore, and without admitting inconceivable divergences as to substance,²⁵⁶ it should nevertheless be thought that the rules regarding self-defence laid down by the Charter of the United Nations were intended to rectify in certain respects the rules that had evolved in general international law, we could only be guided by the criteria adopted in the Charter. As regards the point at issue here it may, surely, be proper to look at general international law in so far as it may help to solve problems of interpretation connected with Article 51, or in so far as it tends to clarify certain

²⁵⁵ A large majority of modern writers holds the view that the prohibition of the principle of the use of armed force has now become a rule of international customary law. None of these writers, however, has questioned the lawfulness of a State's having recourse to the use of armed force to repel an armed attack. We shall merely quote, on this subject, the opinion of the Commission, which as early as 1949 adopted a draft Declaration on the Rights and Duties of States, of which art. 12 reads:

“Every State has the right of individual or collective self-defence against armed attack.” (*Yearbook . . . 1949*, part II, p. 288)

In its observations concerning the draft Declaration, the Commission specifically stated that, in its opinion, the articles thereof enunciated general principles of international law (*ibid.*, p. 290, para. 52).

As to the rare authors who persist in thinking that international customary law would still today allow recourse to armed force to safeguard a subjective right or even a simple interest, they do so (like the authors of the period between the two World Wars) while maintaining that the concept of “self-defence” has no autonomy in general international law. However, they do admit the existence of “self-defence” as an exception in those particular systems of international law which prohibit the use of armed force, such as the Charter of the United Nations. They also consider, therefore, that in those systems the use of force remains lawful if its purpose is to repel an unjust attack (see, as representative of all such opinion, Morelli, *op. cit.*, pp. 353–354).

²⁵⁶ However strange the ideas developed below may appear in the light of the earlier description of the evolution of the rule concerning self-defence in the international legal order.

other aspects which the Article does not spell out but which undoubtedly have some importance. Examples of such aspects are the proportionality between the action taken in a situation of self-defence and the object of repelling an armed attack, or the determination of the point in time at which a State may claim that it is in a situation of self-defence, or the question as to who is competent to determine whether in a particular case the conditions are present in which the right of self-defence is exercisable, etc. It may perhaps be useful to consider some of these questions before completing the study of this subject. There is not, of course, any intention whatsoever of tampering with the content or scope of the rule laid down in Article 51 of the Charter, which once again, the Commission must naturally follow faithfully in codifying the subject under discussion.

110. Notwithstanding the foregoing remarks, it is impossible to pass over in complete silence the school of thought which, unlike the present writer, declines to take it for granted that the authors of Article 51 of the Charter of the United Nations in fact intended that the rule of written law they were drafting should have the same object and the same scope that general international law ascribes to the rule whereby self-defence constitutes a circumstance precluding the wrongfulness of conduct involving the use of armed forces. According to this school, the authors of Article 51 did not mean that this Article should regulate all the situations in which a State would be qualified to plead a situation of self-defence as an exonerating circumstance, but only the most important situation, namely, that where action taken to confront an armed attack is justified. According to that opinion, Article 51 does not deal with the other cases in which "self-defence" could also be legitimately pleaded and leaves the determination and regulation of such cases to general international law, unless an exception is provided for in other regulations of the Charter. Patently, if this point of view should be shown to be sound, the codification on which the Commission is at present engaged could not be complete if it took into account only the situation contemplated in Article 51 of the Charter. It would then be indispensable to inquire more searchingly into the entire subject held by general international law to be strictly that of self-defence. Accordingly, a digression is necessary in the present discussion for the purpose of considering whether the opinion referred to above is correct.

111. According to the authors belonging to the school of thought referred to, Article 51 of the Charter contains no evidence of any intention to limit the possibility of pleading self-defence to the case where "an armed attack occurs" against a State. These authors argue that, by referring to this specific case, the Article *ipso facto* meant to give only one example, and the intention was simply to lay down the rule regarding a typical situation. There was never any intention (it is said) to exclude the possibility of pleading self-defence in other cases, for, in the opinion

of these authors, those other cases are covered by customary law, and under that law the plea of self-defence may be advanced also in cases where the conduct to be justified was not adopted in order to resist an "armed attack".²⁵⁷ All those other cases are, according to their thesis, governed exclusively by the relevant rules of general international law, and such cases include above all, but not solely, the use of armed force to deal with a "threat" of armed attack.²⁵⁸ An

²⁵⁷ See Waldock, *loc. cit.*, pp. 495 *et seq.*, and the chapter on the use of force written by Waldock in J.L. Brierly, *The Law of Nations*, 6th ed., rev. by H. Waldock (Oxford, Clarendon Press, 1963), pp. 416 *et seq.*; L.C. Green, "Armed conflict, war and self-defence", *Archiv des Völkerrechts* (Tübingen), vol. 6, No. 4 (1956-1957), pp. 432 *et seq.* and pp. 987 *et seq.*; Bowett, *Self-defence . . . (op. cit.)*, pp. 187 *et seq.*; the statement by L.C. Green and the communications from D.W. Bowett and V. Dedijer on the occasion of the debate, in 1958, in the International Law Association (ILA, *Report of the Forty-eighth Conference of the International Law Association held at New York* (1958) (London, 1959), pp. 517, 598, 609 *et seq.*); M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven, Conn., Yale University Press, 1961), pp. 232 *et seq.*; M.S. McDougal, "The Soviet-Cuban quarantine and self-defence", *The American Journal of International Law* (Washington, D.C.), vol. 57, No. 3 (July 1963), pp. 597 *et seq.*; D.P. O'Connell, *International Law*, 2nd ed. (London, Stevens, 1970) vol. 1, pp. 316 *et seq.* See also the comments by M.S. McDougal and Sir Francis Vallat on the provisional report prepared by J. Zourek in *Annuaire de l'Institut de droit international, 1975* (Basel), vol. 56, pp. 76 *et seq.* According to J. Stone (*Legal Controls of International Conflict* (London, Stevens, 1954), pp. 243 *et seq.*), Article 51 by its terms reserves a pre-existing right—though he points out that the reservation is subject to limitations (e.g. the right is exercisable only in response to an armed attack, the Security Council must be informed) which are unknown to customary international law. Stone then adds:

"The form of Article 51 as a reservation rather than grant is critical. Within the limits of Article 51 the licence of self-defence is reserved even if some other provisions of the Charter apparently forbid it. Beyond these limits self-defence by all States still depends on customary international law as modified (in the case of Members) by any specific prohibitions elsewhere in the Charter". (Stone, *op. cit.*, p. 244.)

In Stone's opinion, therefore, in cases other than that of armed attack, the States Members of the United Nations may plead self-defence if this is admitted by customary international law and if not expressly prohibited by other rules of the Charter. Stone later confirmed his view in *Aggression and World Order* (London, Stevens, 1958), pp. 43-44. S.M. Schwebel ("Aggression, intervention and self-defence in modern international law", *Recueil des cours . . . 1972-II* (Leyden, Sijthoff, 1973), vol. 136, pp. 479 *et seq.*) carefully sets out the opinions of the writers who follow this school of thought and objectively marshals the arguments for and against their theses, though he seems to be inclined to support their theses.

²⁵⁸ Some of the authors cited above regard as lawful (*légitime*) recourse to "preventive" self-defence (*défense légitime*) in the broadest sense. For example, McDougal ("The Soviet-Cuban quarantine . . ." (*loc. cit.*), p. 603) considers the blockade of Cuba by the United States in 1963 as a case of preventive self-defence. Other authors, on the contrary, such as Waldock (*loc. cit.*, pp. 497-498) take the view, however, that preventative self-defence is admissible only in the case of an imminent armed attack. Be that as it may, and without wishing to take sides (at least for the moment) in the argument about the admissibility or inadmissibility

additional point made by some of these authors concerns cases of the use of force not involving armed forces, and also cases where resistance is offered to wrongful action harming the State's vital interests, even where such action does not involve the use or the threat of the use of force.²⁵⁹

112. The authors whose views are cited above, in approximate terms, of course, in so far as they agree *inter se*, buttress their theses by a wealth of arguments based on the language of the article. They contend that the fact that the authors of the English language (original) version of Article 51 used the expression "inherent right" reflects the intention to refer to a right provided for in general international law; the express provision which states that "Nothing in the present Charter shall impair" this right is evidence—according to these writers—of an intention not to limit the right in any manner whatsoever; the fact that the Article uses the expression "if an armed attack occurs" against a Member of the United Nations, and not the expression "*only* if . . .", is said to confirm the intention of the drafters of the provision merely to give an example (and incidentally, the draftsmanship is

criticized as inept). These writers also argue on the basis of the context, in particular, the fact that Article 51 occurs in Chapter VII of the Charter, which would explain why self-defence is mentioned only in connection with the situation of an armed attack. In addition, they cite historic arguments, for example, the fact that the terms of Article 51 did not appear in the Dumbarton Oaks proposals, inasmuch as the provision was at that time considered as superfluous, as at the time of the formulation of the Briand-Kellogg Pact. They consider that the clause was added later for the sole purpose of co-ordinating the security systems of the United Nations and of the regional organizations with regard to the exercise of collective action against an aggressor. However, this would, of course, have left unchanged the implicit proviso in force previously in favour of individual self-defence.

113. This is not the place for a detailed discussion of the merits or flaws in the various arguments that have been mentioned, and still less for venturing an interpretation of the Charter and its provisions, for that is clearly beyond the scope of the present task. Moreover, the divergence between the views of the present writer and of those who have been cited concerns not the interpretation of a provision of the Charter but rather the interpretation of general international law and, above all, the determination of the scope of the concepts employed here. At this point, it is important to reiterate a remark made earlier on. What is the fundamental reason why these publicists argue so strenuously that the scope of self-defence under general international law is much wider than that of resistance to armed attack, and thus conclude that Article 51 of the Charter, in expressly safeguarding only the right of a State to react in self-defence only in the case of armed attack, was not intended to cover the entire field of application of the concept of self-defence and left intact the much wider scope of that concept in general international law? The reason is largely that many of these writers remain wedded to notions and to a terminology—which this writer regards as incorrect—drawn from a relatively antiquated portion of State practice with which they are more familiar. It is no accident that, in their arguments, they often cite practical cases, such as that of the *Caroline* and others, which they place under the heading of self-defence in keeping with the examples set by the diplomats of the time. It has, it is submitted, been clearly shown that these cases are in fact illustrations of different circumstances; admittedly, what they have in common with self-defence is that their effect is to preclude the wrongfulness of certain kinds of State conduct, but in many other essential respects they are quite unlike self-defence. It is indispensable to differentiate, clearly, the concept of self-defence properly so-called from the various notions that are often grouped together under the common label of self-help. It is worth repeating that self-defence is a concept clearly shaped by the general theory of law to indicate the situation of a subject of law driven by necessity to

bility in international law of "preventive" self-defence, the present writer wonders whether those who argue for its admissibility really need to rely on the idea that Article 51 of the Charter deliberately did not settle the question and left it to be settled by general international law. In this connection, it is pertinent to cite the opinion of R. Bindschedler ("La délimitation des compétences des Nations Unies", *Recueil des cours . . .*, 1963-1, (Leyden, Sijthoff, 1964), vol. 108, pp. 397 *et seq.*), that the authors of Article 51 intended by the use of the words "if an armed attack occurs against a Member of the United Nations" to codify all the customary rules concerning self-defence. According to Bindschedler, therefore, those words have the effect of debarring a State from pleading self-defence if it was the victim only of a delinquency not constituting an armed attack. He adds, however, that the plea of self-defence ought to be admissible in cases of imminent danger of armed attack, for the words in question should be read in the light of customary international law which (he says) admits preventive self-defence. Bindschedler confirms this opinion in his comments on the report by Žourek in *Annuaire de l'Institut . . .* (*op. cit.*), pp. 72-73. Apparently, therefore, he reaches his conclusion on the basis of an interpretation of Article 51, even though it is an interpretation in the light of general international law, rather than on the basis of a direct reliance on general international law which (he thinks) the Charter deliberately refrained from touching.

²⁵⁹ The author who goes furthest in this direction and who is most categorical is Bowett:

"Whilst it is conceded that the right of self-defence generally applies within the context of force, it is neither a necessary nor an accurate conclusion that the right of self-defence applies only to measures involving the use of force. The function of the right of self-defence is to justify action, otherwise illegal, which is necessary to protect certain essential rights of the state against violation by other states.

The substantive rights to which self-defence pertains, and for which it serves as a means of protection are:

"(a) The Right of Territorial Integrity.

"(b) The Right of Political Independence.

"(c) The Right of Protection over Nationals.

"(d) Certain Economic Rights." (Bowett, *Self-defence . . .* (*op. cit.*), p. 270.)

defend himself by the use of force, and in particular by the use of a weapon or weapons, against another's attack. Nowadays this is as true in the system of international law as in the systems of municipal law, where the concept was defined long ago. In making such an affirmation, no one would dream of denying that States can, in other circumstances, resort to certain courses of conduct that are justified by a situation of necessity, or even distress, or that are untainted by wrongfulness because they are legitimate reactions to an infringement of their rights which nevertheless falls short of an armed attack, subject of course to the present limitations on such a reaction. The fear that the effect of adopting an accurate and strict definition of the circumstances in which recourse to self-defence is permissible may be to prevent the State from acting lawfully to protect its rights for other reasons and in other circumstances, is, in the final analysis, groundless.²⁶⁰ There is nothing to be gained from distorting the concept of self-defence in order to make its field of application much wider than it actually is, for such an enlargement would certainly not contribute to the necessary clarification of concepts.

114. After these considerations, it should be pointed out straightaway that the school of thought referred to above in no sense represents the prevailing view or even a majority view. On the contrary, the majority of the publicists who have written about self-defence by no means share that opinion; they rebut it firmly and effectively.²⁶¹ It may be said that all the theses advanced by the advocates of that school of thought

²⁶⁰ It is realized that behind the idea of describing as instances of "self-defence" cases which do not come within such a definition there may be the intention to circumvent the obstacle—one that some people consider to be too categorical—to the use of coercion in the application by a State of countermeasures designed to impose sanctions or to secure performance of an obligation after an infringement of its rights falling short of armed attack. Furthermore, in view of the absolute prohibition of any form of sanction involving the use of armed force and in view of the frustration of the hopes that the establishment of the United Nations would lead to an effective system for a centralized guarantee of law, the impression may sometimes be gained that, all too often, the subjective rights of States are ultimately devoid of any form of effective protection. This could—although it involves too many disadvantages to embark lightly on such a course—lead to a possible review, even by a spontaneous evolution, of the inflexibility of certain prohibitions, but such an evolution has not taken place nor is it about to take place. Nevertheless, there would in no case be any advantage in advocating misguided interpretations of certain provisions, for these interpretations can only lead to a dangerous confusion of principles.

²⁶¹ See, among the writers holding this majority view, J.L. Kunz, "Individual and collective self-defence in Article 51 of the Charter of the United Nations", *The American Journal of International Law* (Washington, D.C.), vol. 41, No. 4 (October 1947), pp. 877 *et seq.*; N.Q. Dinh, "La légitime défense d'après la Charte des Nations Unies", *Revue générale de droit international public* (Paris), 3rd series, vol. XIX, No. 1-2 (January-June 1948), pp. 240 *et seq.*; H. Kelsen, "Collective security and collective self-defence under the Charter of the United Nations", *The American Journal of International Law* (Washington, D.C.),

have been subjected to critical analysis and rejected one by one. The different arguments deployed in rebuttal will not be recounted here. Suffice it to say that the plea of self-defence in justification of the use of armed force by a State in cases other than those in which the State in question is the object of an armed attack is held by the majority to be utterly inadmissible, either on the basis of a direct and exclusive interpretation of Article 51 of the Charter or on that of an examination of the relationship between that Article and the corresponding rule in general international law, or else on the basis of a study of customary law alone. In connection with the expression used in Article 51 of the Charter, it has been emphasized that the English term "inherent right", probably mistranslated into French by the term "*droit naturel*" (with its undesirable connotations of the natural law theory of the fundamental rights of States),²⁶² and better reflected in

vol. 42, No. 4 (October 1948) pp. 791-792, and *The Law of the United Nations* (London, Stevens, 1950), pp. 269, 797 *et seq.*; P.C. Jessup, *A Modern Law of Nations: An Introduction* (New York, Macmillan, 1948), pp. 165 *et seq.*; H. Wehberg, "L'interdiction du recours à la force: Le principe et les problèmes qui se posent", *Recueil des cours . . .*, 1951-I (Leyden, Sijthoff, 1952), vol. 78, pp. 81 *et seq.*; Oppenheim, *op. cit.*, 7th ed. (1952), vol. II, p. 156; E. Jiménez de Aréchaga, "La legítima defensa individual en la Carta de las Naciones Unidas", *Estudios de derecho internacional (Homenaje al profesor Camilo Barcia Trelles)*, University of Santiago de Compostela (Zaragoza, Octavio y Félez, 1958), pp. 328 *et seq.*, and *Derecho constitucional de las Naciones Unidas* (Madrid, Escuela de funcionarios internacionales, 1958), pp. 401 *et seq.*; D. Ninčić, Reply to the questionnaire prepared by G. Schwarzenberger, in: *ILA, op. cit.*, pp. 617 *et seq.*; S. Krylov, Statement in the debate at the ILA: *ibid.*, p. 512; Q. Wright, "United States intervention in the Lebanon", *The American Journal of International Law* (Washington D.C.), vol. 53, No. 1 (January 1959), pp. 116 *et seq.*; Partsch, *loc. cit.*, p. 257; G. Dahm, *Völkerrecht (op. cit.)*, pp. 410 *et seq.*, and "Das Verbot der Gewaltanwendung nach Art. 2 (4) der UNO-Charta und die Selbsthilfe gegenüber Völkerrechtsverletzungen, die keinen bewaffneten Angriff enthalten", in *Festschrift für Rudolf Laun zu seinem achtzigsten Geburtstag*, Special No. of *Jahrbuch für internationales Recht* (Göttingen), vol. XI (1962), pp. 51 *et seq.*; Brownlie, *op. cit.*, pp. 272 *et seq.*; L. Henkin, "Force, intervention and neutrality in contemporary international law", *Proceedings of the American Society of International Law at its Fifty-Seventh Annual Meeting (Washington, April 25-27, 1963)*, (Washington, D.C., 1963), pp. 148 *et seq.*; Skubiszewski, *loc. cit.*, pp. 765 *et seq.*; Skakunov, *loc. cit.*, pp. 107 *et seq.*; Lamberti Zanardi, *La legittima difesa . . . (op. cit.)*, pp. 204 *et seq.*; Delivanis, *op. cit.*, pp. 49 *et seq.*; Žourek, *loc. cit.*, pp. 52 *et seq.* (see also the comments by E. Castrén and G. Chaumont on the report by Žourek, *ibid.*, pp. 74 *et seq.*); Taoka, *op. cit.*, pp. 126 *et seq.*

In the 2nd edition of H. Kelsen's *Principles of International Law (op. cit.)*, rev. by Tucker, the latter examines the two conflicting interpretations of Article 51, but in the main he seems to prefer that in which self-defence is applicable only in the case of armed attack (pp. 64 *et seq.*). Similarly, Goodrich, Hambro and Simons, in the 3rd edition of their *Charter of the United Nations: Commentary and Documents (op. cit.)*, pp. 344 *et seq.*, incline towards the narrow interpretation, thus rectifying the attitude adopted in the earlier editions.

²⁶² Writers in both schools of thought have stressed that any reference to natural law is unacceptable; see, for example, Bowett, *Self-defence . . . (op. cit.)*, p. 187; Bindschedler, *loc. cit.*, p. 397; Žourek, *loc. cit.*, p. 46; Lamberti Zanardi, *La legittima difesa . . . (op. cit.)*, p. 213.

Spanish by the term “*derecho inmanente*” and in Russian by “*neotemlemoe pravo*” (indefeasible right), is never used in practice to designate the customary right.²⁶³ Again, much emphasis has been placed on the fact that the Charter describes as “inherent” only the right to invoke self-defence as justification of conduct adopted “if an armed attack occurs against” the State. It is not possible to read into the text of Article 51, either explicitly or implicitly, any kind of extension of this right to other cases in which the State is affected by an infringement of a right which, however important, is not held to be one of those infringed by an armed attack. The idea that the case mentioned in Article 51 is intended simply to serve as an example is therefore rejected as absurd and, furthermore, as conflicting with the evidence in the *travaux préparatoires*.²⁶⁴ Lastly, and what is most important for the present purposes, the writers who have gone most thoroughly into the substance of this problem have highlighted the plain truth (and the present writer is firmly convinced that it is the truth) that the principles that were current in general international law at the time when the Charter was drafted in no way differed, as to substance, from those laid down in Article 51. The entire question of a conflict between two allegedly different rules, one said to be operative in general international law and the other in the United Nations system of law, is artificial and has no basis in fact. There is no conflict, no divergence, no “referral” from the one to the other. In international law, whether customary general international law or the treaty law of the Charter, there is only one basic rule on the matter under consideration; there is in both systems only one exception, that of “self-defence”, to the prohibition they now impose on

the use of armed force in inter-State relations, i.e. the right to take up arms to resist an armed attack.

115. The conclusions reached go a long way towards clarifying and simplifying the final task of defining, for the purposes and in the framework of the draft, the principle that self-defence is a circumstance precluding the wrongfulness of conduct by a State that is not in conformity with an international obligation owed by that State. It would be wrong to think that, for these purposes and in this framework, it is necessary also to try to settle some highly controversial problems arising, in doctrine and in United Nations practice, in connection with the interpretation and application of the wording of Article 51 of the Charter. The function of the Commission is to “codify” international law, on this as on all the other topics which it has been considering in its reports on the international responsibility of States. So far as “self-defence” is concerned, the present writer took care first to dispel the mistaken idea that there may be a difference as to substance between the concept of self-defence adopted by customary international law and that adopted by the international treaty law of the United Nations. It has been shown that in this respect the representatives of States who drafted the Charter merely put in writing—in other words, “codified”—the ideas and principles forming part of their legal thinking. The conclusion drawn was, therefore, that the rule to be formulated by the Commission on the topic under consideration cannot stray too far from that embodied in the Charter. The Commission would, however, be going beyond the limits of the task entrusted to it if it wanted in addition to express an opinion on problems which, in the final analysis, only the competent United Nations bodies are qualified to settle. Hence, the Commission is not expected to espouse any one of the (at times) conflicting views held with regard to the interpretation of the Charter and its provisions.

116. Accordingly, the Commission can hardly take sides, for example, in the controversy between those favouring a narrow and those favouring a broad interpretation of the language used in Article 51 to describe the case in which “an armed attack occurs* against a Member of the United Nations” (in French: “un Membre des Nations Unies est l’objet* d’une agression armée”).²⁶⁵ It is not really for the Commission to decide whether, correctly construed, these terms mean that recourse to armed force is inadmissible for the purpose of confronting action that has not yet in fact taken the form of an actual armed attack (“agression”) or that they mean, rather, that the possibility of what is known as “preventive” self-defence is admissible, particularly if the object of the preventive action is to halt, before it materializes, a thoroughly planned armed attack that is about to be launched. As is well known, opinions differ as to the

²⁶³ For example, Lamberti Zanardi (*ibid.*). The present writer does not, however, share the view expressed by Kelsen, (*The Law of the United Nations (op. cit.)*, pp. 791–792) that the adjective is merely decorative. In our opinion, as in that of Lamberti Zanardi, the word “inherent”, which is quite simply the one used in the United States of America note during the negotiation of the Briand–Kellogg Pact, is intended primarily to emphasize that the ability to make an exception to the prohibition on the use of force for the purpose of lawfully defending itself against an armed attack is a prerogative of every sovereign State and one that it is not entitled to renounce. This signifies—and attention has already been drawn to this particularly important point—that no treaty can “derogate” from this prerogative manifestly vested in States by an imperative principle.

²⁶⁴ See the analysis of the *travaux préparatoires* on Article 51 made by Lamberti Zanardi, *La legittima difesa . . . (op. cit.)*, pp. 192 *et seq.* and 209 *et seq.*, where he reproduces the most significant statements of position. He infers from them that the representatives of States at the San Francisco Conference, and particularly the representatives of the five major Powers that co-operated in the drafting of Article 51, were perfectly aware that the Article allowed self-defence solely in the case of an armed attack. He also finds confirmation for such a conclusion in a parallel analysis of United Nations practice.

As to the practice for the years 1963–1970, see also J.-P.L. Fonteyne, “Forcible self-help by States to protect human rights: Recent views from the United Nations”, *Humanitarian Intervention and the United Nations*, ed. R. B. Lillich (Charlottesville, Va., University Press of Virginia, 1973), pp. 211 *et seq.*

²⁶⁵ In Spanish: “*en caso de ataque armado*”, and in Russian: “*esli proizoidet vooruzhennoe napadenie*”.

inferences to be drawn from a textual or historical or teleological interpretation. In many specific cases, States have debated this question hotly and at great length, and there is no denying the shortcomings of either of the answers. Nor is it likely that general international law can offer greater clarity and certainty on this question than the legal system of the United Nations, or that it might shed some light on the interpretation. This writer believes, therefore, that the rule he is going to formulate can do nothing more than rely on decisions which can only be taken by other bodies.

117. The same is true of the problems which have arisen and arise in the United Nations in connection with the interpretation of the English words "armed attack" and the French words "*agression armée*", and the question of their approximate equivalence.²⁶⁶ The bodies responsible for interpreting and applying the Charter have often come up against the problem of determining how intensive and extensive the use of armed force must be in order for it to be regarded as an "armed attack" or "*agression armée*". The impact that the Definition of aggression adopted by the General Assembly in 1974²⁶⁷ had on the solution to this problem and the more general problem of determining which acts may be included in the concepts under consideration is certainly not to be underestimated. Under the heading of acts of aggression, the Definition includes acts that do not necessarily all qualify as "armed attacks"; various questions may therefore arise. In trying to determine whether or not an "armed attack" has taken place within the meaning of Article 51, difficulties may, moreover, sometimes arise because of the particular "object" against which the armed attack was directed or because of the "subjects" which carried it out. It is not, however, the purpose of the provision suggested below to try to settle problems of this kind.

118. On the other hand, and without inquiring too deeply into the various problems of interpretation of the Charter which arise in connection with the issue that is about to be mentioned, it is necessary here to touch on the question of "collective self-defence".²⁶⁸ It is important to have a clear idea of what is meant

²⁶⁶ The original proposal used the English words, which were translated into Spanish as "*ataque armado*" and into Russian as "*vooruzhennoe napadenie*".

²⁶⁷ Resolution 3314 (XXIX), annex.

²⁶⁸ See on this question: Kunz, *loc. cit.*, pp. 874–875; Kelsen, "Collective security . . ." (*loc. cit.*), pp. 792 *et seq.*, and *The Law of the United Nations* (*op. cit.*), pp. 792 *et seq.*; Dinh, *loc. cit.*, pp. 24 *et seq.*; B. Boutros Ghali, *Contribution à l'étude des ententes régionales* (Paris, Pedone, 1949), pp. 193 *et seq.*; Waldock, *loc. cit.*, pp. 503 *et seq.*; Stone, *Legal Controls* . . . (*op. cit.*), p. 245; D. W. Bowett, "Collective self-defence under the Charter of the United Nations", *The British Year Book of International Law, 1955–1956* (London), vol. 32 (1957) pp. 130 *et seq.*, and *Self-defence* . . . (*op. cit.*), pp. 200 *et seq.*; Jiménez de Aréchaga, *Derecho constitucional* . . . (*op. cit.*), pp. 412 *et seq.*; Arango-Ruiz, *loc. cit.*, pp. 634–635; McDougal and Feliciano, *op. cit.*, pp.

when this special type of action taken in self-defence is mentioned in relation to action taken by a State which is the direct victim of an aggression or an armed attack, and when it is said that in both cases self-defence may be a circumstance precluding the wrongfulness of State conduct involving the use of armed force. In order not to belabour this point, this writer would make just two remarks. First, one must dismiss the idea that "collective" self-defence means nothing more than a plurality of acts of "individual" self-defence committed collectively—or, better, concurrently—by different States, each of which has been the victim of an armed attack, for there is no reason why the adjective "collective" should be used to describe a situation which is, in fact, only a purely fortuitous juxtaposition of several conducts adopted in "individual" self-defence. Secondly, this writer cannot agree with the idea that, although the reference to collective self-defence in Article 51 of the Charter was doubtless originally bound up with the intention of specially safeguarding the operation of regional arrangements for mutual assistance,²⁶⁹ that principle may not also be applied outside the framework of such arrangements. It seems quite inconsistent to admit, in principle, the full lawfulness of the operation of pre-existing mutual assistance arrangements and, at the same time, to treat as wrongful the fact that a State comes, with the strength at its command—even in the absence of any such arrangements—to the assistance of another State that has suffered an armed attack (that other State must, of course, request or, at least, consent to such assistance). The lawfulness, the full lawfulness, of such conduct was admitted by general international law, as was the lawfulness of the conduct of the attacked State in defending itself by the use of force against an armed attack, as an exception to the general prohibition of the use of armed force, when general international law recognized that prohibition.

119. It was noted above²⁷⁰ that it would be useful to devote some attention to certain questions on which

²⁶⁹ *244 et seq.*; Brownlie, *International Law* . . . (*op. cit.*), pp. 328 *et seq.*; R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (London, Oxford University Press, 1963), pp. 208 *et seq.*; B. Boutros Ghali, *Contribution à une théorie générale des alliances* (Paris, Pedone, 1963), pp. 95 *et seq.*; Skubiszewski, *loc. cit.*, pp. 768 *et seq.*; Delivanis, *op. cit.*, pp. 155 *et seq.*; Lamberti Zanardi, *La legittima difesa* . . . (*op. cit.*), pp. 276 *et seq.*; Žourek, *loc. cit.*, pp. 47–48; Taoka, *op. cit.*, pp. 137 *et seq.*

²⁶⁹ The drafters of the Article were thinking principally of the Act of Chapultepec (16 March 1945), by which a group of American States agreed to treat as an attack against all of them an attack against one of them. (OAS, *The International Conferences of American States, Second Supplement: 1942–1954* (Washington, D.C., 1958), pp. 66 *et seq.*) After the adoption of the Charter, many arrangements were concluded on the same basis; they all provided that the other contracting parties would come to the assistance of a State party that suffered an armed attack, even if no attack had occurred against those other parties and they were not consequently in a position to act in individual self-defence.

²⁷⁰ See para. 109.

the text of Article 51 of the Charter is silent, but which may be of practical importance for the topic under consideration and for which reference to general international law may also be helpful. Accordingly, the passages which follow refer briefly—although certainly these comments would better appear in the commentary than in the text of the article to be drafted—to certain requirements which are frequently said to be essential conditions for the admissibility of the plea of self-defence in a given case. Reference is made, in particular, to the requirements that the action to be excused must, in the case in question, be “necessary”, that it must be “proportional” to the objective which it is supposed to achieve, and that it must take place “immediately”. These are, actually, merely three aspects of the same principle which serves as a basis for the effect, attributed to the situation of self-defence, of precluding the wrongfulness of a given conduct: the objective to be achieved by the conduct in question, its *raison d’être*, is necessarily that of repelling an attack and preventing it from succeeding, and nothing else.²⁷¹

120. The reason for stressing that action taken in self-defence must be *necessary* is that the State attacked (or threatened with imminent attack, if one admits preventive self-defence) must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force. In other words, had it been able to achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravened the general prohibition against the use of armed force. The point is self-evident and is generally recognized; hence it requires no further discussion. It should merely be noted that this requirement would be particularly important if the idea of preventive self-defence were admitted. It would obviously be of lesser importance if only self-defence following the attack was regarded as lawful.

121. The requirement of the *proportionality* of the action taken in self-defence, as we have said, concerns the relationship between that action and its purpose, namely—and this can never be repeated too often—that of halting and repelling the attack or even, in so

far as preventive self-defence is recognized, of preventing it from occurring. It would be mistaken, however, to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the “defensive” action, and not the forms, substance and strength of the action itself. A limited use of armed force may sometimes be sufficient for the victim State to resist a likewise limited use of armed force by the attacking State, but this is not always certain. Above all, one must guard against any tendency in this connection to consider, even unwittingly, that self-defence is actually a form of sanction, such as reprisals. There must of course be some proportion between the wrongful infringement by one State of the right of another State and the infringement by the latter of a right of the former through reprisals. In the case of conduct adopted for punitive purposes, of specifically retributive action taken against the perpetrator of a particular wrong, it is self-evident that the punitive action and the wrong should be commensurate with each other. But in the case of action taken for the specific purpose of halting and repelling an armed attack, this does not mean that the action should be more or less commensurate with the attack. Its lawfulness cannot be measured except by its capacity for achieving the desired result. In fact, the requirements of the “necessity” and “proportionality” of the action taken in self-defence can simply be described as two sides of the same coin. Self-defence will be valid as a circumstance precluding the wrongfulness of the conduct of the State only if that State was unable to achieve the desired result by different conduct involving either no use of armed force at all or merely its use on a lesser scale.

Within these limits and in this sense, the requirement of proportionality is definitely confirmed by State practice.²⁷² The occasional objections and doubts expressed about it have been due solely to the mistaken idea of a need for some kind of identity of content and strength between the attack and the action taken in self-defence. It must be emphasized once again that, without the necessary flexibility, the requirement would be unacceptable. As indicated at the beginning of this paragraph, a State which is the victim of an attack cannot really be expected to adopt measures that in no way exceed the limits of what might just suffice to prevent the attack from succeeding and bring it to an end. If, for example, a State suffers a series of successive and different acts of armed attack from another State, the requirement of proportionality will certainly not mean that the victim State is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating succession of

²⁷¹ On the subject of the requirements referred to, see Kunz, *loc. cit.*, pp. 877–878; Jessup, *op. cit.*, pp. 163–164; Cheng, *op. cit.*, pp. 94 *et seq.*; Waldock, *loc. cit.*, pp. 463–464; Schwarzenberger, “The fundamental principles . . .” (*loc. cit.*), pp. 332 *et seq.*; Jiménez de Aréchaga, “La legítima defensa . . .” (*loc. cit.*), pp. 337–338, and *Derecho constitucional . . .* (*op. cit.*), pp. 411–412; Dahm, *Völkerrecht* (*op. cit.*), pp. 417–418; McDougal and Feliciano, *op. cit.*, pp. 217–218, 229 *et seq.*, 241 *et seq.*; Brownlie, *International Law . . .* (*op. cit.*), pp. 261 *et seq.* and 434; Higgins, *op. cit.*, p. 205; Kelsen, *Principles . . .* (*op. cit.*), pp. 81 *et seq.*; Goodrich, Hambro and Simons, *op. cit.*, p. 347; Lamberti Zanardi, *La legittima difesa . . .* (*op. cit.*), pp. 127 *et seq.*, 267 *et seq.*; R. W. Tucker, “Reprisals and self-defence: the customary law”, *The American Journal of International Law* (Washington, D.C.), vol. 66, No. 3 (July 1972), pp. 588–589; Zourek, *loc. cit.*, pp. 48 *et seq.*

²⁷² See the cases cited by Lamberti Zanardi, *La legittima difesa . . .* (*op. cit.*), pp. 127 *et seq.*, 267 *et seq.*

attacks. If this conviction were to lead to the opposite extreme, that of denying that the requirement of proportionality has any incidence whatsoever on the lawfulness of an armed reaction to self-defence, it might be held to justify acts such as the large-scale murderous bombing of large areas of a State's territory in order to secure the evacuation of a small island wrongfully occupied by its forces. Even in national law, excessive forms of self-defence are punishable.

Here too one must keep in mind the distinction between action taken in self-defence proper and a subsequent and separate punitive and retributive action (even if materially alike) that the State which is the victim of the wrong represented by the armed attack takes against the State which did the wrong. Moreover, the limits inherent in the requirement of proportionality are clearly meaningless where the armed attack and the likewise armed resistance to it lead to a state of war between the two countries.

122. There remains the third requirement, namely that armed resistance to armed attack should take place *immediately*, i.e. while the attack is still going on, and not after it has ended. A State can no longer claim to be acting in self-defence if, for example, it drops bombs on a country which has made an armed raid into its territory after the raid has ended and the troops have withdrawn beyond the frontier. If, however, the attack in question consisted of a number of successive acts, the requirement of the immediacy of the self-defensive action would have to be looked at in the light of those acts as a whole. At all events, practice and doctrine seem to endorse this requirement fully, which is not surprising in view of its plainly logical link with the whole concept of self-defence.

123. One final question deserves to be touched on: who is to determine whether in a given practical case the conditions are such as to justify invoking self-defence? It seems perfectly evident that a State which considers itself the victim of an armed attack or, in more general terms, of conduct entitling it to react in self-defence against the author of that conduct, should not have to seek anybody's permission beforehand to do so; to maintain the opposite would be to contradict the very essence of the notion of self-defence. If, in certain circumstances, a State considers itself or another State to be the victim of an attack and takes

the view that it must therefore use armed force immediately in order to repel it, the extremely urgent situation obviously leaves it no time or means for requesting other bodies, including the Security Council, to undertake the necessary defensive action. There is of course nothing extraordinary in this. Seen from that angle, the situation is the same as when conduct not in conformity with an international obligation is adopted in other circumstances which international law likewise regards as precluding the wrongfulness of the conduct. This does not mean, however, that the State acting in self-defence simply has unilateral discretion to determine outright whether conditions permit it to do so.²⁷³ Other States, first and foremost the State affected by the conduct allegedly adopted in self-defence, may object that the necessary conditions did not exist. A dispute will then arise, the settlement of which is to be sought, in principle, by one of the peaceful means contemplated in Article 33 of the Charter. If the State which acted should be held not to have been entitled to invoke self-defence in justification of its action, the wrongfulness of the conduct it adopted will not be precluded and the State will obviously incur responsibility for that conduct.

124. The writer considers that the necessary information and elements are now to hand for proceeding to a definition of the rule of international law concerning self-defence. Having regard to the conclusions reached on the different matters discussed in this section, he wishes to propose the adoption by the Commission of the following provisions:

Article 34. Self-defence

The wrongfulness of an act of a State not in conformity with an international obligation to another State is precluded if the State committed the act in order to defend itself or another State against armed attack as provided for in Article 51 of the Charter of the United Nations.

²⁷³ See, in this sense H. Lauterpacht, *The Function of Law in the International Community* (Oxford, Clarendon Press, 1933), pp. 177 *et seq.*; Giraud, *loc. cit.*, pp. 800 *et seq.*; Basdevant, *loc. cit.*, p. 549; Jessup, *op. cit.*, pp. 164–165; Oppenheim, *op. cit.*, 7th ed. (1952), vol. II, pp. 159, 186 *et seq.*; Jiménez de Aréchaga, "La legítima defensa . . ." (*loc. cit.*), pp. 335–336, and *Derecho constitucional . . .* (*op. cit.*), pp. 409–410; McDougal and Feliciano, *op. cit.*, pp. 218 *et seq.*; Higgins, *op. cit.*, p. 205; Briery, *The Law of Nations* (*op. cit.*), pp. 407–408; Zourek, *loc. cit.*, pp. 49–50.

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**Observations and comments of Governments on chapters I, II and III
of part 1 of the draft articles on State responsibility for
internationally wrongful acts**

[Original: English,
French, Russian,
Spanish]
[6 March, 1 and 21 April,
6 and 21 May 1980]

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NOTE

For the text of chapters I, II and III of part I of the draft articles on State responsibility, see *Yearbook . . . 1979*, vol. II (Part Two), pp. 91-93, document A/34/10, chap. II, sect. B.1.

INTRODUCTION

1. The International Law Commission, at its thirtieth session in 1978, decided, in accordance with articles 16 and 21 of its Statute, to communicate to Governments, through the Secretary-General, chapters I, II and III of part 1 of its draft articles on responsibility of States for internationally wrongful acts, and to request them to transmit their observations and comments on the provisions of those chapters. Governments were requested to submit their observations and comments on the provisions in question by 31 December 1979.¹

¹ See *Yearbook . . . 1978*, vol. II (Part Two), pp. 77-78, Document A/33/10, para. 92.

In the Commission's opinion, because of the complexity of the topic of State responsibility for internationally wrongful acts, Governments must have as much time as possible for preparing the observations and comments in the light of which the Commission will, at the appropriate time, have to undertake the second reading of the draft articles under consideration. The Commission accordingly reached the conclusion that the articles of the draft should be submitted to Governments for observations and comments before the draft as a whole is adopted on first reading. Such a procedure, which has been followed in the past by the Commission in connection with other

drafts (such as the draft articles on the law of treaties) would make it possible for the second reading to be undertaken by the Commission without too great a delay.²

2. The General Assembly, by paragraph 8 of section I of resolution 33/139 of 19 December 1978, endorsed the Commission's decision. The General Assembly also, by paragraph 4(a) of the same section of that resolution, recommended that the Commission should:

Continue its work on State responsibility with the aim of completing at least the first reading of the set of articles constituting part I of the draft on responsibility of States for internationally wrongful acts, within the present term of office of the members of the International Law Commission, taking into account the views expressed in debates in the General Assembly and the observations of Governments.

3. At its thirty-first session in 1979, the Commission expressed its intention to conclude its study of the circumstances precluding wrongfulness considered in the Special Rapporteur's eighth report which were still outstanding, namely, state of necessity and self-defence, and thus complete on first reading part I of the draft articles on State responsibility for internationally wrongful acts within the present term of office of the members of the Commission, as recommended by the General Assembly in its resolution 33/139.³

² *Ibid.*

³ *Yearbook ... 1979*, vol II (Part Two), p. 90, document A/34/10, para. 71.

4. The General Assembly, by paragraph 4(b) of resolution 34/141 of 17 December 1979, recommended *inter alia* that the Commission should:

Continue its work on State responsibility with the aim of completing, at its thirty-second session, the first reading of the set of articles constituting part one of the draft on responsibility of States for internationally wrongful acts, taking into account the written comments of Governments and views expressed on the topic in debates in the General Assembly . . .

5. Pursuant to the Commission's decision, endorsed by the General Assembly, the Secretary-General, by means of a letter signed by the Legal Counsel, dated 18 January 1979, requested Governments to transmit their observations and comments on the provisions of chapters I, II and III of part 1 of the draft articles on State responsibility for internationally wrongful acts, not later than 31 December 1979. By 21 May 1980, replies to the Legal Counsel's letter had been received from the Governments of the following twelve Member States: Austria, Barbados, Byelorussian Soviet Socialist Republic, Canada, Chile, Mali, Mauritius, the Netherlands, Qatar, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics and Yugoslavia. The Governments of Mauritius and Qatar indicated that they had no comments or observations at present. The comments and observations received from the Governments of the ten other States are reproduced below, in alphabetical order. Further comments and observations that may be received from Governments will be reproduced in addenda to the present document.

Observations and comments of governments

Austria

[Original: English]
[25 April 1980]

1. GENERAL REMARKS

1.1 *Form of the draft*

1. In its report on the work of its twenty-fifth session (1973), the International Law Commission states that the final form to be given to the codification of State responsibility will have to be decided upon when the Commission has completed the draft. The Commission states further that, without prejudicing this decision, it has decided to give to the study the form of a set of draft articles, as expressly recommended by the General Assembly in resolutions 2780 (XXVI) and 2926 (XXVII).¹

2. It should be noted, however, that the language used in these resolutions, like "preparation of draft

articles" (resolution 2780 (XXVI)) or "preparation of a first set of draft articles" (resolution 2926 (XXVII)), suggests the unreflected use of familiar words rather than a firm commitment of the General Assembly to the form of a convention. Be that as it may, the present draft articles, and what is known of the remaining parts, have such a highly theoretical character and are so firmly rooted in one conception that it is doubtful whether they could survive a diplomatic conference intact. A single successful amendment to a key article could alter the whole meaning of it.

3. Thought should therefore be given to alternative methods of putting the finished draft to use in the international community.

1.2 *Scope of the draft*

4. Although the Commission has hitherto intentionally refrained from formulating an article or articles on the scope of its draft² it had, during the course of its work, to make some decisions concerning it.

¹ *Yearbook ... 1973*, vol. II, p. 169, Document A/9010/Rev.1, para. 36.

² See *Yearbook ... 1970*, vol. II, p. 307, document A/8010/Rev.1, para. 72.

1.2.1 *Comprehensive study*

5. The existing draft articles prove that the decision not to limit the study to the international responsibility for injuries to aliens³ was necessary and useful, although the Commission will now have to take care so as not to adhere too closely to one specific notion of state responsibility to the detriment of other elements. It should bear in mind that the draft it is going to produce ought to be generally acceptable and, accordingly, take into account the various concepts which exist in this respect.

1.2.2 *Limiting the draft to the responsibility of States*

6. In limiting the draft to the international responsibility of States,⁴ the Commission is continuing an approach which it had initiated with the matter of diplomatic law and the law of treaties. Even if one does not fully share the theoretical reasons given therefore, on practical grounds it is certainly preferable not to complicate an already stupendous task.

1.2.3 *Exclusion of the liability for risk*

7. It appears further justified to exclude from the study the totally different problem of liability for lawful activities, which is at present regulated exclusively by special multilateral conventions (e.g. nuclear energy and outer space).⁵

8. It is nevertheless commendable that the Commission has in the meantime made this important matter the subject of a separate study⁶ which has, as a first result, led to significant clarifications of the terminology.

1.3 *Structure of the draft*

9. The 26 draft articles (Chapters I, II and III of part 1) on which the General Assembly invited comments in Resolution 33/139 are only a fragment of the proposed draft on State responsibility. Since the adoption of that resolution the Commission has adopted more articles,⁷ thereby completing, except for two articles, part 1 of the draft. Although these

additional articles are not formally within the scope of the present comment, they will be referred to when necessary.

10. According to the general plan, as set forth in the Commission's report on the work of its twenty-seventh session (1975),⁸ the draft, when completed, will consist of three parts: the first, dealing with the origin of international responsibility, the second, with the content, forms and degrees of international responsibility, and a possible third, with the settlement of disputes and the "implementation" ("*Mise en œuvre*") of international responsibility.

11. This incomplete state of the draft makes it extremely difficult to judge its usefulness as a whole. Although the general plan seems to indicate that the draft, when finished, will cover the whole subject, the importance of certain issues mentioned for inclusion in the as yet untouched parts cannot be properly assessed. It is, for instance, not altogether clear whether provisions on the settlement of disputes are needed in the context of the draft until it is known what sort of articles are proposed and what function they are intended to have in the draft.

12. Moreover, the lack of precise information as to what questions are to be regulated in the missing parts, and in what manner, makes it impossible to comment in any definite and final way, even on the handling by the Commission of some fundamental issues in the existing draft articles.

13. Two examples may illustrate that point.

1.3.1 *The issue of "fault"*

14. The report submitted in 1963 by Mr. Ago, Chairman of the Sub-Committee on State responsibility, which identified the problems to be dealt with in the study of State responsibility, mentions "fault" as a subjective element of the internationally wrongful act in the form of the following query: "Must there be fault on the part of the organ whose conduct is the subject of a complaint? Objective responsibility and responsibility related to fault *lato sensu*. Problems of the degree of fault." To this a footnote adds that "it would be desirable to consider whether or not the study should include the very important questions which may arise in connection with the proof of the events giving rise to responsibility".⁹

15. The present draft article 3, however, does not include "fault" among the constituent elements of an internationally wrongful act, but formulates "objectively" that every breach of an international obligation constitutes an internationally wrongful act of the state to which it is attributable. And even though the

³ See *Yearbook ... 1963*, vol. II, p. 228, document A/5509, annex I, para. 5.

⁴ See *Yearbook ... 1970*, vol. II, p. 306, document 8010/Rev.1, para. 66(a), and *Yearbook ... 1973*, vol. II, p. 179, document A/9010/Rev.1, chap. II, sect. B, art. 2, para. (11) of the commentary.

⁵ See *Yearbook ... 1969*, vol. II, p. 233, document A/7610/Rev.1, para. 83, and *Yearbook ... 1973*, vol. II, p. 169, document A/9010/Rev.1, paras. 38-39.

⁶ See *Yearbook ... 1978*, vol. II (Part Two), pp. 149 *et seq.*, document A/33/10, paras. 170-178, and A/CN.4/L.284 and Corr.1, section II of which is reproduced in *ibid.*, pp. 150-152, document A/33/10, annex.

⁷ See *Yearbook ... 1979*, vol. II (Part Two), pp. 91 *et seq.*, document A/34/10, chap. III, sect. B.1.

⁸ *Yearbook ... 1975*, vol. II, pp. 55 *et seq.*, document A/10010/Rev.1, paras. 38-51.

⁹ *Yearbook ... 1963*, vol. II, p. 228, document A/5509, annex I, para. 6.

solution thus adopted can by no means be traced to a consensus of the theory and practice of international law, neither the Special Rapporteur nor the Commission, in their respective reports, discuss the problem at all in relation to article 3, nor do they give any reason for their choice. This is all the more surprising as the Special Rapporteur, in a text entitled "Le délit international", established fault as an essential "subjective" element of the internationally wrongful act.¹⁰

16. Notwithstanding the above-mentioned choice of the Commission, the term "negligent" creeps in sometimes in the commentaries of the Special Rapporteur¹¹ or of the Commission,¹² without, however, being anywhere regulated or defined.¹³

17. Even for all that, however, no final opinion can be expressed on the issue, since it may still be the subject of regulation in presently missing parts of the draft.

18. One thing, however, needs to be stated clearly: even if one adheres to the view of the Special Rapporteur¹⁴ which the Commission endorsed—"that the topic of the international responsibility of States was one of those in which progressive development could be particularly important",¹⁵ such progressive development would still require a convincing reasoning in each instance to become acceptable. Passing over a problem in silence cannot be counted as such.

1.3.2 *The issue of grading international obligations according to their importance to the international community*

19. This issue, too, cannot be properly evaluated in the absence of part 2. In the report on the work of its twenty-second session (1970), the Commission endorsed the warning of its Special Rapporteur¹⁶ against confusing the task of determining the principles which govern the responsibility of States for internationally wrongful acts with that of defining the rules that place obligations on States, the violation of which may generate responsibility. It admitted, however, that these "may have to be treated as a necessary element in assessing the gravity of an internationally wrongful act and as a criterion for determining the consequences it should have",¹⁷—thus presumably in part 2.

¹⁰ R. Ago, "Le délit international", *Recueil des cours de l'Académie de droit international de La Haye, 1939-II* (Paris, Sirey, 1947), vol. 68, pp. 476–498.

¹¹ See *Yearbook ... 1970*, vol. II, p. 194, document A/CN.4/233, para. 51; and *Yearbook ... 1971*, vol. II (Part One), p. 222, document A/CN.4/246 and Add.1–3, para. 71.

¹² See *Yearbook ... 1973*, vol. II, pp. 182–183, document A/9010/Rev.1, chap. II, sect. B., para. (11) of the commentary to art. 3.

¹³ See also sect. 2.3 below, observations relating to art. 23.

¹⁴ *Yearbook ... 1970*, vol. II, p. 185, document A/CN.4/233, para. 24.

¹⁵ *Ibid.*, p. 307, document A/8010/Rev.1, para. 71.

¹⁶ *Ibid.*, pp. 184–185, document A/CN.4/233, paras. 22–25.

¹⁷ *Ibid.*, p. 306, document A/8010/Rev.1, para. 66, (c).

20. It appears, however, that for systematic reasons the Commission felt compelled to introduce already in article 19 a distinction between "international crimes" and "international delicts", the distinction being based on the quality of the violated norm, of which several examples are cited in the text of the article.

21. Whether this distinction, which is a particular concern of the Soviet theory of international law, is useful and justified in the present context can only be determined after the consequences of this distinct category of internationally wrongful acts have been formulated in part 2 of the draft.

2. COMMENTS ON INDIVIDUAL ARTICLES

22. The incompleteness of the draft further suggests that comments should be made rather on the handling of fundamental issues in the draft articles than on the formulation of the articles. Individual draft articles are, therefore, commented on only in relation to such fundamental issues.

23. An additional difficulty arises from the fact that the Commission has worked for many years on the draft and during the course of those years, for one or another reason, has changed its position on some points, so that its commentary to later articles is not always consistent with that to earlier ones.

2.1 *General principles* (chapter I, articles 1–4)

Article 1

24. In paragraph (12) of the commentary to article 1 the Commission states that it:

felt unable to accept the idea of some writers that the rule that any internationally wrongful act of a State involves the international responsibility of that State should allow of an exception in the case where the wrongful act was committed in any of the following circumstances: *force majeure* or act of God, consent of the injured State, legitimate exercise of a sanction, self-defence or emergency.

It was of the opinion that;

the true effect of the presence of such circumstances is not, at least in the normal case, to preclude responsibility that would otherwise result from an act wrongful in itself, but rather to preclude the characterization of the conduct of the State in one of those circumstances as wrongful.¹⁸

Hence it proposes to deal with the question in chapter V of part 1 of the draft.

25. Although this view seems basically correct, it is inconsistent with paragraph (7) of the commentary to article 2, which reads:

When a State engages in certain conduct in circumstances such as self-defence, *force majeure* or the legitimate application of a sanction, its conduct does not constitute an internationally wrongful act because, in those circumstances, the State is not required to comply with the international obligation which it

¹⁸ *Yearbook ... 1973*, vol. II, p. 176, document A/9010/Rev.1, chap. II, sect. B.

would normally have to respect, so that there cannot be a breach of that obligation.¹⁹

26. If one compares that second statement with the wording of article 1, the cases contemplated seem to fall outside the scope of the draft because, according to article 1 it applies only to responsibility for internationally *wrongful* acts. Yet this is precisely the impression which the Commission, according to the commentary to article 1, wishes to avoid. If, however, these seemingly contradictory comments simply are to imply, as paragraph (13) of the commentary to article 1²⁰ appears to suggest, that international responsibility is not limited to internationally wrongful acts, this should be expressed more clearly in the text and not only in the commentary. The necessity of this conception should, moreover, be reviewed in the light of the decision of the Commission, concerning liability for injuries resulting from lawful activities.²¹

27. In any case, as pointed out in section 1.3 above, this is one of the articles whose final appreciation depends on the completion of the draft.

Article 2

28. In paragraph (5) of the commentary to article 2, the Commission considers the case of States members of a federal union which have retained, within limits, a measure of international personality. In dealing with the argument that "even when it was the member State which, within the limits of its international personality, had assumed an obligation towards another State, it was still the federal State and not the member State which bore the responsibility for a breach of that obligation by the member State", the Commission states:

Without wishing to take a position at the present stage on the validity of this argument, the Commission noted that, even if it proved to be well-founded, the breach of an international obligation committed by the member State possessing international personality would still constitute an internationally wrongful act by that member State.²²

29. While the opinion expressed in the last part of the sentence seems to be correct, it cannot be reconciled with the first-mentioned view, and thus the linking part of the sentence, "even if it proved to be well-founded", is misleading. Obviously, two different subjects of law cannot bear responsibility for the same act unless the conditions of article 27 or article 28 apply.²³

30. What is presumably meant is that the consequences of an internationally wrongful act committed by a member State of a federal union may affect the

federal State, for instance if it resulted in the duty to make monetary compensation and the member State did not possess financial autonomy. Although this situation will most likely be dealt with in either part 2 or part 3 of the draft, that should not deter the Commission from eliminating the present inconsistency from the commentary to article 2.

Article 3

31. In what is probably the key article of the whole draft, the Commission establishes two constituent elements of the internationally wrongful act of the State: a breach of an international obligation (objective element), being attributable to that State (subjective element).

32. As has been pointed out in section 1.3.1, it is impossible at the present stage of the draft, in which essential parts are still missing, to determine whether the omission of "fault" from the definition of the subjective elements of the internationally wrongful act leads to a satisfactory result.

33. The same is true for the omission of the element of "damage" or "injury" from the definition of the objective elements of the internationally wrongful act. The arguments which led the Special Rapporteur to his choice²⁴ and which have been *grosso modo* accepted and repeated by the Commission²⁵ seem logical and convincing. Still, a final assessment will become possible only after part 2 of the draft has been formulated, since it will only then appear which modes of reparation the Commission had in mind for internationally wrongful acts which cause neither "economic" nor "moral" damage.²⁶ The successful solution of this problem will be the decisive test of the usefulness of the present formulation of article 3.

2.2. The "act of the State" under international law (chapter II, articles 5–15)

Article 7

34. See comments above on article 2.

Article 8

35. The wording of sub-paragraph (a) of this article is ambiguous, since it seems to cover cases where a "person or group of persons was in fact acting on behalf of the State" in transactions under private law.

²⁴ See *Yearbook ... 1970*, vol. II, pp. 194–195, document A/CN.4/233, paras. 53–54; and *Yearbook ... 1971*, vol. II (Part One), p. 223, document A/CN.4/246 and Add.1–3, paras. 73–74.

²⁵ See *Yearbook ... 1970*, vol. II, pp. 308–309, document A/8010/Rev.1, para. 81; and *Yearbook ... 1973*, vol. II, pp. 183–184, document A/9010/Rev.1, chap. II, sect. B, para. (12) of the commentary to article 3.

²⁶ *Yearbook ... 1973*, vol. II, pp. 183–184, document A/9010/Rev.1, chap. II, sect. B, para. (12) of the commentary to article 3.

¹⁹ *Ibid.*, p. 178.

²⁰ *Ibid.*, p. 176.

²¹ See sect. 1.2.3 above.

²² *Yearbook ... 1973*, vol. II, p. 177, document A/9010/Rev.1, chap. II, sect. B.

²³ See *Yearbook ... 1974*, vol II (Part One), pp. 280–281, document A/9610/Rev.1, chap. III, sect. B.2, paras. (9)–(11) of the commentary to article 7.

i.e. in the same manner as private persons. As the Commission has pointed out,²⁷ it considers the effective exercises of elements of the governmental authority an indispensable condition for cases falling under subparagraph (b).

36. The same should apply to subparagraph (a). The Special Rapporteur stated in the commentary to his proposed article that "the underlying principle in international law . . . requires that the criterion should be the public character of the function or mission in the performance of which the act or omission contrary to international law was committed".²⁸ It would, therefore, be preferable to qualify the formulation in subparagraph (a) in a manner that would limit it to the effective exercise of elements of the governmental authority or, at least, exclude transactions under private law.

Article 13

37. It is doubtful whether the Commission's decision not to include in this article a second paragraph, corresponding to the provisions in articles 11, 12 and 14, meets the requirements of the case. As the Commission has noted, a territorial State might incur international responsibility if it "associated itself with the perpetration, by an organ of the organization, of an action constituting an internationally wrongful act, or if it failed to react in the appropriate manner to such an action . . .".²⁹ Without underestimating the difficulties of formulating a suitable provision, to which the Commission alludes, it is nevertheless unlikely that mere silence of the draft will solve the problem. The uncertainty created by the silence may, on the contrary, give rise to unnecessary international disputes.

Article 14

38. When reading paragraph (12) of the commentary to article 8³⁰ in conjunction with paragraphs (3), (4) and (5) of the commentary to article 14,³¹ it is not clear whether article 14, paragraph 1, includes the case of an insurrectional movement, *recognized by foreign States as a local de facto government*, which in the end does not establish itself in any of the modes covered by article 15 but is defeated by the central authorities. Again, uncertainty may engender unnecessary disputes.

²⁷ See *Yearbook . . . 1974*, p. 285, document A/9610/Rev.1, chap. III, sect. B.2, para. (11) of the commentary to art. 8.

²⁸ *Yearbook . . . 1971*, vol. II (Part One), p. 264, document A/CN.4/246 and Add.1-3, para. 191.

²⁹ *Yearbook . . . 1975*, vol. II, pp. 90-91, document A/10010/Rev. 1, chap. II, sect. B.2, para. (13) of the commentary to art. 13.

³⁰ See *Yearbook . . . 1974*, vol. II (Part One), pp. 285-286, document A/9610/Rev.1, chap. III, sect. B.2.

³¹ *Yearbook . . . 1975*, vol. II, pp. 91-92; document A/10010/Rev.1, chap. II, sect. B.2.

2.3 *The breach of an international obligation* (chapter II, articles 16-26)

Article 18

39. Although the concept underlying paragraph 2 of article 18 is fully in line with present-day international law, the Commission was unfortunately unable to translate that concept, as explained in the commentary to the article,³² faithfully into the text. The words "ceases to be considered an internationally wrongful act if, subsequently . . ." are by no means precise enough to prevent the occurrence of situations which, according to the commentary, the Commission intended to exclude.

Article 19

40. See comments under section 1.3.2 above.

Articles 20, 21 and 22

41. Although under present circumstances it is rare that individuals have legal remedies against the inaction of legislatures, a development in this direction is neither theoretically excluded nor practically impossible. Where such a remedy exists, an alien concerned would have to exhaust the local remedies under the circumstances envisaged in article 22, even when the obligation breached was one requiring the State to adopt a particular course of conduct (art.20).

42. It would therefore seem advisable not to limit the application of article 22 to the obligations mentioned in article 21, but to include obligations demanding the adoption of a particular course of conduct in the introductory sentence of article 22. Since only "effective remedies" require exhaustion, the situation would not change for States which do not provide individuals with legal remedies against the inaction of their legislatures; but the suggested reformulation would leave room for future developments.

Article 23

43. The qualification of the obligations mentioned as examples in the commentary to the article³³ as obligations to prevent a given event, on the understanding that "The State bound by an obligation of this kind cannot assert that it has achieved the required result by claiming that it has set up a perfect system of prevention if in practice that system proves ineffective and permits the event to occur",³⁴ without taking account of the element of "due diligence", leads to unacceptable results. The statement: "Only when the event has occurred because the State has failed to

³² See *Yearbook . . . 1976*, vol. II (Part Two), p. 92, document A/31/10, chap. III, sect. B.2, para. (18) of the commentary to art. 18.

³³ See *Yearbook . . . 1978*, vol. II (Part Two), pp. 81-82, document A/33/10, chap. III, sect. B.2, para. (3) of the commentary to art. 23.

³⁴ *Ibid.*, p. 82, para. (4) of the commentary.

prevent it by its conduct, *and when the State is shown to have been capable of preventing it by different conduct . . .*³⁵ taken literally in its unmitigated form, would imply that a State may be required to surround a foreign diplomatic mission with its whole army to prevent an infringement of its inviolability, simply because it will, obviously, be “capable [of that] different conduct”. This is, surely, a most undesirable result of the rule as presently phrased.

44. The Commission seems to feel the undesirability of the result, since it uses qualifying phrases in the commentary to balance the aforementioned statements, like “the conduct that it might *reasonably* be expected to have adopted”,³⁶ “lack of prevention”,³⁷ “adopt measures *normally* likely to prevent”³⁸ but none of this qualifying language transpires into the text of the article itself. On the contrary: the Commission, in eliminating the words “following a lack of prevention” from the text proposed by the Special Rapporteur,³⁹ eliminated even the last qualifying condition.

45. Although, as stated above in section 1.3.1, the incomplete state of the draft makes a final assessment of the existing draft articles impossible, it is difficult to see how the above-mentioned shortcomings of article 23 can be redressed in another part of the draft without improving the present text of that article and adjusting its commentary.

³⁵*Ibid.*, pp. 82–83, para (6) of the commentary (emphasis not in original text). See also pp. 85–86, para (16) of the commentary.

³⁶*Ibid.*, pp. 82–83, para. (6) of the commentary (emphasis not in original text).

³⁷*Ibid.*, pp. 83 and 85, paras. (8) and (14) of the commentary.

³⁸*Ibid.*, p. 85, para. (13) of the commentary (emphasis not in original text).

³⁹*Ibid.*, vol. II (Part One), p. 37, document A/CN.4/307 and Add.1 and 2, para. 19.

Barbados

[Original: English]
[November 1979]

It is highly desirable that the draft articles, being a full and explicit enunciation of the principles underlying state responsibility for internationally wrongful acts, should be included in a convention.

Byelorussian Soviet Socialist Republic

[Original: Russian]
[9 April 1980]

1. The consolidation of international relations on the basis of the principles of peaceful coexistence among States with different social systems serves in every way to promote the vast expansion of the role of inter-

national law in strengthening and deepening the process of international détente and in [further] developing the progressive principles set out in the Charter of the United Nations.

2. This is also the perspective from which to consider the first three chapters of part 1 of the draft articles prepared by the International Law Commission on State responsibility for internationally wrongful acts, which, on the whole, in the opinion of the Byelorussian SSR must be viewed positively.

3. The Byelorussian SSR attaches great importance to the provisions of article 19 of the draft, which contains a separate enumeration and definition of such internationally wrongful acts of States as aggression, genocide, *apartheid* and the maintenance by force of colonial domination.

4. The inclusion of these internationally wrongful acts in the list of international crimes is unquestionably in keeping with the tasks of the struggle to strengthen peace and international security and with the purposes and principles of the Charter of the United Nations.

5. The Byelorussian SSR reserves the right to make additional observations as work on the draft articles progresses and after the entire draft has been completed.

Canada

[Original: English]
[11 January 1980]

1. The Government of Canada considers that draft articles 1–26 elaborated by the International Law Commission on the subject of State responsibility for internationally wrongful acts can constitute an important contribution to the codification and progressive development of international law in a sensitive area of inter-State relations. The decision of the Commission to concentrate its efforts on formulating “secondary rules” of State responsibility and to avoid in its present work programme the elaboration of definitions of acts of States that would constitute internationally wrongful acts has materially assisted it in achieving a large measure of success with respect to the 26 draft articles open for observation and comment. In that the implications of these draft articles cannot be fully assessed until the two remaining draft articles in part 1, and the whole of part 2 of the draft, on the content, forms and degrees of international responsibility, have been completed, the observations and comments that follow are necessarily general in nature and tentative.

2. Canada, as a federal State, fully supports the concept contained in paragraph 1 of draft article 7 wherein the conduct, as defined, of a territorial governmental entity within a State is considered to be an act of the State itself. This concept is consistent with the theory and practice of federal States such as

Canada. Concern must be expressed, however, with respect to the breadth of responsibility of a State that is outlined in paragraph 2 of draft article 7. The Government of Canada considers that further study should be given to the question of the attribution to a State of responsibility in respect of the conduct of an entity which is not part of the formal structure of the State or of a territorial governmental entity but which is empowered to exercise elements of governmental authority. In the view of the Government of Canada the circumstances in which a State may be held responsible for such actions must be more restrictively delineated. Its position on this paragraph is therefore reserved.

3. The Government of Canada would make a comment with respect to paragraph (b) of draft article 8 similar to that made concerning paragraph 2 of draft article 7, and would therefore reserve its position on this paragraph.

4. In the view of the Government of Canada, paragraph 1 of draft article 18 correctly states the rule with respect to the requirement that a breach of an international obligation may only occur in respect of an obligation that was in force for the State concerned at the time the act in question was performed. It is for further consideration whether paragraphs 3, 4 and 5 of draft article 18, being details of the rule, are necessary. The Government of Canada would agree with the representative of New Zealand at the Sixth Committee that, of the three, paragraph 4, concerning composite acts, would appear to be of greatest importance.¹ However, where possible, the Government of Canada considers that the rules under elaboration should be formulated as simply as possible. Paragraph 2 of draft article 18 appears to give sanction to the concept of retroactivity. As the Government of Canada considers that this concept, in respect of legal provisions, should be circumscribed to the maximum degree possible, its view is that paragraph 2 of draft article 18, along with paragraphs 3, 4 and 5, should be given further consideration. Its position on this draft article is therefore reserved.

5. The Government of Canada considers that the Commission, in its elaboration of draft article 19, has formulated a primary rule of State responsibility and has entered into an area of controversy better left unattended at present. Despite the acceptance, at the highest judicial level in the international community, of the concept of State obligations towards the international community as a whole, it is to be recognized that the impracticability at present of formulating definitions of internationally wrongful acts must *a fortiori* inhibit the possibility of achieving consensus on definitions of international crimes and on the concept of State responsibility for international crimes. At the

same time, the Government of Canada associates itself with the generally accepted view as to the seriousness of breaches of the obligations outlined in paragraphs 2 and 3 of draft article 19. In that it is not possible to formulate a definitive position with respect to draft article 19 in the absence of draft provisions on the practical implications of breaches on international crimes as defined, which might be outlined in part 2 of the Commission's present draft (or in part 3, on the "implementation" of international responsibility, if drafted), the Government of Canada reserves its position with respect to this draft article.

6. With respect to draft articles 20, 21 and 23, the Government of Canada expresses the view that while in legal theory the distinction between "obligations of conduct" and "obligations of result" commands a certain logic, it is for consideration whether, in view of the likely difficulty in applying the distinction to actual cases, the distinction is necessary. In the view of the Government of Canada, the Commission should make every effort to elaborate the applicable principles in as simple and brief provisions as possible. These three draft articles should, therefore, be reviewed to ensure that the distinction they outline is necessary and practical. Pending such a review, the Government of Canada reserves its position thereon.

7. While draft article 22 may be considered to formulate the local remedies rule in an acceptable manner, the Government of Canada wishes to express its view, in response to the invitation contained in paragraph 61 of the Commentary on this draft article in the Commission's Report on the work of its twenty-ninth session (1977), on the question of the Commission's decision

Not to limit the scope of the principle explicitly to cases concerning conduct adopted by the State "within its jurisdiction".² In the view of the Government of Canada both the local remedies rule and the exception to it relating to injury to foreign individuals or to their property that has been caused outside the territory of the State concerned are firmly established in international law. The Government of Canada therefore considers that draft article 22 should be reformulated to take into account this well-known exception. Accordingly, the Government of Canada reserves its position thereon pending such a review.

8. The Government of Canada fully appreciates the significance of draft articles 24, 25 and 26 on the moment and duration of the breach of an international obligation. The practical implications have been graphically illustrated in the Commission's Report on the work of its thirtieth session (1978).³ Nevertheless,

¹ See *Official Records of the General Assembly, Thirty-first Session, Sixth Committee, 19th meeting*, para. 14; and *ibid.*, Sessional fascicle, corrigendum.

² *Yearbook ... 1977*, vol. II (Part Two), p. 50, document A/32/10, chap. II, sect. B.2, para. (61) of the commentary to art. 22.

³ See *Yearbook ... 1978*, vol. II (Part Two), pp. 86-87, document A/33/10, chap. III, sect. B.2, para. (5) of the commentary to art. 24.

it is for consideration whether there is a need for the detail and complexity of these three rules as elaborated. In the view of the Government of Canada, the Commission should review these three draft articles with a view to ascertaining whether the rules contained therein are as simply expressed and as practical as possible.

Chile

[Original: Spanish]
[9 October 1979]

1. At its thirtieth session (1978), the United Nations International Law Commission decided, in conformity with articles 16 and 21 of its Statute, to communicate to Governments of member States, through the Secretary-General, chapters I, II and III of Part I of the draft articles on State responsibility for internationally wrongful acts, and to request them to transmit their observations thereon.

2. The above-mentioned decision was communicated to the Government of Chile by note LE 113 (33) of 18 January 1979, which stated that the Secretary-General would be grateful to receive such observations and comments as it might have on the provisions thus far adopted by the Commission, at the Government's earliest convenience and not later than 31 December 1979.

3. In this connection, the Government of Chile is convinced that the Commission, in taking up the topic of State responsibility for internationally wrongful acts, has decided to codify a subject which is one of the most prominent and most deeply rooted in the doctrine of international law—it has rightly been termed the corner-stone of international law. Accordingly, the Commission is to be commended for its achievement in giving preliminary approval to the first three chapters of part I of the draft articles, because the fact that there is a consensus on those provisions shows that the structure for regulating international conduct and strengthening harmonious relations among peoples is being soundly constructed.

4. As the Commission points out in its annual report,¹ under the plan adopted by the Commission, part I of the draft articles is concerned with the origin of international responsibility and with determining in what circumstances and on what grounds a State is held responsible for an internationally wrongful act attributable to it. This first part has been divided into five chapters which follow a logical sequence, and the first three have now been submitted to the Governments of States Members of the United Nations for their consideration. They relate respectively to general principles, to the act of the State under international law and to the breach of an international obligation.

5. The opening chapter of part I of the draft articles on international responsibility clearly sets forth the basis of the institution in question by indicating, in article 1, that every internationally wrongful act of a State awaits international responsibility for that act. Draft article 2, which is closely related to the above, makes that responsibility under international law universal by providing, in essence, that every State is subject to the possibility of being held responsible for a wrongful act it has committed.

6. According to these provisions, State responsibility is based on the legally binding nature of international law. The Commission thus endorses a view that is widely shared both in theory and in practice. To obtain an overall picture, however, it is necessary to read these provisions in conjunction with those of articles 16 and 19, both contained in chapter III of part I, since together they form the technical legal basis mentioned above. According to article 19, a State commits an internationally wrongful act when its conduct "constitutes a breach of an international obligation . . . regardless of the subject-matter of the obligation breached", while article 16 provides a bench-mark for determining when there is a breach of an international obligation by a State: "when an act of that State is not in conformity with what is required of it by that obligation". In addition, article 4 provides that an act of a State "may only be characterized as internationally wrongful by international law", thus endorsing the sound principle that a State cannot evade its international responsibility by invoking its internal law; the very reference to an "internationally wrongful" act presupposes that the international order takes precedence over the domestic order of States.

7. Thus, the Commission has correctly defined the legal grounds for international responsibility of the State by basing it on the binding nature of international law; any breach, any justifiable wrong, suffices to render the offending entity responsible under international law for acts of commission or omission, so that it may be required to fulfil the obligation to make reparation. The draft articles have made the international responsibility of States essentially objective and broad in character so that it is no less rigorous than, and just as universal and strict as, respect for the legal system from which it derives.

8. Lastly, draft article 3 specifies the conditions which together determine the existence of an internationally wrongful act and which consist, in short, of the act of the State and the breach of an international obligation—topics dealt with in chapters II and III respectively. Article 3(a) introduces a new element by providing that an internationally wrongful act may be attributable to a State in respect of either an action or an omission on its part. The point is that international law does not always impose active obligations, in the sense that its subjects must conduct themselves in such a way that their actions produce a change in the outside world; there are occasions when international

¹ *Yearbook . . . 1979*, vol. II (Part Two), p. 89, document A/34/10, paras. 66–67.

rules provide for or prescribe, in the form of a prohibition, an obligation "not to do". These particular cases of active and passive wrongful acts are regulated at later stages in the draft articles. Article 3(b) adds that the conduct of a State becomes internationally wrongful when it constitutes a breach of an international obligation of the State. In view of our previous comments, this subparagraph could well have been omitted, since it is redundant if articles 3(a), 4, 16 and 19 are read as a whole, as indicated above.² However, the placing of the subparagraph shows, firstly, that the Commission did not wish to leave any room for doubt about what constitutes an internationally wrongful act, and secondly, that article 3, in its present wording, logically links chapter I to the chapters which follow.

9. In sum, chapter I of part 1 of the draft articles on the responsibility of States for internationally wrongful acts constitutes, in letter and spirit, a carefully formed structure resulting from a wide-ranging study of present-day international law; it is judiciously balanced and thus firmly establishes the foundations of this legal institution, which today is regarded as the backbone of the international legal system.

10. Chapter II of part 1 of the draft articles deals with the "act of the State" under international law. Article 5 provides that conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned, provided that organ was acting in that capacity in the case in question. There are obvious reasons for the general rule thus defined. The State, as a legal entity with sovereign powers, manifests its will through its competent organs, which in turn are served by individuals. Thus, in practice, the organs of a State will reflect the decisions of that State as such; one might say that they are its physical extensions. It is this insight which enables one to grasp the fact that, in both internal and external affairs, what is manifested is, not decisions and actions of individuals considered as such, but of the State itself, since the legal rule has been to attribute or impute to the State the conduct and volition of individuals. The rule in question rightly leaves the determination of State organs and their powers to the internal order. From the standpoint of international law, the administrative or functional dispositions of States are of little importance; each State is sovereign when it comes to apportioning its internal powers, in accordance with its own characteristics, with a view to the fulfilment of the general national will. What the rule does concern itself with is the imputation to the State, as a subject of international law, of injurious conduct on the part of those entities which, in accordance with the internal provisions governing them, express the will of the State. Draft article 6 is therefore explicit in considering the conduct of an organ as an act of the State, whether it belongs to the constituent, legislative, executive,

judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the organization of the State.

11. For the purposes of international law, and particularly of responsibility under that system, the State is indivisible. The manifestation of the will of the State is what counts so far as that system is concerned. Draft article 7 therefore supplements the two preceding provisions by indicating, in paragraph 1, that actions and omissions of organs of territorial governmental entities within a State shall also be considered as an act of that State, provided they were acting in that capacity. The article is thus concerned with entities which, for the purposes of the domestic order of a State, have a personality separate from that of the State itself but possess certain governmental prerogatives and powers, as in the case of municipalities, provinces, regions, cantons and the like—a situation that has been widely recognized in international practice. This does not exclude the case of a federal State, as the Commission agreed when commenting on the question in its report.³ In paragraph 2 of article 7, the Commission completes the range of entities which, like State organs or other governmental entities, perform certain services for the community, thus exercising functions which involve elements of the governmental authority.

12. In its desire to give a comprehensive picture, the Commission, in draft article 8, completes its enumeration of cases in which the action of certain individuals is considered as an "act of the State". While the three preceding articles referred to the conduct of organs which were within the formal structure of the State and to the conduct of organs of territorial governmental entities within the State or of other entities empowered by internal law to exercise certain elements or the governmental authority, article 8 attributes to the State the conduct of persons who, as individuals, were acting in fact on behalf of the State—that is to say, without having been formally appointed as organs of the State system. It is important in this matter to secure the principle of effectiveness in the international order; thus, in accordance with article 8(a), the conduct of a person or group of persons is considered as an act of the State if it is established that such person or group of persons was in fact acting on behalf of the State, since it is standard practice, in certain cases, for State organs or entities which are empowered by internal law to exercise governmental functions to employ the services of persons or groups of persons who, as private individuals or private entities, proceed to carry out on behalf of the State the functions entrusted to them. The inclusion of subparagraph (a) is therefore fully justified, since the

² See para. 6 above.

³ See *Yearbook . . . 1974*, vol. II (Part One), pp. 279 *et seq.*, document A/9610/Rev.1, chap. III, sect. B.2, paras. (5) *et seq.* of the commentary to art. 7.

performance of such work means that the private entities are transformed, at least temporarily, into interpreters of the will and action of the State, entailing the responsibility of the latter. Subparagraph (b) of the article is broader in scope than the preceding one, inasmuch as it refers to the conduct of persons or groups of persons who in fact were exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified their so doing. This hypothetical case differs from the preceding one in that there is no assignment of tasks to be performed on behalf of the State: what is involved is a spontaneous assumption of governmental authority; from that standpoint, it is explicable—and the Commission agreed—that the conduct of the individuals concerned should commit the State for whose benefit they are acting.

13. A situation which in practice arises much less frequently than the preceding ones, but regarding which the Commission is correct in harbouring no doubts about the likelihood of its materializing in international relations, is that described in draft article 9. This article provides that the conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed. The article emphasizes the fact that the person or group of persons placed at the disposal of another State must possess the status of organs. In that connection, the Commission observes, by way of example, that “experts” placed at the disposal of a given State under a co-operation agreement cannot be regarded as “organs” of the sending State.⁴ The fact that the organ in question must have been placed at the disposal of the other State is also stressed, which tacitly excludes, for instance, cases where the organ is limited to performing in the territory of the other State functions proper to the sending State or organization, since being at the disposal of the beneficiary implies that the organ is subject to the exclusive direction and control of the beneficiary State and not, on the contrary, under instructions from the sending State.⁵ As a third condition, article 9 requires that the organ shall have been acting in the exercise of elements of the governmental authority of the beneficiary foreign State; in other words, it must have been exercising official duties normally performed by the organs of the beneficiary State.

14. An organ’s acting outside its competence may entail the international responsibility of the State to which it belongs. The same may be said of the organs of territorial entities and governmental entities dis-

cussed above. This assertion brought to an end a long debate in the international-law literature. In accordance with the provisions of draft article 10, the conduct of an organ of a State or of one of the entities mentioned above, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity. This provision is fully justified and is based on very practical reasoning, since it is impossible for States dealing with each other in the international community to know for certain when State organs or entities of this kind are observing the limits imposed on them by their internal laws and when they are exceeding them. The draft article in question is open to criticism, however, as being too broadly worded, in that what is really relevant is relegated to a secondary level. Without prejudice to acceptance of the underlying principle, the following wording may be suggested:

“The conduct of an organ or entity, as the case may be, which exceeded its competence according to internal law or contravened instructions concerning its activity shall also be considered as an act of the State under international law.”

15. In accordance with the two paragraphs of draft article 11, the conduct of persons or groups of persons not acting on behalf of the State shall not be considered as an act of the State, without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to and which is to be considered as an act of the State by virtue of draft articles 5 to 10. This is an almost pedantic clarification, since the general rule laid down here may be deduced from the interpretation *a contrario* of article 8(a).⁶ Its philosophy is therefore entirely in keeping with the context of the draft articles, although its provisions might well have been combined with those of article 8(a). However, the Commission, setting greater value on certainty than on brevity, has chosen to deal in a manner which leaves no room for doubt with a situation which has been much discussed in the literature.

16. Using similar wording, draft article 12 provides that the conduct of an organ of a State acting in that capacity, which takes place in the territory of another State or in any other territory under its jurisdiction, shall not be considered as an act of the latter State under international law, without prejudice to the attribution to a State of any conduct which is related to that referred to and which is to be considered as an act of that State by virtue of draft articles 5 to 10. The precept in question is sufficiently clear not to require lengthy legal disquisitions, since it follows logically from draft article 9.⁷ Nevertheless, anything which helps to furnish clarification and to provide the material needed for a proper understanding of inter-

⁴ *Ibid.*, pp. 286–287, para. (2) of the commentary to art. 9.

⁵ *Ibid.*, p. 287, paras. (4) and (5) of the commentary.

⁶ See para. 12 above.

⁷ See para. 13 above.

national norms is an extremely worthwhile endeavour, especially in the case of such intrinsically delicate subjects as those now being dealt with by the Commission in the draft articles.

17. Draft article 13 is likewise a provision following from article 9, whereby the Commission emphasizes the precise interpretation to be placed on exceptions to its other rules. It states that the conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

18. The question whether the conduct of an organ that is a product of an insurrectional movement can be attributed to the State, which has been in dispute since the nineteenth century, is decisively disposed of in draft article 14. The general rule laid down in that article is that such conduct shall not be considered as an act of the State under international law unless it is to be so considered under the general provisions of draft articles 5 to 10, without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in cases in which such attribution may be made under international law. This provision is closely linked to article 15, inasmuch as the latter related to the attribution to the State of the act of a successful insurrectional movement or, in other words, of one which has become the Government or has resulted in the formation of a new State. Accordingly, without prejudice to the imputation to the State of the actions of an insurrectional movement in accordance with the general rules governing the "act of the State", draft article 14 refers to cases in which the insurgents were defeated by the authorities of the constituted Government. In such cases, therefore, the conduct of the insurgents cannot be attributed to the State, but is to be considered as a wrongful act affecting only the internal order of the State.

19. Article 15 of part 1 of the draft, which concludes chapter II, deals with the attribution to the State of the act of an insurrectional movement which becomes the new Government of a State; however, such attribution shall be without prejudice to the consideration as an act of the State of conduct which would have been previously so considered by virtue of articles 5 to 10. Similarly, if an insurrectional movement has resulted in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration, its act shall be considered as an act of the new State. Writers on international law and international judicial bodies have uniformly taken the view that, if the insurrection is successful, its authorities must be regarded as representative of the collective will of the nation from the time when the conflict began, which means that their conduct is to be considered as an act of the State. Thus, the Commission's draft takes the right course in definitively establishing a view that is fully shared by the international community.

20. In the light of the foregoing, it can be said that the work of the Commission on chapter II of part 1 of the draft articles on State responsibility for internationally wrongful acts has, like its work on chapter I, produced a well-conceived and methodically structured set of provisions in which one appreciates the effort to define a system whose purpose, as in this case, is to establish the true dimension of the international conduct of States and make a precise appraisal of the rules governing it.

21. Chapter III deals with the breach of an international obligation. Article 16, which opens this chapter, is a defining clause; it states that there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation. Thus, the precept is perfectly clear; the existence of an infringement of a norm of international law will be objectively determined by the lack of conformity between what is prescribed by that norm and the conduct engaged in by the State, acting as has been seen, through its relevant organs or entities. A material finding that the requirements of the norm are not reflected in the actions of the State to which it is directed is sufficient ground for establishing the existence of the international offence constituting the basic prerequisite for State responsibility, the modern conceptual characteristics of which are here set forth.

22. As was pointed out earlier, a State has many opportunities to maintain that its conduct is in accordance with the international order, since that depends on whether the act of the State the conduct engaged in by entities whose acts are attributed to the State is in conformity with what is provided for and required by the norm; and the same may be said with regard to the possibility of a breach. As noted above,⁸ the cases in which international responsibility is incurred as a result of infringements of the norms of international law are to be determined by international law itself. The origin of the international obligation covered by this rule may be of various kinds (customary, conventional or other), as stated in draft article 17, and its origin does not in any way affect the international responsibility arising from the internationally wrongful act of the State concerned. The subject-matter of the international obligation breached is likewise irrelevant (draft article 19).

23. There is no doubt that, in order to give rise to international responsibility, the obligation which a State disregards through actions attributable to it must be in force for that State, and the purpose of the five paragraphs of draft article 18 is to spell out this requirement with sufficient clarity to ensure a proper understanding of it. However, the scope of paragraph 2, which states that, even where the conduct of a State constituted a breach of an international obligation, it

⁸ See para. 6.

ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law, should be made clearer. A reading of this paragraph shows the need to state expressly that it would apply only during the interval between the occurrence of the breach and the utilization of the mechanisms for "implementing" the resulting international responsibility, because a State cannot be allowed to evade its duty to redress the wrong caused by its wrongful act by claiming that the injurious event is now lawful. There is an old legal maxim to the effect that the law shall apply only to future events and, unless expressly otherwise provided, shall never have retroactive effect. Hence, it would be advisable to spell out explicitly the function to be served by the period during which this paragraph would apply, and it might be suggested that that period should be the time which elapses between the breach and the utilization of the instruments for "implementing" the international responsibility arising out of it; for, if the injured State does not manifest its will to obtain compensation and during its silence the injurious conduct becomes compulsory under a norm of general international law, it would not be wrongful for it to resort to means of enforcing the obligation to answer for the breach (since a State can hardly be allowed to derive advantage from its own guile by means of a special or conventional norm).

24. In dealing with the question of a breach of an international obligation as an internationally wrongful act, draft article 19 lists various kinds of conduct which, because of their gravity and consequences for the international community, are more reprehensible and more clearly entail the international responsibility of the State engaging in them than the general run of cases. Certain types of conduct involving a breach of international norms *stricto sensu*—i.e., international delicts—are here classified according to circumstances such as to elevate them to the category of international crimes. The article states that the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime constitutes an international crime, and proceeds to list some examples of such conduct, including, for example, a serious breach of the international obligation to maintain international peace and security, such as that prohibiting aggression, and a serious breach of the obligation to safeguard the right of self-determination of peoples. Article 19 thus expressly distinguishes between international delicts and international crimes, the latter being so reprehensible to the international community as to place a considerable blemish on the conduct of the offender, without prejudice to the "implementation" to the latter's consequent responsibility, as appropriate. Thus, the Commission has sought to embody in specific legal texts numerous types of conduct which customary international law has described as highly offensive to

the conscience of the civilized international community, thereby acknowledging the concept of an international crime, which previously was primarily a matter for theoretical discussion, and classifying some of its major manifestations and the legal treatment accorded to it by contemporary international law.

25. Articles 20 and 21 of the draft prepared by the Commission refer to two closely related aspects: the breach of an international obligation "of conduct" or "of means" and the breach of an international obligation "of results". These aspects have been thoroughly dealt with in French legal theory concerning the internal laws of States, and it is therefore logical to assume that the obligations laid down by international law are not all of the same kind. In some cases, States will be called on specifically to conduct themselves in a certain manner, either actively or passively; in others, they will be required only to achieve a specified result. Article 20 is concerned solely with the breach of international obligations whose fulfilment requires a State to use specifically determined means, as is often the case in direct relations between States. As the Commission rightly points out in its report, it should be noted that the sphere in which an international obligation "of conduct" produces its effects will depend, in the last analysis, on the international legal interests which the obligation is intended to protect.⁹ Thus, where an international obligation requires the adoption of a particular course of conduct by a given branch of the State machinery, the obligation will be fulfilled if the conduct specifically required by the obligation is adopted; if not, it must be held that the obligation has been breached.

26. Draft article 21 refers to obligations "of result", which relate to cases in which the aim is to achieve a situation in the context of the State's internal legal system. Here, the obligation requires a concrete, specified result, and the State is free to choose whatever means it deems appropriate; in other words, the State is not required to adopt a particular course of conduct. In this part of its draft, the Commission touches on another aspect of the manifold configuration of international obligations, inasmuch as a breach of an obligation of the kind referred to in this article quite often may engage the responsibility of the State at the international level. A breach of an obligation "of result" calls for careful appraisal as regards the comparison of the result required by the primary norm with what the State has in practice achieved; this is not so in the case of an obligation "of means", where the conduct adopted by the State is simply compared with the instruments which the obligation required it to use. Hence the importance of the role of international practice and international

⁹ See *Yearbook . . . 1977*, vol. II (Part Two), p. 14, document A/32/10, chap. II, sect. B.2, para. (9) of the commentary to art. 20.

judicial decisions in determining how the primary obligation "of result" is to be interpreted, with a view to specifying its precise scope and significance. It is hardly necessary to point out in this connection that both the cases covered by article 21 refer to the "specified result" called for under the international obligation in force—or, where the obligation so allows, an "equivalent" result. Accordingly, the provision in question is consistent with the entirely logical plan adopted by the Commission for this important draft.

27. Draft article 22 provides for the exhaustion of local remedies. The practical and legal reasons for this principle of general international law, which is being increasingly incorporated in international agreements, are obvious, for there will be no need to resort to international remedies if the victim of a breach of international law has obtained in the local courts reparation which he considers commensurate to the injury. As the Commission rightly notes in its report, failure to fulfil this preliminary condition of using the effective local machinery available "therefore has the effect of excluding the wrongfulness of the failure to achieve the internationally required result."¹⁰ Obviously, in order for this course to be taken, the State must have means of recourse available to individuals, since otherwise the breach of an international obligation by the State will be consummated as from the moment of the breach and not from the time when judgement is rendered by the domestic courts competent to make good the injurious act at the petition of those involved. It should be added that these means are not only appropriate for redress of the international offence but remain effectively available to all who are injured by the wrong in question.

28. The Commission rounds off its work of defining the scope of the breach of an international obligation by considering, in article 23, another special type of obligation "of result", namely that where the result required of the State is to ensure that a given event does not occur—a residual circumstance which does not involve any action by the State as such but rather an act of man or of nature. Thus, the State bound by an obligation of this kind cannot claim to have achieved the required result by assenting that it has set up a good system of prevention if, in practice, that system proves ineffective and permits the event to occur. The Commission's commentary rightly points out that the "event" whose occurrence the State is required to prevent must not be understood as being "damage" in the sense in which that term is used in the general theory of State responsibility, as one of its constituent elements, although of course it is true that such an event will generally be an injurious event.¹¹ The comparison between the conduct actually adopted

by the State and the conduct which it might reasonably be expected to have adopted in the particular case concerned in order to prevent the event from occurring is therefore sufficient to establish responsibility under this provision.

29. Another aspect of international wrongfulness that is of considerable importance in connection with State responsibility is the determination of the *tempus commissi delicti*, a term which covers the continuance in time of the breach and the exact determination of the moment when it occurred. The Commission also touched on this question in article 21, paragraph 2, and in article 22 of the draft. Similarly, the provision now under discussion, article 24, is closely linked to the two following ones, articles 25 and 26, which constitute together a fully consistent set of rules on the subject. Article 24 states that the breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. Furthermore, the time of commission of the breach of an international obligation by a State does not extend beyond that moment, even if the effects of the act of the State continue subsequently. There is no doubt that the temporal element involved in a breach of an international obligation may be decisive in solving important problems in the matter under discussion, since the exact determination of the moment when the wrongful act occurred is a prerequisite for determining the moment when international responsibility is engaged and, consequently, the moment when the affected State is able to take international action to invoke that responsibility. The time factor also has a bearing on decisions concerning the "national character of the claim", which a broad spectrum of opinion maintains is a prerequisite for the extension of diplomatic protection; in other words, such protection may validly be sought as from the moment of commission of the internationally wrongful act—apart from the obvious fact that the determination of the *tempus commissi delicti* will be essential for the purpose of asserting, in due course, that the *claim has lapsed* by prescription.

30. As previously noted, draft article 25 introduces new elements for the exact determination of the moment when the breach of an international obligation occurs, concerning three possible cases of injurious circumstances that can arise in the course of the activities of States. Generally speaking, these are cases in which the breach does not result from an act whose duration coincides with the moment of commission of the breach but extends in time after or before that moment. Paragraph 1 of the article deals with a "continuing" act, measuring conduct involving an action or omission attributable to the State which proceeds unchanged over a given period of time. Paragraph 2 relates to a "composite" act, that is to say, an act which, although like the "continuing" act is spread over a certain period of time, consists not of a single act but rather of a series of individual courses of State conduct succeeding each other in an extended

¹⁰ *Ibid.*, p. 30, para. (3) of the commentary to art. 22.

¹¹ See *Yearbook . . . 1978*, vol. II (Part Two), p. 82, document A/33/10, chap. III, sect. B.2, para. (5) of the commentary to art. 23.

sequence of actions or omissions which amount, precisely, to an aggregate act. Finally, paragraph 3 of the article governs the case of a "complex" act, where a succession of acts extending in time relate to a single case and, taken as a whole, represent a certain position adopted by the State towards other States. As can be appreciated, the Commission uses precise and careful language, covering the various possible cases of conduct constituting a breach of primary rules of international law and also showing commendable zeal in examining and co-ordinating sound contemporary legal principles.

31. Chapter III concludes with article 26, which provides that the breach of an international obligation requiring a State to prevent a given event occurs when the event begins, but that the time of commission of the breach extends over the entire period during which the event continues. This serves as a fitting conclusion to the chapter on the breach of an international obligation.

32. Consequently, the Government of Chile would like to reiterate what was said at the beginning of these comments and to express its gratification with the important draft articles under consideration and its hope that they will be brought to a successful conclusion and will become rules of general international law. It commends the Commission for submitting to the Governments of Member States a carefully studied draft conducive to the progressive development and codification of international law.

Mali

[Original: French]
[27 August 1979]

The Republic of Mali attaches very special importance to the drafting of articles on State responsibility, a topic on which the International Law Commission has been working since 1953. The strengthening of the international legal order makes the codification and development of rules and principles governing State responsibility particularly significant.

It is encouraging to note that the Commission expects to complete the first reading of the articles comprising part I of the draft articles on State responsibility. The Commission works slowly because it must have a deep understanding of State practice, judicial practice and doctrine, which differ considerably. Its work is made even more difficult by the profound political and social transformations in the international community.

The Malian Government wishes to make the following observations on those draft articles.

1. Article 18 (Requirement that the international obligation be in force for the State)

This article, which deals with the *tempus commissi delicti*, is closely related to articles 24 (Moment and

duration of a breach of an international obligation by an act of the State not extending in time), 25 (Moment and duration of the breach of an international obligation by an act of the State extending in time) and 26 (Moment and duration of the breach of an international obligation to prevent a given event). It would therefore be better to emphasize that link, either by bringing those articles closer to article 18 or through cross-references.

2. Article 19 (International crimes and international delicts)

This article will have to be one of the corner-stones of the future treaty. It would be more comprehensive if paragraph 2 described as an internationally wrongful act the breach by a State of an international obligation designed to protect fundamental interests of a State, a group of States or the international community.

3. Article 22 (Exhaustion of local remedies)

The exhaustion of local remedies is a highly complex problem. In any event, the article should reflect the fact that the breach of an obligation may occur when the local remedies process drags on indefinitely.

4. Article 23 (Breach of an international obligation to prevent a given event)

The present wording of this article appears to be too categorical.

It is rather difficult to differentiate in the article between an "obligation of conduct" and an "obligation of result". Moreover, the relationship between this article and paragraph 1 of article 21 (Breach of an international obligation requiring the achievement of a specified result) must be defined. Any new wording should also take into account the fact that if the obligation merely requires the State to prevent an event, rather than to adopt a particular course of conduct, there may be much controversy concerning what constitutes appropriate or inappropriate conduct with regard to that event.

5. Article 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act)

Before it can be determined that aid has been "rendered" for the commission of an internationally wrongful act, several factors must be taken into consideration. This article is, however, of vital importance, and the Malian Government urges that it should be maintained, if not made more forceful.

On the basis of this article, a legal determination of the responsibility of any State rendering aid or assistance to the racist régimes of southern Africa should be possible.

These then are a few preliminary observations which the Malian Government would like to make. It reserves

the right, however, to submit its overall comments when chapters IV and V are added to the present draft, for it is only when the entire text of the draft is available that it will be possible to evaluate *in toto* the meaning of each article and its implications for international practice.

The Netherlands

[Original: English]
[8 May 1980]

1. The Netherlands Government would make the following general comments before discussing the articles in detail.

The codification of rules governing the responsibility of a State for its wrongful acts is of the utmost importance, in particular, in view of the steady increase of primary rules of international law, developed in response to the needs of the international community in respect of the international economic order and the utilization of common areas of the seas and outer space. The codification of rules governing State responsibility is also a necessary supplement to the codification of the law of treaties. Efforts should therefore be made to complete the work on this subject in the near future.

2. Articles 1 to 27, which have been submitted to the various Governments, constitute only part of the draft to be drawn up by the International Law Commission. A sound opinion on the approach decided upon by the commission and on the individual provisions will not be possible until the entire draft is available. Both the part concerning implementation, including the settlement of disputes, and the part on the content, forms and degrees of international responsibility will explain and supplement to a considerable extent the draft articles now being considered. The comments below have therefore been made with the reservation that observation on one part of the draft can only be of a provisional nature. This means that before adopting the draft on first reading, Governments should be given the opportunity to express their opinion on the draft as a whole, and not on the remaining provisions only.

Chapter I (General Principles)

3. The Netherlands Government agrees with the general principles taken by the Commission as the basis of the draft. With respect to the order of the articles, it would seem more logical to begin the draft with an article (corresponding to the present article 3) which states the conditions which in any case have to be met by an action or omission before it can be described as a wrongful act within the meaning of the draft.

Only then can the consequence of a wrongful act committed by the State be established, namely the responsibility of the State (the present article 1). By placing the articles in this order, it also becomes clear

that the term "act" means both "action" and "omission".

4. The Netherlands Government also agrees with the Commission's decision not to make damage a constituent element of a wrongful act. This decision ensues, indeed, from the structure of the draft; whether or not damage is required is a matter of primary rules. The Commission's decision is also correct from another point of view: a State could have a legitimate interest in the fulfilment of an international obligation which has been breached in a specific case even though it has suffered no damage.

This principle should be observed in the rest of the draft, notably with regard to the consequences which an injured party may attach to a wrongful act. The element of damage should not be introduced into the draft indirectly either, for example as a general requirement for admissibility. Moreover, it should be pointed out that the omission of the element of damage is consonant with draft article 19, which recognizes that the breach of an obligation resting upon a State can affect the interests of the international community as a whole.

5. From the point of view of the progressive development of international law, article 2 is a valuable element in the draft, although it is certain that it will be of no importance in practice unless States are prepared to submit to the judgement of a higher authority.

Chapter II (The "Act of the State" under international law)

6. In this chapter concerning the attribution to the State of certain conduct, the Commission has decided to work on the principle that the conduct of private persons cannot be attributed to the State. The Netherlands Government agrees with this principle. It ensues from this, however, that the term "State organ" must be defined broadly, in the sense of any person or group of persons acting *de jure*, and in certain circumstances *de facto*, on behalf of the State. If article 8 in particular can be interpreted in this way, the lack of a definition of the term "State organ" need present no problem.

7. It is not entirely clear how the cases in article 8(a) and (b) differ. It would seem that paragraph (a) could be omitted if the phrase "in the absence of the official authorities" were also omitted from paragraph (b).

8. Article 10 lays down that even if an organ acts outside its competence or contravenes instructions concerning its activity, its conduct is still attributable to the State. It would seem that this rule applies not only to the organs listed (those referred to in articles 5 and 7) but also to the organ referred to in article 9.

Chapter III (Breach of an international obligation)

9. The principal rule of the draft is that a wrongful action or omission must be judged on the basis of the

rule or rules of law which apply at the time of the action or omission. Article 18 elaborates on this rule for a number of cases. The Netherlands Government agrees with the rule. Legal security demands that certain conduct cannot be considered as wrongful by applying a posterior rule.

Draft article 18, paragraph 2, provides for an exception to this principal rule for the opposite situation.

While agreeing with the basic consideration behind this provision, the Netherlands Government would consider it more appropriate to include such an article—if indeed it belongs at all in a codification confined to secondary rules—in the part dealing with circumstances precluding wrongfulness. An objection to the present wording of the second paragraph of article 18 is that it does not make it sufficiently clear that it is the primary norm of peremptory law itself which determines its effect: either retroactive force or immediate effect.

10. Article 19 is without doubt the most fundamental of all the articles now being considered. It is a very interesting attempt to distinguish between a crime and a delict. However, the lack of further details of the distinction makes it very difficult to make any observations.

The Netherlands Government reserves judgement on both the point of such a distinction and the list of international crimes in article 19, paragraph 3, (a), (b), (c) and (d), until the Commission has made known what consequences it attaches to the distinction.

It is remarkable, however, that the article contains no indication whatsoever of how to differentiate between the various crimes with respect to the legal consequences. In view of the consequences of the crime of aggression (the right of self-defence, enforcement measures by the Security Council) described in the Charter of the United Nations, there is cause to re-examine the matter in connection with parts 2 and 3, which have still to be drawn up.

11. The only difference between the rules stated in article 21, paragraph 1 and article 23 seems to be that of the description of the content of the primary norm, namely the achievement of a specified result or the prevention of the occurrence of a given event. This difference would seem too slight to justify separate treatment, which has been emphasized in the draft by the position of article 22.

12. With respect to article 22, the Commission raises the question of whether or not the requirement of exhaustion of local remedies should be restricted to those cases where the breach of an international obligation of which a State is accused took place within the jurisdiction of that State.

The opinion of the Netherlands Government is that the question should be answered in the affirmative—i.e., the requirement should be so restricted—for the following reasons. The application of the local remedies rule will not infrequently fail to bring about the desired result (the conduct of a State which is in

conformity with its international obligations), since the national courts are often not authorized to check a State's conduct against its international obligations. On the other hand, the reason for establishing the requirement of the exhaustion of local remedies is that the alien is within the jurisdiction of a third State. It is therefore not right, when a State has acted outside its jurisdiction, to require that the alien with respect to whom the State has breached its international obligations must first follow the prescribed national procedure before it can be established that there has been a breach of an international obligation.

Ukrainian Soviet Socialist Republic

[Original: Russian]
[30 April 1980]

1. The United Nations has no more lofty and humanitarian goal than the strengthening of peace and international security and the creation of conditions to safeguard States from encroachments on their rights and legitimate interests. The codification of norms of international law in the field of State responsibility is contributing to the attainment of this goal.

2. In general, the Ukrainian SSR takes a favourable view of chapters I, II and III of the draft articles on State responsibility prepared by the International Law Commission. Among the most important provisions set forth in these chapters is the definition of international crime in article 19. Under paragraph 2 of that article, an international crime is an internationally wrongful act which results from the breach by a State of an international obligation which is essential for the protection of the fundamental interests of the international community.

3. It is highly significant that the list of international crimes includes aggression, the maintenance by force of colonial domination and genocide. As a member of the Special Committee against *Apartheid*, the Ukrainian SSR is particularly satisfied to note that the wrongful act of *apartheid* is included in the list of international crimes. The categorization of these offences as international crimes fully accords with the purposes and principles of the Charter of the United Nations and rightly takes into account the major goals of the struggle to strengthen universal peace and international security.

4. The Ukrainian SSR reserves the right to make additional comments about the draft articles on State responsibility being prepared by the Commission at later stages of their consideration, if necessary.

Union of Soviet Socialist Republics

[Original: Russian]
[28 April 1980]

Chapters I, II and III of the draft articles on State responsibility prepared by the International Law

Commission on the whole merit a positive assessment. Article 19, in which internationally wrongful acts of States constituting a breach of obligations essential for the protection of fundamental interests of the international community are expressly mentioned and defined as international crimes, is an important provision of the draft. The inclusion in the list of international crimes of such wrongful acts as aggression, the maintenance by force of colonial domination, genocide and *apartheid* is in keeping with the objectives of the struggle to strengthen peace and international security and with the purposes and principles enunciated in the Charter of the United Nations. The Soviet Union reserves the right to make additional observations as work on the draft articles progresses.

Yugoslavia

[Original: French]
[26 March 1980]

1. In compliance with the request communicated to it by the International Law Commission, through the Secretary-General of the United Nations, the Government of the Socialist Federal Republic of Yugoslavia wishes to emphasize, first of all, that it considers the proposed draft articles on State responsibility a useful basis for the continuation of work on this subject. The Yugoslav Government is mindful of the high quality of chapters I to III of part I of the draft and appreciates the excellent work done by the Commission, and in particular by its Special Rapporteur, Mr. Roberto Ago. The draft articles and commentaries are an important contribution to the study of an extremely complex question of international law, which thus far has not been examined thoroughly enough and the regulation of which is essential—and increasingly so—in order to ensure the normal conduct of international relations. Considering that, in the conditions prevailing in the international community, it is particularly important to strengthen the role of international law and to consolidate the international legal order based on the purposes and principles of the Charter of the United Nations, the Yugoslav Government attaches special importance to the codification of the rules concerning State responsibility as something which can constitute a major contribution to the attainment of this objection.

2. Since chapters I and II constitute only a portion of the future draft articles on State responsibility, of which part I will eventually comprise five chapters, the Yugoslav government would like to emphasize that its observations are only of a preliminary nature and that their purpose, pending completion of the provisional draft, is to offer comments and suggestions at a stage when the Commission is still working on the rest of the text. Accordingly, these remarks do not in any way prejudice the position which the Yugoslav Government may deem it appropriate to adopt at a later stage of the

work. In anticipation of a complete text, the Government will therefore confine itself to stating its views on the general plan and approach adopted by the Commission with regard to the draft as a whole and on the overall solutions embodied in chapters I, II and III of part I, which deals with the origin of international responsibility. The observations and suggestions relating to certain draft articles should be understood accordingly, inasmuch as the Yugoslav Government might perhaps reconsider the positions it has taken, once the Commission has completed the entire text.

3. First of all, the Yugoslav Government fully supports the Commission's basic plan of considering, in connection with the draft articles, only the responsibility of States for internationally wrongful acts, and of considering the question of such responsibility as a general and independent topic. Experience shows that any other approach to this topic is irrational and would therefore offer no prospect of success. Underlying this plan is the assumption that any departure from international law, viewed as a global, general and well-ordered system of binding rules of international conduct, is a wrongful act reduced to the common denominator expressed in the notion of the internationally wrongful act which always, and in every circumstance, entails *international responsibility*. This initial assumption, which, in the view of the Yugoslav Government, the Commission consistently develops in the provisions proposed thus far, makes it possible to establish a solid and indispensable connection between obligations and responsibilities and to close any loophole through which responsibility for non-compliance with international obligations might be avoided.

4. As the Commission sees it, the final result of its efforts should be expressed in the elaboration of general rules, the purpose of which is to govern a whole series of legal relations among States from the time when, from the standpoint of international law, an "abnormal" situation arises, or in other words, from the time when the conduct of a particular State is not in conformity with what is required of it by an international obligation. In order to accomplish this task, the Commission broke the topic of responsibility down into a number of narrower subject areas and planned to formulate them in several stages, the first of which is in progress. Since, of course, the subject areas covered by the successive stages planned by the Commission form a coherent whole, it may even now be concluded that the work must continue until all the elements of responsibility have been fully examined and formulated.

5. The Commission's plan, understood in this way, is acceptable to the Yugoslav Government and, in its opinion, presents several advantages. The first is that the general rules concerning responsibility are to be regarded as a vital addition to all the other rules ("primary" rules, as the Commission calls them) of international law—as a further development of the

general system of international law, the rules of which should ensure that responsibility is established and regulated for every breach, in whatever area, of international law. The formulation of such rules will undoubtedly be conducive to that certainty of the law which is so necessary in international relations. Another advantage is that their adoption will help to reinforce the binding nature of all rules of international law and will result in more responsible conduct by every State, particularly in connection with the obligations it has assumed, which in turn will help to strengthen the international legal order. The aspirations of most of the international community today are undeniably directed towards the establishment of an "international public order", which should ensure, first and foremost, peace, security and justice for all States. Lastly, unlike the hitherto somewhat elusive rules on State responsibility (which, being unclear and scattered throughout the various areas of international law, have been relatively ineffective, mainly because they are difficult to establish), a single set of general rules on responsibility in the form of a convention could, and Yugoslav Government hopes would, make the system of international responsibility much more stringent and effective. As regards the effective application of the rules which the Commission is formulating, this Government believes that it could be stated even at this stage that the elaboration of an "implementation" and settlement of disputes system is unquestionably necessary. Although the formulation of the relevant rules is a matter to be considered at a later stage, the Yugoslav Government wishes to emphasize that it is prepared even now to support any initiative in that direction.

6. In accordance with its usual practice, the Commission has combined the method of codification with that of progressive development. However, whenever possible, and particularly when no sound legal principles could be deduced from customary law, the Commission, in proposing solutions, has taken into account not only modern legal concepts but also the current needs of the international community. As a result of this attitude and of the inductive method employed, which consists in not relying on preconceived theoretical premises and in focusing on State practice and international judicial decisions, the proposed draft articles contain solutions resulting primarily from the application of the method of progressive development of international law.

7. The Yugoslav Government welcomes this approach, since it testifies to the Commission's determination to ensure that the proposed rules are norms possessed of such modernity and actuality that the draft articles as a whole, and those still to come, will meet the demands which an international community undergoing profound change places on international law.

8. Following this general review, the Yugoslav Government would like to make some specific observations on chapters I, II and III of the draft.

9. Generally speaking, the four basic principles are well presented and therefore acceptable to the Yugoslav Government as the general basis on which the entire set of draft articles rests. Establishment of the fact that every internationally wrongful act entails international responsibility is in conformity with what should be the generally accepted view, namely, that any wrongful act is a departure from international law, which is binding in all its parts without exception. The principle that a State committing such an act cannot be exempted from responsibility is entirely correct. The Yugoslav Government agrees with the Commission's reasoning that this principle follows from the principle of sovereign equality, because if all States are equal where rights are concerned, they must also be equal in the matter of responsibility.

10. The essential principles proposed are formulated succinctly and concisely, that in fact being one of the characteristics and one of the qualities of the draft articles as a whole. However, one might ask whether, during the second reading of the text, it would be appropriate to consider the possibility of further elaborating the general principles, particularly those set out in article 3. Similarly, once the text is completely finished, consideration might be given to the possibility of deriving from its content other general principles, which would have a place in chapter I. In the opinion of the Yugoslav Government, it would be very useful if the Commission would agree to consider that point.

11. Chapter II is an elaboration of the "subjective" element of an internationally wrongful act, as described in article 3(a). The general rule in article 5, namely, that "conduct of any State organ having that status under the internal law of that State" is an act attributable to the State, "provided that organ was acting in that capacity in the case in question", adequately reflects the Commission's general conception and does not give rise to any objection. In view of that provision, the Yugoslav Government does not consider article 6 essential, especially since the commentary to article 6 states that its purpose is to prevent the invocation of the old, obsolete practice of exempting certain State organs from responsibility.¹

12. The Yugoslav Government supports the principle set forth in article 10 that "The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority", acting outside its competence or contrary to instructions concerning its activity, cannot constitute the basis for precluding the responsibility of the State. However, there arises the question why the same principle should not also apply in the case of such conduct by organs of another State or of an international organization placed at the disposal of the State in question and acting on its behalf (the situation

¹ See *Yearbook ... 1973*, vol. II, p. 198, document A/9010/Rev.1, chap. II, sect. B., para. (17) of the commentary to art. 6.

covered by article 9). The Yugoslav Government considers that the principle laid down in article 10 should apply in that case also. Yet it is not clear from the wording of article 10 whether it also covers the situation under article 9. The Yugoslav Government therefore suggests that the possibility of redrafting article 10 should be considered.

13. It would also seem more logical for draft article 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State) to follow the provisions relating to the conduct of State organs, and it would therefore be better placed after articles 9 and 10.

14. It should be stressed that, in the application and interpretation of the provisions of chapter II the question will probably arise of the meaning of the terms . . . "a territorial governmental entity" and, in particular, "an entity . . . empowered . . . to exercise elements of the governmental authority". These terms may be understood differently in different States, and it would therefore be very useful, should the Commission decide to adopt a special clause containing definitions of the terms used—an action which the Yugoslav Government would welcome—to define exactly what the above terms mean.

15. The Yugoslav Government particularly wishes to express its agreement with the provisions of articles 14 and 15, on the responsibility of an insurrectional movement. Those provisions constitute a major contribution to the clarification of certain situations which now frequently emerge in international relations and in connection with which the question of responsibility was not sufficiently clear.

16. As the Commission has rightly indicated, chapter III constitutes the very essence of this part of the draft. It elaborates the "objective" element of an internationally wrongful act, as described in article 3(b). Article 16, which serves the same purpose here as article 5 does in chapter II, establishes as the main rule that there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation. Although the provision is very succinct and extremely general, it is satisfactory, in the view of the Yugoslav Government, precisely because of its general scope, and it constitutes a very broad basis on which the Commission was able to formulate cases and situations which, considered from various aspects, may occur in practice and which are regulated by subsequent articles. The Yugoslav Government thinks that these articles are, as a whole, well drawn up and that the solutions they contain are in principle acceptable.

17. However, it should be pointed out that the formulation and language of draft article 18 are very complicated and that paragraph 2 can only be understood after a reading of the commentary. In the

opinion of the Yugoslav Government, it would be useful if the Commission could try to simplify the wording of this article, of course without touching the substance, and include in paragraph 2 some material from the commentary so that the proposed provisions would be clearer from a reading of the text itself.

18. The Yugoslav Government particularly welcomes draft article 22, concerning exhaustion of local remedies. This provision is especially important because, by indicating the course to be followed in order to reach a settlement in such situations and by providing for international responsibility only if local remedies have been exhausted or there has been a denial of justice, it confirms the principle of sovereignty and prevents unnecessary outside interference in matters within national jurisdiction.

19. In chapter III, draft article 19 is undoubtedly the most important. The Yugoslav Government therefore deems it necessary to examine the proposed rule in detail. In its opinion, the Commission's decision to propose different treatment for international crimes and international delicts should be welcomed and unreservedly supported. Since the time of the Nuremberg principles, a conception has gradually taken shape in the international community, namely that there are extremely serious breaches of international law which must be characterized as international crimes. In the view of the Yugoslav Government, there is no doubt that this conception is now part of prevailing international law.

20. Paragraph 2, which specifies the breaches that are to be considered "international crimes", is clearly the key provision of this article. The Yugoslav Government regards the draft of this provision as a good basis for future work and supports it in principle. However, it would be very useful to improve its wording by establishing explicitly that such a breach of an international obligation entails not only condemnation but also a concrete reaction by the entire international community. In other words, it is extremely important to make it more conclusively apparent from the wording that an international crime is not only a violation of the interests of the State directly affected by the crime, but that an internationally wrongful act of this kind affects the overall social interest of all States without exception.

21. The Yugoslav Government also supports the provisions of paragraph 3 because, in that paragraph, the Commission has cited as examples of international crimes those which can in fact be considered extremely dangerous. The question arises, however, of the placement of this provision in the draft as a whole. After the text of paragraph 2 has been finalized, and depending on its content, a decision can be taken as to whether the present paragraph 3 should remain in article 19 or whether that provision should be placed in part 2 of the draft, dealing with the content, forms and degrees of international responsibility.

DOCUMENT A/CN.4/330*

**Preliminary report on the content, forms and degrees
of international responsibility (Part 2 of the
draft articles on State responsibility)**

by Mr. Willem Riphagen, Special Rapporteur

[Original: English]
[1 April 1980]

ABBREVIATIONS

I.C.J.	International Court of Justice
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
ICAO	International Civil Aviation Organization
P.C.I.J.	Permanent Court of International Justice
<i>P.C.I.J., Series A</i>	<i>P.C.I.J., Collection of Judgments (through 1930)</i>

EXPLANATORY NOTE: ITALICS IN QUOTATIONS

An asterisk inserted in a quotation indicates that, in the passage immediately preceding the asterisk, the italics have been supplied by the Special Rapporteur.

1. When, in response to relevant recommendations of the General Assembly, the International Law Commission in the early 1960s decided to study *ex novo* the topic of State responsibility, it included at the very outset the content, forms and degrees of State responsibility among the questions to be considered under the topic.¹ Thus, reference to the contents, forms and degrees of State responsibility are found in memoranda submitted by members of the Sub-Committee on State Responsibility set up by the Commission in 1962, as well as in the records of the

proceedings of that Sub-Committee.² More significant are the conclusions reached in this respect by the Sub-Committee itself when it decided unanimously to recommend to the Commission a series of "indications on the main points to be considered as to the general aspects of the international responsibility of the State" which "may serve as a guide to the work".³ After outlining a preliminary point (Definition of the concept of the international responsibility of the State) and a first point (Origin of international responsibility), the indications recommended by the Sub-Committee to the Commission are as follows:

Second point: The forms of international responsibility

(1) *The duty to make reparation*, and the right to apply sanctions to a State committing a wrongful act, as consequences of responsibility. Question of the penalty in international law. Relationship between consequences giving rise to reparation and those giving rise to punitive action. Possible distinction between international wrongful acts involving merely a duty to make

* Incorporating documents A/CN.4/330/Corr.1 and 3.

¹ Actually, the first Special Rapporteur for the topic, Mr. F. V. Garcia Amador, already dealt in the reports he submitted to the Commission between 1956 and 1961 with questions having a bearing on the content, forms and degrees of State responsibility. He reviewed, for example, the duty of the State to make reparation for injury caused in its territory to the person or property of aliens. See *Yearbook... 1956*, vol. II, p. 173, document A/CN.4/96; *Yearbook... 1957*, vol. II, p. 104, document A/CN.4/106; *Yearbook... 1958*, vol. II, p. 47, document A/CN.4/111; *Yearbook... 1959*, vol. II, p. 1, document A/CN.4/119; *Yearbook... 1960*, vol. II, p. 41, document A/CN.4/125; and *Yearbook... 1961*, vol. II, p. 1, document A/CN.4/134 and Add.1.

² See *Yearbook... 1963*, vol. II, pp. 228 *et seq.*, document A/5509, annex I, appendix I.

³ Para. 6 of the report by Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility, to the Commission (*ibid.*, pp. 228).

reparation and those involving the application of sanctions. Possible basis for such a distinction.

(2) *Reparation*. Its forms. *Restitutio in integrum* and reparation by equivalent or compensation. Extent of reparation. Reparation of indirect damage. Satisfaction and its forms.

(3) *Sanction*. Individual sanctions provided for in general international law. Reprisals and their possible role as a sanction for an international wrongful act. Collective sanctions.⁴

2. At its fifteenth session, in 1963, the Commission approved unanimously the report of the Sub-Committee on State Responsibility, including the proposed programme of work contained therein.⁵ During the discussion, it was pointed out that the questions listed were intended solely to serve as an aide-mémoire for the Special Rapporteur when he came to study the substance of particular aspects of the definition of the general rules governing the international responsibility of States, and that the Special Rapporteur would not be obliged to pursue one solution in preference to another in that respect. It was also pointed out that the approval of the programme of work proposed by the Sub-Committee was without prejudice to the position of the members of the Commission on the substance of the questions set out in that programme.⁶ By its resolution 1902 (XVIII) of 18 November 1963, the General Assembly recommended that the Commission:

Continue its work on State responsibility, taking into account the views expressed at the eighteenth session of the General Assembly and the report of the Sub-Committee on State responsibility and giving due consideration to the purposes and principles enshrined in the Charter of the United Nations.

3. At its nineteenth session, in 1967, the Commission, in its new composition, confirmed the instructions given to the Special Rapporteur in 1963.⁷ The note submitted at that session by Mr. Roberto Ago, Special Rapporteur, reproduced the indications on the main points to be considered under the topic recommended by the Sub-Committee on State Responsibility,⁸ and approved by the Commission, including those quoted under the second point (The forms of international responsibility).⁹ They were likewise reproduced in the first report by Mr Ago as Special Rapporteur, submitted to the Commission in 1969.¹⁰

4. Following consideration at its twenty-first session of that first report, the Commission reported in 1969 to the General Assembly, *inter alia*, as follows:

⁴ *Ibid.*

⁵ *Ibid.*, p. 224, document A/5509, para. 55.

⁶ *Ibid.*, para. 54.

⁷ *Yearbook... 1967*, vol. II, p. 368, document A/6709/Rev. 1, para. 42.

⁸ See para. 1 above.

⁹ *Yearbook... 1967*, vol. II, p. 326, document A/CN.4/196, para. 2.

¹⁰ *Yearbook... 1969*, vol. II, p. 139, document A/CN.4/217 and Add.1, para. 91.

... The Special Rapporteur, in summing up the debate, gave an account of the views of members of the Commission and announced his future plan of work. There was general agreement on the main lines of the programme to be undertaken on the subject during the next sessions.

Thus the Commission was in general agreement in recognizing that the codification of the topic of the international responsibility of States should not start with a definition of the contents of those rules of international law which laid obligations upon States in one or other sector of inter-State relations. The starting point should be the imputability to a State of the violation of one of the obligations arising from those rules, irrespective of their origin, nature and object. The aim, then, will be to establish, in an initial part of the proposed draft articles, the conditions under which an act which is internationally illicit and which, as such, generates an international responsibility can be imputed to a State. This first stage of the study will include the definition of the objective and subjective conditions for such imputation; the determination of the different possible characteristics of the act or omission imputed, and of its possible consequences; and an indication of the circumstances which, in exceptional cases, may prevent the imputation. The Special Rapporteur was asked to submit a report on the topic, containing a first set of draft articles, at the Commission's twenty-second session.

*Once this first essential task has been accomplished, the Commission proposes to proceed to the second stage, which concerns determination of the consequences of imputing to a State an internationally illicit act and, consequently, the definition of the various forms and degrees of responsibility.** To that end, the Commission was in general agreement in recognizing that two factors in particular would guide it in arriving at the required definition: namely, the greater or lesser importance to the international community of the rules giving rise to the obligations violated, and the greater or lesser seriousness of the violation itself. A definition of the degrees of international responsibility will include determination of the respective roles of reparation and sanction and, particularly in connexion with the latter, separate consideration of the cases in which responsibility is reflected only in the establishment of a legal relationship between the defaulting State and the injured State and the cases in which, on the contrary, a particularly serious offence might also give rise to the establishment of a legal relationship between the guilty State and a group of States, or eventually between that State and the entire international community.

At a third stage it will be possible to take up certain problems concerning what has been termed the "implementation" of responsibility, and questions concerning the settlement of disputes which might be caused by a specific violation of the rules relating to international responsibility."¹¹

5. The conclusions reached by the Commission in 1969 were, on the whole, favourably received by the Sixth Committee of the General Assembly. The plan for the study of the topic, the successive stages in the execution of the plan and the criteria to be applied to the different parts of the draft, as laid down by the Commission, received general approval. In resolution 2501 (XXIV) of 12 November 1969, the General Assembly recommended that the Commission should continue its work on State responsibility, taking into account paragraph 4(c) of General Assembly resolution 2400 (XXIII) of 11 December 1968 in which the Assembly recommended, *inter alia*, that the Commission make every effort to begin substantive work on State responsibility as from its next session.

¹¹ *Ibid.*, p. 233, document A/7610/Rev.1, paras 79-82.

6. Since then, and with reference to the general structure of the draft, the Commission has consistently reiterated, in its annual report to the General Assembly, that: (a) *the origin of international responsibility* forms the subject of part 1 of the draft, which is concerned with determining on what grounds and under what circumstances a State may be held to have committed an internationally wrongful act which, as such, is a source of international responsibility; (b) part 2 will deal with *the content, forms and degrees of international responsibility*, that is to say, with determination of the consequences that an internationally wrongful act of a State may have under international law in different cases (reparative and punitive consequences of an internationally wrongful act, relationship between these two types of consequences, material forms which reparation and sanction may take); (c) once these two essential tasks are completed, the Commission may perhaps decide to add to the draft a part 3 concerning *the "implementation" ("mise en œuvre") of international responsibility and the settlement of disputes*.¹² In its report on the work of its twenty-seventh session (1975), the Commission, in the paragraphs devoted to the structure of the draft, even developed some of the points which in its opinion should be addressed under the part of the draft devoted to *the content, forms and degrees of international responsibility*, as follows:

43. In the second phase of the study plan, the aim will be to determine what consequences an internationally wrongful act of a State may have under international law in different hypothetical cases, in order to arrive at a definition of the content, forms and degrees of international responsibility and to incorporate appropriate provisions in the draft articles. It will first be necessary to establish in what cases a State which has committed an internationally wrongful act may be held to have incurred an obligation to make reparation, and in what cases such a State should be considered as becoming liable to a penalty. The establishment of a distinction between internationally wrongful acts giving rise only to an obligation to make reparation and internationally wrongful acts incurring a penalty; the possible basis for such a distinction; and the relationship between the reparative and the punitive consequences of an internationally wrongful act, are some of the questions of principle which will have to be settled before the other matters covered by the second phase of the study plan can be taken up. In this context it will also be necessary to consider a possible distinction between cases where legal relationships arising out of the internationally wrongful act are established solely between the State which has committed the act and the State directly injured by it, and cases where such relationships are also established with other States or even with the international community as a whole. The next step will be to study the more specific issues arising in connexion with reparation and penalties as consequences of the internationally wrongful act of a State under international law. This will entail going into questions relating to modes of reparation (*restitutio in*

integrum, reparation by equivalent or compensation, satisfaction), the extent of reparation, the criteria for fixing reparation, the different types of penalties (individual and collective) and the various material forms (reprisals, etc.) they can take, with due regard, in particular, to pertinent developments resulting from the adoption of the Charter of the United Nations and the establishment of the United Nations system in practice.¹³

7. In the course of the consideration by the Sixth Committee of the report annually submitted by the Commission to the General Assembly, representatives of Member States have referred frequently with approval to the structure of the draft articles on State responsibility under preparation, including its division in parts, and to the content, forms and degrees of State responsibility as the subject-matter of part 2 of the draft. The General Assembly itself has recognized expressly, in its resolutions on the report of the Commission, that the draft articles on State responsibility will comprise more than one part. Thus, for example, General Assembly resolution 32/151 of 19 December 1977 recommended that the Commission should continue on a high priority basis its work on State responsibility,

"with the aim of completing *at least the first reading of the set of draft articles constituting part 1 of the draft** on responsibility of States for internationally wrongful acts, within the present term of office of the members of the International Law Commission".

A similar recommendation is contained in General Assembly resolution 33/139 (sect. I) of 19 December 1978. Still more significant in this respect is the relevant recommendation contained in resolution 34/141 adopted by the General Assembly on 17 December 1979. Paragraph 4(b) of that resolution reads as follows:

4. *Recommends* that the International Law Commission should:

...

(b) Continue its work on State responsibility with the aim of completing, at its thirty-second session, the first reading of the set of draft articles constituting part one of the draft on responsibility of States for internationally wrongful acts, taking into account the written comments of Governments and views expressed on the topic in debates in the General Assembly, and proceed to the study of the further part or parts of the draft with a view to making as much progress as possible in the elaboration of draft articles within the present term of office of the members of the Commission.*

8. In accordance with the plan approved for the study of the topic and the priorities given to its successive stages of execution, Mr. Ago, as Special Rapporteur, began in 1970 to submit a series of reports on *the origin of international responsibility*.¹⁴

¹³ *Yearbook... 1975*, vol. II, p. 56, document A/10010/Rev.1, para. 43.

¹⁴ See *Yearbook... 1970*, vol. II, p. 177, document A/CN.4/233; *Yearbook... 1971*, vol. II (Part One), p. 199, document A/CN.4/246 and Add.1-3; *Yearbook... 1972*, vol. II, p. 71, document A/CN.4/264 and Add.1; *Yearbook... 1976*, vol. II (Part One), p. 3, document A/CN.4/291 and Add.1 and 2; *Yearbook... 1977*, vol. II (Part One), p. 3, document A/CN.4/302 and Add.1-3; *Yearbook... 1978*, vol. II (Part One), p. 31, document A/CN.4/307 and Add.1 and 2; *Yearbook... 1979*, vol. II (Part One), p. 3 document A/CN.4/318 and Add.1-4; and p. 13 above, document A/CN.4/318/Add.5-7.

¹² See *Yearbook... 1973*, vol. II, p. 170, document A/9010/Rev.1, para. 43; *Yearbook... 1974*, vol. II (Part One), p. 274, document A/9610/Rev.1, para. 114; *Yearbook... 1975*, vol. II, p. 56, document A/10010/Rev.1, para. 41; *Yearbook... 1976*, vol. II (Part Two), p. 71, document A/31/10, para. 71; *Yearbook... 1977*, vol. II (Part Two), pp. 7-8 document A/32/10, para. 24; *Yearbook... 1978*, vol. II (Part Two), p. 76, document A/33/10, para. 86; *Yearbook... 1979*, vol. II (Part Two), p. 89, document A/34/10, para. 66.

namely, on the various questions falling under the first phase of the study of the topic. It is on the basis of these reports that the Commission considered and adopted, or is in the process of adopting, the various articles and commentaries relating thereto, constituting part 1 of the draft on State responsibility under preparation. Engaged in the elaboration of the provisions of part 1, the Commission has not yet had the opportunity to undertake the study of the various questions falling under part 2 (*Content, forms and degrees of international responsibility*). However, on the occasion of the consideration and formulation of provisions of part 1, members of the Commission have frequently made incidental references to aspects of questions falling under or having a bearing on part 2 of the draft. Moreover, the Commission's commentaries to various draft articles of part 1 contain developments of particular importance for the study of part 2 or reserve expressly certain questions for consideration in the context of part 2. See, in particular, the commentaries of the Commission to articles 1, 2, 3,¹⁵ 11,¹⁶ 17, 19,¹⁷ 21, 22,¹⁸ 24, 25, 27,¹⁹ 28, 29, 30, 31 and 32,²⁰ as well as the commentaries to chapters III²¹ and V²² of part 1.

9. Articles 1 to 32 of part 1 of the draft have already been adopted by the Commission in first reading, and it is the Commission's intention to complete the first reading of that part at its current session by concluding its study of the circumstances precluding wrongfulness considered in the eighth report of the former special rapporteur, Mr. Ago, which are still outstanding, namely "state of necessity" and "self-defence". Then, as stated in its 1979 report to the General Assembly, the Commission will be in a position to continue its study of the subject and to take up Part 2 of the draft, dealing with the content, forms and degrees of international responsibility. In order to continue its consideration of the subject—and in view of Mr. Ago's election as Judge of the International Court of Justice—the Commission, at its 1979 session,

¹⁵ For the commentaries to arts. 1 to 6, see *Yearbook... 1973*, vol. II, pp. 173 *et seq.*, document A/9010/Rev.1, chap. II, sect. B.

¹⁶ For the commentaries to arts. 10 to 15, see *Yearbook... 1975*, vol. II, pp. 61 *et seq.*, document A/10010/Rev.1, chap. II, sect. B.2.

¹⁷ For the commentaries to arts. 16 to 19, see *Yearbook... 1976*, vol. II (Part Two), pp. 78 *et seq.*, document A/31/10, chap. III, sect. B.2.

¹⁸ For the commentaries to arts. 20 to 22, see *Yearbook... 1977*, vol. II (Part Two), pp. 12 *et seq.*, document A/32/10, chap. II, sect. B.2.

¹⁹ For the commentaries to arts. 23 to 27, see *Yearbook... 1978*, vol. II (Part Two), pp. 81 *et seq.*, document A/33/10, chap. III, sect. B.2.

²⁰ For the commentaries to arts. 28 to 32, see *Yearbook... 1979*, vol. II (Part Two), pp. 94 *et seq.*, document A/34/10, chap. III, sect. B.2.

²¹ See *Yearbook... 1976*, vol. II (Part Two), pp. 75–78, document A/31/10, chap. III, sect. B.2.

²² See *Yearbook... 1979*, vol. II (Part Two), pp. 106–109, document A/34/10, chap. III, sect. B.2.

appointed the author of the present report Special Rapporteur for the topic of State responsibility.²³

10. By submitting, at this stage, the present preliminary report on the content, forms and degrees of international responsibility, the newly appointed Special Rapporteur intends to facilitate a general review by the Commission of a series of questions of principle having, or which may have, a bearing on the elaboration of the provisions to be included in part 2 of the draft. Any guidance or preliminary conclusion of the Commission on such questions will greatly help the work that the Special Rapporteur is supposed to do in the future in connection with the elaboration of those provisions.

11. Under *article 1* of the draft articles on State responsibility as provisionally adopted by the Commission,²⁴

Every internationally wrongful act of a State entails the international responsibility of that State.

An "internationally wrongful act" of a State, according to *articles 3 and 16*, is conduct of that State which is not in conformity with what is required of it by an international *obligation*. Part 2 of the draft articles will have to define the meaning of "international responsibility—in other words, the legal consequences under international law of the internationally wrongful act of a State. While it is possible to talk about an "obligation" of a State under international law without necessarily mentioning another entity towards which such obligation exists (indeed, of the 32 draft articles provisionally adopted up until now only two, *articles 29 and 30*, use the term "obligation of [a] State towards [another] state"), the word "responsibility" would seem to imply another entity towards which a State is responsible. Actually, as stated by the then Special Rapporteur, Mr. Ago, in his third report on State responsibility, the term "international responsibility" has been used to mean:

all the forms of new legal relationship which may be established in international law by a State's wrongful act—irrespective of whether they are limited to a relationship between the State which commits the wrongful act and the State directly injured, or extend to other subjects* of international law as well, and irrespective of whether they are centred on the guilty State's obligation to restore the rights of the injured State and to repair the damage caused, or whether they also involve the faculty of the injured State itself, or of other subjects,* of imposing on the guilty State a sanction permitted by international law.*²⁵

It follows, incidentally, from the above quotation that, while part 1 avoids the term "injured State" and even attaches international responsibility to a breach of an international obligation irrespective of the existence of any injury to interests protected by primary rules of

²³ *Ibid.*, p. 90, document A/34/10, paras. 71–73.

²⁴ For the text of all the draft articles adopted so far by the Commission: *ibid.*, pp. 91 *et seq.*, document A/34/10, chap. III, section. B.1.

²⁵ *Yearbook... 1971*, vol. II (Part One), p. 211, document A/CN.4/246 and Add.1–3, para. 43.

international law, part 2 cannot but take into account such injury, and the subject or subjects of international law to which the interests affected are, so to speak, allocated by international law for the purpose of responsibility.

12. At the same time, while it may be true that for the purposes of part 1, and as stated in *article 17*, paragraph 2,

The origin of the international obligation (i.e., see para. 1, "customary, conventional or other") breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State.

Part 2, in determining the new legal relationships established by a State's wrongful act, cannot ignore the origin—in particular the conventional origin—of the international obligation breached. Furthermore, of course, the Commission, in provisionally adopting *article 19* of its draft articles, was fully aware that "the subject-matter of the obligations breached"—in other words, the content of the primary rule of international law involved—may influence the legal consequences of such a breach, to be determined in part 2. Indeed, the same article, by introducing the quantitative element of the seriousness of the breach in its definition of international crime clearly points to the obvious relevance of the quantitative element, not for part 1 but for part 2 of the draft articles.

13. While, therefore, part 1 could leave aside a number of distinctions as irrelevant for the purposes of determining under what circumstances the "international responsibility of a State" arises, part 2, in defining the *meaning* of international responsibility, will somehow have to reflect these distinctions.

14. It may also be useful to recall at the outset some other questions which are raised by the drafting of several articles of part 1 and which the Commission deliberately left open to be dealt with elsewhere, possibly in part 2 of the draft articles. Thus, *articles 27 and 28*, stipulating—in the case of *article 27*, by implication—the international responsibility of a State other than the one which committed an internationally wrongful act, raise the question of the relationship between this responsibility and the responsibility, if any, of the latter State, incurred in connection with one and the same wrongful act.

15. Again, *article 29*, in precluding the wrongfulness of a specified act of a State in relation to another State which has validly given its consent to the commission of that specified act, deliberately leaves open the question of international responsibility entailed towards a *third* State. Whereas paragraph 2 of this article nullifies paragraph 1 "if the obligation arises out of a peremptory norm of general international law", if the article does not purport to deal with the possible impact of the consent given on the responsibility towards a third State in cases where there is no breach of an obligation arising out of a peremptory norm.

16. *Articles 31 and 32*—and possibly the articles, still to be drafted, dealing with "state of necessity" and "self-defence"—while precluding the wrongfulness of an act of a State under certain circumstances, do not purport to exclude any and every form of a "new legal relationship" which may be established in international law as a legal consequence of such act. Here again part 2 of the draft articles may be the appropriate place to spell out such legal consequences.

17. Finally, *article 30*, in referring to counter-measures as measures "legitimate under international law" against another State "in consequence of an internationally wrongful act of that other State", clearly presupposes at least some indication in part 2 of what are those measures "legitimate under international law".

18. It would seem that in all the cases dealt with in chapter V under the heading of "Circumstances precluding wrongfulness" there is room for defining the legal consequences of the acts which, *in abstracto*—that is, leaving aside the peculiar circumstances of the concrete situation—still constitute "breaches of an international obligation". At its thirty-first session, the Commission deliberately did not take a decision on the question whether those legal consequences should be dealt with in part 2 of the draft articles on State responsibility or in the context of the Commission's consideration of another topic, namely, the topic "International liability for injurious consequences arising out of acts not prohibited by international law".

19. The present Special Rapporteur is inclined to favour the first of these alternatives. Chapter V deals with cases in which, in view of special circumstances, an otherwise wrongful act is "justified" to the effect that some or all of the legal consequences attached to a wrongful act disappear. Contrariwise, the other topic deals with cases in which, in view of special circumstances, an *in abstracto* perfectly legal act entails some legal consequences otherwise attached to wrongful acts. Obviously the two types of cases tend to "meet" somewhere, possibly in considerations of risk-allocation; but the fundamental differences in international law between *a priori* wrongful and *a priori* legitimate acts of a State would seem to militate in favour of avoiding misunderstanding by separate treatment of the two types of cases.

20. More or less in connection with the foregoing, another question arises. It is recalled that in the situations dealt with in *article 31* (*Force majeure* and fortuitous event) and *article 32* (Distress), full responsibility is restored, *inter alia*, "if the State in question has *contributed*" to the occurrence of the situation" (of "material impossibility" or of "extreme distress", as the case may be). One might be tempted to draw an analogy with the cases dealt with in chapter II. There, of course, a different question, that of attribution of conduct to a State, is addressed. Nevertheless, there is a similarity between the two

questions respectively treated in articles 31 and 32, on the one hand, and in chapter II on the other. Indeed, articles 11, 12 and 14, in stipulating that the conduct of persons or groups of persons, or organs, mentioned in those articles, is *not* attributed to the State, add the proviso that this non-contribution “is without prejudice to the attribution to the (a) State of any *other** conduct which is *related to**” the non-attributed conduct and “which is to be considered as an act of the (that) State by virtue of articles 5 to 10”. It would seem that this proviso deals with the case in which conduct directly attributable to the State under articles 5 to 10 *contributes* to a situation not in conformity with what is required by a primary rule of international law. Here again, this contribution seems to restore full responsibility, or at least some degree of responsibility, towards an injured subject of international law.

21. *Article 15* of the draft articles goes even further and—whether in situations where a succession of governments or a succession of States is involved—imposes responsibility for acts of “an insurrectional movement” on the State to which, rather than to any other State, the insurrectional movement, so to speak, “belongs”. One could almost consider this as a case of contribution *a posteriori*.

22. In any case, it would seem clear that the proviso in *articles 11, 12 and 14* also covers cases where the contribution of the State’s “agents” consists of a failure to take appropriate action, legislative or otherwise, to prevent or put an end to conduct of persons or groups of persons not acting on its behalf.

23. As a follow-up of this construction, one might perhaps argue that there is room in part 2 of the draft articles for consideration of some degree of responsibility of a State as a result of conduct not of its “agents” (i.e. the organs, persons and groups of persons mentioned in articles 5 to 10), but of other persons who “belong” to that State rather than to any other State, either by virtue of being its nationals or because they are operating in, or from the territory of that State.

24. The Special Rapporteur would, however, advise against the Commission’s pursuing this train of thought within the context of the topic of State responsibility (as contrasted with the topic of “international liability for injurious consequences of acts not prohibited by international law”). Indeed, were one to envisage even some degree of responsibility of the State by virtue of conduct of its nationals or conduct within its territory, one would in fact invite “extraterritorial” legislation and/or a control by the State over what happens within its territory, effective to a degree of being incompatible with its obligation to respect fundamental freedoms of the individual human being.

25. Rightly, the present draft articles simply refer to a possible responsibility of the State for acts of its agents “related to” conduct not attributable to the State—thereby, it seems, requiring a positive contri-

bution of those agents to the course of events and permitting, in case of responsibility for failure to act, that account be taken not only of the obvious limitations of the factual power of any State, but also of the legal limits of its jurisdiction and its duty to respect human rights.

26. On the other hand, it would seem that the Commission should address itself, within the context of the discussion of part 2 of the draft articles, to the question of the content, form and degree of State responsibility for “contributory” conduct, and this both in relation to articles 11, 12 and 14 and to articles 27 and 28.

27. The primary object of part 2 of the draft articles on State responsibility is to determine the legal consequences of the breach of an international obligation entailing the responsibility of a State. As indicated above,²⁶ those legal consequences may vary according to the subject-matter of the international obligation breached, the seriousness of the breach under the circumstances of the case, and other factors as well. More generally, the legal consequences of an internationally wrongful act having essentially the nature of a reaction (response) directed at the restoration of an equilibrium broken by that wrongful act, a “rule of proportionality” would seem to govern in principle all such legal consequences. Before attempting to analyse further this notion of “proportionality”, it would seem useful to draw up, first, a systematic catalogue of possible legal consequences of internationally wrongful acts.

28. Once more it is recalled that the term “international responsibility” has been used to mean all the forms of new legal relationships that may be established by international law by a State’s wrongful act. In drawing up a systematic catalogue of these new legal relationships, three parameters appear: The first is the content of the new obligations of *the guilty State*; the second, the new “rights” of *the injured State*; the third, the position of *third States* in respect of the situation created by the internationally wrongful act.

29. Turning now to the *first-mentioned parameter*—the new obligations of the guilty State—the obvious primary purpose of the “response” is to re-establish the situation which would have prevailed if no breach of the international obligation had occurred—in other words, the *restitutio in integrum*.²⁷ In essence, a full *restitutio in integrum* is, in fact, always impossible;

²⁶ See para. 12.

²⁷ Among the more recent cases and literature, see for example the Award on the Merits in Dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic: American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XVII, No. 1 (January 1978), p. 1; and M. B. Alvarez de Eulate, “La *restitutio in integrum* en la práctica y en la jurisprudencia internacionales”, *Temis*, Revista de Ciencia y técnica jurídicas de la Facultad de Derecho de la Universidad de Zaragoza (Zaragoza), Nos. 29–32 (1971–1972), p. 11.

what has happened has happened, and no power on earth can undo it. One has to differentiate in view of the time-element involved (as, indeed, a time-element has been introduced in *articles 18, 24, 25 and 26*).

30. From this point of view, there are three possible aspects of the content of the new legal relationship(s): (a) what could be called the *ex nunc*-aspect, which concerns the present; (b) what could be called the *ex tunc*-aspect, which concerns the past; and (c) what could be called the *ex ante*-aspect, which concerns the future. (Here again, no sharp distinctions between the three aspects can be made.) Accordingly, the *ex nunc*-aspect typically envisages the re-establishment of a "right" which has been taken away by the wrongful act.

31. The *ex tunc*-aspect typically envisages the payment of damages as a reparation for the injurious consequences caused by the wrongful act, whereas the *ex ante*-aspect points to a confirmation of the obligation breached, possibly in the form of a guarantee against future breaches of the same obligation. One might say that while the *ex nunc*-aspect is centred on the position of the injured State, the *ex tunc*-aspect looks at the factual consequences of the conduct of the guilty State and the *ex ante*-aspect concerns, rather, the credibility of the primary rule itself. However that may be, the three aspects, as already indicated, are not more than facets of the same object: an attempt to conform what is to what ought to be, or, in the words of the often-quoted judgement of 13 September 1928 of the Permanent Court of International Justice in the *Factory at Chorzów* case (Merits), an attempt "to wipe out all the consequences of the illegal act".²⁸ Indeed, if we look at the *ex tunc*-aspect of the payments of damages as applied in various international judgements and arbitral awards, we often see it encompass the *ex nunc*-aspect (particularly if the re-establishment of the "right" taken away is considered impossible), and even the *ex ante*-aspect, by way of the according of "punitive" damages. Actually, the time-element reappears even if, ostensibly, only the actual damage caused by the conduct of the guilty State is taken into account; thus the awarding of damages for *lucrum cessans*.

32. The concept of *restitutio in integrum* as a new obligation of a State clearly presupposes a "right" of another State or States (the injured State or States) affected by the internationally wrongful act of the first-mentioned State. The draft articles of part I make several distinctions in respect of the content of the (primary) obligations of a State. Thus, *articles 20, 21 and 23* distinguish between obligations of "conduct", obligations of "result" and obligations "to prevent a given event"; *articles 18, 24, 25 and 26* distinguish breaches of an international obligation by "an act of the State not extending in time", an act "having a continuing character", "a composite act" and "a

complex act"; finally, *article 19* distinguishes the "international obligation... essential for the protection of fundamental interests of the international community", and *article 22* mentions "an international obligation concerning the treatment to be accorded to aliens".

33. All these distinctions necessarily refer implicitly to the content of the right of another State or States which is "protected" by the obligation of the first-mentioned State (or States). As such, those distinctions concerning the content of the primary obligation might well be relevant as well for the content of the new obligation arising for a State from its wrongful act. It would, indeed, seem logical *a priori* that there should be a correlation between the parameters of the legal consequences of a breach of an obligation and the parameters of the primary rule (obligation-right).

34. In so far as the first parameter of both is concerned, there should obviously be a quantitative proportionality between the breach and the legal consequences: the more serious the breach, the more complete the new obligation of *restitutio in integrum* (*lato sensu*, i.e., in its three aspects mentioned above). But the question arises whether the "quality" of the primary rule (obligation-right) necessarily influences the content of the new relationship, arising out of the breach of that primary rule—or is such quality only relevant within the context of the second and third parameters? Indeed, whatever the quality of the primary rule breached, there should be a *restitutio in integrum*. However, the quality of the primary rule may certainly be relevant to the allowable response of the injured State or States and to the position of third States in respect of the response; yet even within the context of the first parameter of the legal consequences, there might be a qualitative correlation. Thus it would seem that, in general, the giving of "guarantees" against future breaches (the *ex ante*-aspect) is reserved for cases of violation, through the use of external force or similar means, of fundamental rights of another State, whereas a mere reparation *ex tunc* is required in cases where, within the framework of the exercise of internal jurisdiction of a State, an obligation "concerning the treatment to be accorded to aliens" (art. 22) has been breached.

35. It would not seem, however, that any hard and fast rules can be laid down in this matter. In particular, there seems to be a "grey zone" of cases (both as regards the means applied by the guilty State and as regards the particular nature of the right of the injured State affected thereby) in which primary rules of international law may require a more complete *restitutio in integrum*—including "guarantees"—to be realized as a legal consequence of the wrongful act. In this connection, one might think of situations where an interdependence of States (which in itself creates a greater vulnerability of the situation for acts of one State causing injury to another State) has found expression in a special protection given to such

²⁸ P.C.I.J., Series A, No. 17, p. 47.

situations by a primary rule of international law; such special protection might also then be reflected in the content of the new legal relationship created by a breach of that primary rule. Thus perhaps the interdependence of States, created by their sharing an indivisible "environment", will tend towards the recognition of a duty—in case of wrongful trans-frontier pollution—to give guarantees against a repetition of such event. In a way, the well-known *Trail smelter* arbitration constitutes an illustration of this theme, inasmuch as the Arbitral Tribunal determined the allowable limits of *future* emissions.²⁹ But, of course, this determination was expressly envisaged by the particular *compromis* between the parties to the dispute.

36. It should, furthermore, be recognized that what appears at first sight to be a merely quantitative difference between one particular wrongful act and another may, in actual fact, be a qualitative difference. Thus, for example, and with reference to *article 19* of the draft articles, the seriousness of the breach of an obligation determines the qualitative difference between an international delict and an international crime. Also it would seem clear that what is, in the first instance, a "simple" violation by a State of its obligation not to use the territory of another State for the performance of *acta jure imperii*, may, when followed by similar acts in a deliberate pattern of conduct, constitute a violation of the territorial integrity of that other State. Similar instances of "continuing", "composite" and even "complex" acts changing the quality of the act in connection with the quality of the rights of other States affected thereby can be easily imagined. Often, if not always, the test of this change of quantity into quality may lie in whether the breach of an international obligation is incidental to an otherwise legitimate act or, contrariwise, such breach is the object and purpose of the act itself.

37. Before turning to the second parameter of the legal consequences of an internationally wrongful act of a State—i.e., the new rights of the injured State—the question of the distinction between "injured State" and "third State" should be analysed somewhat further. The possible content of the new obligation of the guilty State has been discussed above. In the first instance, this new obligation is an obligation towards the injured State or States. It is here that the origin of the primary obligation breached by a State is normally relevant. In particular, the conventional origin of the primary obligation normally entails a responsibility towards the other parties to that convention only. In other words, the parties to the new legal relationship are the same States, and only those States, that were parties to the convention stipulating the primary obligation. Moreover, it seems clear that a *restitutio in integrum*—in whichever of its three aspects—pre-

supposes an "injured" State or States. Normally, if the primary obligation is stipulated in a bilateral treaty the other State party to that treaty is the only State which may claim such *restitutio in integrum*. This would seem to be counterpart of the general rule laid down in article 34 of the Vienna Convention on the Law of Treaties.³⁰ Questions may arise, however, as regards (a) a possible responsibility towards an "injured" State which derives rights from a treaty under the relevant other rules of the Vienna Convention, and (b) a possible responsibility towards a State party to a multilateral treaty which is not directly injured by the breach of an obligation laid down in that treaty.

38. As to the first question, there does not seem to be any reason to treat the protection of the right acquired by the third State in a different way from that of the rights acquired by the parties to the treaty. Surely, under article 37 of the Vienna Convention, the right which has arisen for a third State may be revoked or modified by the parties to the treaty (if it is not "established that the right was intended not to be revocable or subject to modification without the consent of the third State"), but as long as the parties to the treaty have not taken such action, the right of the third State and the corresponding obligation of the States parties remain untouched. So do the legal consequences of a breach of that obligation. Of course, the same goes for a breach of the obligation which has arisen for the third State.

39. The second question is somewhat more complicated, since it involves a possible distinction between—in the terminology of article 60 of the Vienna Convention—"a party specially affected by the breach" of an obligation stipulated in a multilateral treaty, and any "other" party to that treaty. The legal consequence of a breach, dealt with in that article is of course different from the one discussed here; it has a different position in the *scala* of legal consequences, a position which will be discussed below. Here we are rather concerned with the question whether or not the breach by a State of an obligation under a multilateral treaty also entails a new legal relationship between that State and another State, party to that multilateral treaty, whose interests are not directly affected by that breach. Can the latter State (also) claim a *restitutio in integrum*?

40. Obviously that State can not claim damages *ex tunc*, since by definition there is no injury to its material interest. But a re-establishment *ex nunc* (to the direct benefit of the injured State!) and a guarantee *ex ante* against further breaches may well be in the (non-material) interest of that State, in particular in the case mentioned in article 60 of the Vienna Convention, i.e. "...if the treaty is of such a character

²⁹ United Nations, *Reports of International Arbitral Awards*, vol. III (United Nations publication, Sales No. 1949.V.2), pp. 1905–1982.

³⁰ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties. Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287. Hereinafter called "Vienna Convention".

that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty". The Special Rapporteur is even inclined to go further and to accept that a multilateral treaty may be of such a character that even a breach by one party, which can not be considered a "material breach" for the purpose of article 60 of the Vienna Convention, may entitle another State party, whose material interests are not directly affected, to claim from the guilty State a re-establishment *ex nunc* and perhaps even a guarantee *ex ante*, even if the breach does not "radically change the position of every party".

41. One may, of course, consider this question as only rather related to the "implementation" of State responsibility, i.e. as a procedural matter. On the other hand, one might also consider the question as one rather related to the existence of a primary obligation. As is well known, the International Court of Justice, in its judgement of 18 July 1966 in the contentious cases of Ethiopia and Liberia *v.* the Union of South Africa,³¹ decided that Ethiopia and Liberia, although—as stated in its earlier judgement of 21 December 1962³²—having a *persona standi in judicio*, could not claim the performance by the Union of South Africa of its obligations under those articles of the Mandate which related to the implementation of the "sacred trust" (para. 33 of the judgement). Those articles, according to the Court, did not create a "separate self-contained right" of the individual Member States of the League of Nations (*ibid.*) but rather dealt with "matters that had their place in the political field". (It is to be noted that, in its advisory opinion of 21 June 1971,³³ the Court confirmed this distinction and there derived from it the conclusion that a "political organ of the United Nations" must be considered as empowered to take the necessary measures of response (para. 102 of the advisory opinion)). These judgements seem to be based on the opinion that the relevant articles of the Mandate did not create an obligation of South Africa towards the individual Member States of the League of Nations.

42. Whichever way one considers the second question (as one concerning the other "parties" to the new obligation of the guilty State to *restitutio in integrum*; as one concerning the "implementation" of State responsibility, i.e. a question of *persona standi in judicio*; or as one concerning the existence or non-existence of a primary obligation towards a particular State), it seems clear to the Special Rapporteur that there is a distinction to be made—for the purpose of

determining the legal consequences of a wrongful act—between a State directly affected by a particular breach of an international obligation (the "injured State") and other States, be they parties to the (multilateral) treaty creating the obligation or not. Within a *scala* of legal consequences, the new legal relationship created by the wrongful act of a State is primarily one between the guilty State and the State (or States) whose material interests are directly affected by that wrongful act.

43. Up till now we have only discussed the new obligation of the guilty State to *restitutio in integrum* in its three aspects: (a) re-establishment *ex nunc* of the "right" of the injured State (comparable to an obligation to fulfil, be it belatedly, the original primary obligation); (b) payment of damages *ex tunc* (comparable to "support" given to the original primary obligation); (c) giving "guarantees" *ex ante* (comparable to "counter measures" against the non-fulfilment of the original primary obligation). Furthermore, we have dealt with the question which other State or States may claim such *restitutio in integrum* from the guilty State.

44. Now we must turn to the *second parameter*: the question of (other) "responses" of the injured State to the wrongful act as a legal consequence of that wrongful act. It would seem useful to deal first with such other possible responses of both the injured State (second parameter) and other States (third parameter) before discussing the question of the relationship between the various "responses" (in particular the question whether or not such other responses are allowed only after it has become clear that the guilty State has not fulfilled its obligation to *restitutio in integrum*).

45. The first other response one might think of lies in the field of "non-recognition" of the situation created by the wrongful act. It is obviously possible that a primary rule of international law requires a State to recognize an existing factual situation created by another State as "legal", that is as entailing legal consequences. The question then may arise whether or not the fact that the situation is created by an internationally wrongful act of that State has an impact on this obligation. At first sight, it seems self-evident that at least the injured State is not any more obliged to recognize the situation created by another State as "legal" if that situation is created by a wrongful act of that other State. There may even be a duty, under international law, of the injured State or, for that matter, of third States, not to recognize the situation as legal—but this is a matter to be discussed within the context of the third parameter below. However, what exactly is the scope of this right of the injured State not to recognize the situation as legal? To answer this question one has to look at primary rules which create an obligation to "recognize".

46. In this connection, the first primary rules which come to mind are those concerning the limits, under

³¹ South West Africa, Second Phase, *Judgment: I.C.J. Reports 1966*, p. 6.

³² South West Africa, Preliminary Objections, *Judgment: I.C.J. Reports 1962*, p. 319.

³³ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council resolution 276 (1970), Advisory Opinion: *I.C.J. Reports 1971*, p. 16.

international law, of national jurisdiction, and, among those, in particular the rules relating to jurisdiction and other immunities of foreign States and their property. The question then is whether the courts of the injured State may ignore a jurisdictional immunity under international law of a foreign State in dealing with a situation created by that foreign State through an act in breach of its international obligation toward the injured State. The question is dealt with in various national court decisions, and even in national legislation concerning immunities of foreign States. By way of illustration, reference may be made to a judgement of the Netherlands Hoge Raad (Supreme Court) and to the United States legislation on N.V. immunity of foreign States. In the case of *the United States of America v. Bank voor Handel en Scheepvaart* (judgement of 17 October 1969), the United States Supreme Court held that it was empowered to test the conformity with rules of general international law of expropriation measures taken by the United States Government by virtue of its "Trading with Enemy Act" (typically an act *iure imperii*), and such even if the assets expropriated were situated within the territory of the United States and (before the expropriation) were not the property of Netherlands nationals or otherwise Netherlands interests. It should be noted that the implied waiver of immunity by the United States was not considered relevant by the Supreme Court. Furthermore, the Court found that the United States expropriation measures were not contrary to the rules of international law.³⁴

47. Under the United States legislation relating to foreign State immunities,

A foreign State shall not be immune from the jurisdiction of courts of the United States or of the States in any case... (3) in which rights in property taken *in violation of international law** are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign State; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign State and that agency or instrumentality is engaged in a commercial activity in the United States.³⁵

48. Obviously, the question of conformity or non-conformity with rules of international law of foreign legislative or administrative measures may also arise in cases where the foreign State, as such, is not a party in the dispute before the national court, and consequently its immunity (otherwise than via the "Act of State doctrine", a matter which the Commission does not wish to address within the context of the topic "Jurisdictional immunities of States and their property") is not in question. Under such circumstances, the matter of "recognition" of those measures is

usually dealt with by the application of the rules of conflict of laws, particularly of the exception to "recognition" of foreign laws contrary to the "*ordre publique*" of the forum. Whether or not, and if so, to what extent, general rules of public international law have anything to say on the admissible content of national rules of conflict of laws is a matter the Commission has as yet not considered a topic suitable for codification. It would seem therefore to the Special Rapporteur that this particular question of conflict of laws cannot be dealt with in the framework of part 2 of the draft articles on State responsibility. Furthermore, the possible impact of a wrongful act of a State on the scope of its jurisdictional immunity would seem to be more closely linked to, and could therefore better be addressed—if at all—within the framework of the topic entrusted to Mr. Sucharitkul as Special Rapporteur.

49. On the other hand, it may well be that questions of conflict of laws and the recognition due by a State to national rules and decisions of another State are embodied in a treaty between these States. Very often such treaties explicitly limit the duty of recognition by an "*ordre publique*" clause in that treaty. To the extent that this is not the case, one might perhaps consider such a clause to be implied in the treaty, at least for cases in which the other State does not act in conformity with the rules laid down in that treaty which relate to the limits of its jurisdiction. In any case, this situation rather falls within the scope of the *exceptio non adimpleti contractus* as a legal consequence of a wrongful act, to be discussed below.

50. In general, rules of (public) international law relating to (functional) limits of national jurisdiction are considered to be "self-executing", inasmuch as national courts may—and even should—apply such rules even if not "translated" into national legislation. Some national legislations generally refer to the "limits of jurisdiction recognized in international law". Furthermore, in some countries constitutional or other legislation refers to (conventional) rules of international law (even if not dealing with limits of national jurisdiction) as "self-executing", and even to be applied by national courts, the provisions of (prior, or even subsequently enacted) other municipal law notwithstanding.

51. It seems clear that in such cases the national courts of a State will feel inclined not to "recognize", i.e. not to apply, foreign rules or decisions established or taken not in conformity with (conventional) international obligations of that foreign State; in other words; in cases where the application of the foreign rule or decision would be incompatible with the application of the rule of international law binding on both States. Here again, the question may arise whether such "reaction" to a wrongful act of a foreign State is always permissible under (other) rules of international law. Sometimes this is clearly not the case. Thus, for instance, in the field of diplomatic

³⁴ See *Netherlands Yearbook of International Law, 1970*, vol. 1 (Leyden, Sijthoff, 1971), pp. 232–238.

³⁵ United States of America, *United States Statutes at Large, 1976* (Washington, D.C., U.S. Government Printing Office, 1978), vol. 90, part 2, pp. 2892–2893, Public Law 94–583, sect. 1605, sub-sect. 3(a).

immunities, no wrongful act whatsoever of a State could possibly justify a breach of the diplomatic immunities which that State enjoys in the territory of the injured State. This rule however, would seem to fall within the scope of the limitations which rules of international law on particular subject-matters (*inter alia*, protection of interests of the international community of States as a whole and protection of internationally recognized human rights) put to any type of "response" to an internationally wrongful act. These limitations will be discussed below.

52. Apart from such limitations, the non-recognition, in the exercise by a State of its national jurisdiction, of situations created by the internationally wrongful act of another State within its jurisdiction seems to be governed by the rules of international law specifically relating to "jurisdiction". A general rule of international law to the effect that any internationally wrongful act of a State entitles the injured State to overstep the limits of its jurisdiction, does not, in the opinion of the Special Rapporteur, seem to exist. (This does not exclude that such response by the injured State may be lawful in case the guilty State, in its turn, has overstepped the limits of its jurisdiction.)

53. In a certain sense, the question of the "non-recognition" by a State of a situation created by another State is reflected on another level by the rules of international law relating to "intervention" by a State in the affairs of another State. Obviously, a "response" of a State to an internationally wrongful act of another State is not necessarily an "intervention" in the affairs of that other State, prohibited by the general rules of international law. Here again, if a particular type of means of "intervention" is prohibited by international law even as a response to an internationally wrongful act of a State against which the intervention is directed, this is so by virtue of a rule of international law of the type just referred to, i.e. a rule which makes the prohibition of intervention so to speak "resistant" against being breached by way of response to a wrongful act. Such special protection is, it would seem, not given to all interests which are safeguarded by the international law rule prohibiting intervention. In this connection, it is tempting to refer to another context of the "resistance" of a rule of international law against its breach under special circumstances. Reference is made here to the report of the former Special Rapporteur, Mr. Ago, on "state of necessity" as a circumstance precluding wrongfulness.³⁶ In paragraphs 55 and following of this report, Mr. Ago—in the opinion of the present Special Rapporteur, quite convincingly—demonstrates (see in particular paragraph 66) that the prohibition of "intervention" is not necessarily in all its aspects "immune" from being "lawfully" breached by virtue of the excuse of a "state of necessity". It would seem that the same conclusion is equally valid as regards some breach of this prohibition committed as a counter-

measure—in the sense of article 30 of the draft articles—in respect of an internationally wrongful act.

54. In dealing with "non-recognition" as a response to an internationally wrongful act we have to take into account that this legal consequence is not so much directed against the wrongful conduct itself (*ex tunc*), nor even against its immediate result, the event that has taken place (*ex nunc*), but rather against the "follow-up" of that event (*ex ante*). Indeed, non-recognition is refusing to give an otherwise mandatory follow-up to the event that has taken place. (As such, it must be distinguished from another possible legal consequence of a wrongful act: the "substitution", for the purposes of recognition, of the event that has taken place by a situation as it would have been if the conduct had been in conformity with the obligation of the guilty State. Of course, such substitution of a "fiction" for a "fact" presents some inherent difficulties, quite apart from it being in principle a stronger response than the mere non-recognition of the facts.) Obviously, the admissibility of such response must depend on the "quality" of the wrongful act. Thus, for instance, an act of aggression may have the immediate result that a territory not under the sovereignty of the aggressor State is occupied by it. Leaving aside the question whether, and if so, to what extent, such occupation entails any right of the occupying State as a belligerent State, it is common ground that the occupied territory does not, in law, become part of the territory of the occupying State. Consequently, its administration of the territory (at least to the extent not covered by its rights as a belligerent State) is certainly not something that other States are bound to recognize as legal. (See, under the first principle of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations:³⁷ "No territorial acquisition resulting from the threat or use of force shall be recognized as legal.")

55. As is well known, the International Court of Justice, in its advisory opinion of 21 June 1971,³⁸ for the purposes of the legal consequence of non-recognition, as it were, assimilated the "continued presence" of South Africa in Namibia after the withdrawal of the Mandate by the General Assembly to a "territorial acquisition resulting from the threat or use of force" in the sense of the rule embodied in the General Assembly's Declaration mentioned just above. (It is to be noted that the withdrawal of the Mandate was itself construed by the Court as a legal consequence of the wrongful acts of South Africa in violation of its obligations under the Mandate. We will come back to this aspect when discussing the relationship between the various legal consequences of wrongful acts, culminating in the "implementation" of

³⁷ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

³⁸ For reference, see footnote 33 above.

³⁶ See p. 14 above, document A/CN.4/318/Add.5-7, sect. 5.

State responsibility.) In paragraphs 121 and following of its advisory opinion, the Court determines which “dealings with the Government of South Africa” are to be considered as implying “a recognition that South Africa’s presence in Namibia is legal”. Of course, there being no injured State (see para. 127: “the injured entity is a people...”), the Court deals here with a mandatory legal consequence in respect of *third States* (i.e. within the context of the third parameter). Obviously the right of the injured State not to recognize may well encompass more than the duty of a third State not to recognize. Nevertheless, the advisory opinion is relevant also in the context of the second parameter, inasmuch as it describes *a contrario* what non-recognition means. Whereas most of the “dealings with the Government of South Africa” prohibited by the obligation not to recognize the continued presence in Namibia as legal are, anyway, dealings that each State is otherwise free to enter or not to enter into (entering into treaty relations, sending diplomatic, consular or special missions, entering into economic and other forms of relationship) and as such are not relevant to the present context of the second parameter, the Court also mentions “dealings” to which a State might be otherwise obliged under a treaty with the guilty State. Actually, the duty to implement a treaty in respect of the whole territory of the other State party to the treaty and of all the territories for the international relations of which that other State party is responsible (see also the final sentence of para. 118 of the advisory opinion) does not apply in principle to a territory “acquired” or “held” by virtue of an internationally wrongful conduct.

56. It is interesting to note, however, that the Court, in paragraph 122, only refers to “existing bilateral treaties” and to “invoking active intergovernmental co-operation”. Furthermore, as regards multilateral treaties, the Court excludes from their non-application “certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the *people** of Namibia”. As to the last-mentioned point, the Court also more generally states in paragraph 125 that:

In general, the non-recognition of South Africa’s administration of the Territory should not result in depriving the *people** of Namibia of any advantages derived from international co-operation;

and, in paragraph 127, that:

all States should bear in mind that the injured entity is a *people** which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted.

57. All these “reservations” to the non-recognition could, in the opinion of the Special Rapporteur, be explained by the particular legal situation involved, where there was no State injured by the wrongful conduct, but the territory involved was one under international administration for the benefit of its population. This limitation of non-recognition (whether as a duty or as a right) therefore seems to fall rather in

the category, to be discussed below, of the protection of “extra-State” interests.

58. Apart from the right not to recognize as legal the situation created by the wrongful act of the guilty State, the injured State may have other rights as a legal consequence of that wrongful act. Under article 60 of the Vienna Convention, a material breach of a treaty by one of the parties entitles another party “to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part” (*exceptio non adimpleti contractus*). In its aforementioned advisory opinion of 21 June 1971, the International Court in paragraphs 94 and 95, generalizes this rule of international law into “the right to terminate a relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship”. One may have doubts as to the analogy between a “relationship” such as that which is envisaged in this case and a bilateral treaty relationship, in which normally there is a balance between the obligations of both parties. Indeed, whereas the invoking of the *exceptio non adimpleti contractus* can be seen as an application of the principle of reciprocity, there is nothing “reciprocal” in the relationship between the Mandatory and the League of Nations (or the United Nations). As a matter of fact, the Court, in paragraph 103 of the same advisory opinion, characterizes the United Nations as “the supervisory institution” and, at the end of paragraph 54, recalls one of its earlier statements, according to which the rights of the Mandatory in respect of the mandated territory are rather the *reverse of sovereignty over a territory*, inasmuch as they “have their foundation in the obligations of the Mandatory and . . . are, so to speak, mere tools given to enable it to fulfil its obligations.”

59. Be that as it may, one can draw the conclusion that, whether the rights and obligations under a legal relationship are “horizontally” or “vertically” connected by the “object and purpose” of the relationship as a whole, a response of non-fulfilment of obligations under the relationship is a valid legal consequence of the wrongful act of another State party to the relationship are “horizontally” or “vertically” connected by the “object and purpose” of the relationship as a whole, a response of non-fulfilment of obligations connection—such as that between States parties to a treaty—and a “vertical” connection—such as that between the supervisory part and the supervised party—still has important consequences. Indeed under articles 65 and 66(b) of the Vienna Convention and the annex to the Convention, a *compulsory* procedure for the settlement of disputes relating to termination or suspension of a treaty is provided for, also on the ground mentioned in article 60. On the other hand, according to the advisory opinion of the Court, no such procedure is apparently required in the case of the vertical relationship there envisaged.

60. At the same time, the Court expressly mentions, apparently with approval, that the General Assembly,

in withdrawing the Mandate, established as a ground therefore the breach by South Africa of obligations which as such are not directly contemplated, in the Mandate but rather in other instruments: the Charter of the United Nations and the Universal Declaration of Human Rights (para. 92 of the advisory opinion). This seems to point towards a not too restrictive conception of the “object and purpose” of a relationship, such relationship being possibly the result of a combination of different treaties between the same parties in related fields. (One might point out, in this connection, that perhaps the Mandate might be considered as a “treaty adopted within an international organization” in the sense of article 5 of the Vienna Convention.)

61. Indeed, apart from the applicability of the *exceptio non adimpleti contractus* in the strict sense, a breach of an international obligation may also entail legal consequences as regards the rights of the injured State to the non-fulfilment of obligations towards the guilty State other than those relating to the same “object and purpose” as the one underlying the obligation breached by the guilty State. As a matter of fact, one cannot *a priori* exclude counter-measures lying in a different field of activities than the one which is the “object and purpose” of the obligations breached by the guilty State, if only because of the absence of effective (as opposed to legal) reciprocity between the guilty and the injured State in a matter covered by a treaty under which an obligation is breached by the guilty State. However, the rule of proportionality of the response has a particular importance here (we will come back to this aspect below).

62. Passing now to the *third parameter*—the position of third States in respect of the wrongful act—the basic principle seems to be that a wrongful act does not create a new legal relationship between the guilty State and a State other than the injured State. Indeed, one might say that if the wrongful act of the guilty State A towards the injured State B created a new right of State C, the exercise of such right by State C would amount to an intervention in the external affairs of State A (and possibly, even of State B). There are, of course, exceptions to this basic principle of the “bilateral” character (guilty State/injured State) of the legal relationship created by an internationally wrongful act. Theoretically, one can distinguish three types of exceptions:

(a) There might be more than one “directly” injured State;

(b) The “primary” rule, the breach of which constitutes the wrongful act, is contained in a multilateral treaty;

(c) The wrongful act is a breach of an obligation protecting a fundamental interest which is not solely an interest of an individual State (compare the “international crime” mentioned in art. 19 of the draft articles).

(One might, of course, also consider these three types as types of “injury”, and hence as determining which are the “injured States”).

63. As regards the first type of exception, a distinction must be made between a wrongful act directly injuring two or more States separately, a wrongful act inflicting injury to an interest which two or more States have in common, and the case of inflicting injury on an interest which a State has “through” another State. It would seem that some such distinction underlies the judgement of 5 February 1970 of the International Court of Justice in the *Barcelona Traction* case,³⁹ in which the Court refused to recognize a *jus standi* of Belgium on the basis of nationals of that State allegedly holding 88 per cent of the shares in the company, incorporated under the laws of Canada. The Court distinguished this situation from the one in which there are “concurrent claims being made on behalf of persons having dual nationality...”, and from the situation where “...international law recognizes parallel rights of protection in the case of a person in the service of an international organization” (para. 98 of the judgement; see also paras. 53, 96 and 97). Be that as it may, the Judgement clearly recognizes the possibility of one and the same wrongful act directly inflicting injury on more than one State.

64. The second type of exception is addressed in articles 60 and 70 of the Vienna Convention within the context of the *exceptio non adimpleti contractus*. Article 60, paragraph 2, distinguishes between “a party specially affected by the breach” and “any party other than the defaulting State”. It is interesting to note that, while the former party may invoke the breach as a ground for suspending the operation of the treaty in the relations between itself and the defaulting State (“bilateral” character), the latter party individually has no such right. The response of suspending the operation of the treaty or even terminating it is reserved to “the other parties by unanimous agreement”. Furthermore, paragraph 2(c) of article 60 embodies a sort of *clausula rebus sic stantibus*, inasmuch as it takes into account the consequences of the breach as radically changing “the position of every party with respect to the further performance of its obligations under the treaty”. In that case, any party other than the defaulting State may suspend the operation of the treaty with respect to itself, and presumably also in its relations with the parties, other than the defaulting State. The situation here is somewhat similar to that envisaged in article 17, paragraph 2, *in fine*, of the Vienna Convention on Succession of States in Respect of Treaties.⁴⁰ Indeed, in both cases the “radical change” is linked with the character of the treaty itself. Actually, article 60 of the Vienna Convention only applies to a *material* breach of a treaty, i.e. (apart from the repudiation of the

³⁹ *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment: I.C.J. Reports 1970, p. 3.*

⁴⁰ *Official Records of the United Nations Conference on Succession of States in Respect of Treaties, vol. III, Documents of the Conference* (United Nations publication, Sales No. E.79.V.10), p. 190.

treaty) “the violation of a provision essential to the accomplishment of the object or purpose of the treaty”. It seems hard to imagine such a breach as not affecting every other party. Indeed, unless a multilateral treaty is nothing more than a “unification” of independent bilateral relationships (in which case one might even say that the multilateral treaty as such does not have an “object and purpose” of its own), a material breach by a party cannot but inflict injury on all the other parties. (Compare also the type of multilateral treaties, mentioned in art. 20, para. 2 of the Vienna Convention and in art. 17, para. 3 of the Vienna Convention on Succession of States in Respect of Treaties.) Nevertheless, the response can in the first instance only be a *collective* one. The individual action envisaged in article 60, paragraph 2(c) seems to be in the nature of a (provisional) withdrawal from the multilateral treaty as a consequence of a “radical change” in the factual situation, rather than in the nature of a response to a wrongful act. Both the reference to “the further performance of its obligations under the treaty” and the fact that the suspension of the operation of the treaty also affects the relations with parties other than the defaulting State seem to point in the direction of this construction. Surely the provision can only be applied if there has occurred a wrongful act, but it is not so much this wrongful act as the resulting situation—and, presumably, its maintenance or follow up, the “radical change”—which is the basis for withdrawal. In this connection, one might point to the inverse position in article 62, paragraph 2(b): a fundamental change of circumstances may not be invoked if it is the result of a breach, by the party invoking it, of an international obligation. (A similar provision is contained in art. 61, para. 2. Compare also proposed art. 33, para. 2, of the draft articles on State responsibility.)⁴¹ The character of the provision of article 60, paragraph 2(c) as not pertaining to the category of response to a wrongful act is furthermore underlined by the fact that only suspension of the operation of the treaty is allowed. Such suspension, under article 72, paragraph 1, has a limited effect, and even (para. 2) entails a duty “to refrain from acts tending to obstruct the resumption of the operation of the treaty” (a duty in some respects comparable to the one laid down in article 18 of the Vienna Convention).

65. For the reasons outlined above, it would seem that, within the context of the *exceptio non adimpleti contractus*, article 60 of the Vienna Convention does not treat all the parties to a multilateral treaty as “injured States” on the same footing (indeed, we have noted before that the *exceptio non adimpleti contractus*, as regards bilateral treaties, may be considered as the reflection of the principle of reciprocity of performances under the treaty; as such, the material breach by one party almost necessarily creates a “radical change” of the situation for the other

party). On the other hand, the Vienna Convention does recognize the existence of particular multilateral treaties in which the legal relations between each party and each other party are inextricably interwoven and constitute an indivisible whole. This is not far from saying that such particular multilateral treaties create a legal situation in which each obligation of a State party to the treaty is an obligation *erga omnes* (of course, within the framework of the community of States parties to the multilateral treaty). Seen in this light, the second type of exception is rather a prefiguration on a regional scale, of the third. (The term “regional” in this context should not be taken only in its “territorial” sense, but covers all groupings of States, whether on a territorial basis or on a “functional” or even on a purely “personal” basis, such as groupings for collective self-defence.)

66. Passing now to the third type of exception, we note that the existence of such an exception is prefigured by article 19 of the draft articles on State responsibility.⁴² Indeed, quite apart from the question of which response of the third State is allowed under the rules of international law, a “non-neutral position” of the third State in respect of the wrongful act seems to be implied in the qualification of the wrongful act as an “international crime”. The present preliminary report, in discussion of part 2 of the draft articles, is certainly not the place to review the wording of article 19. The question does, however, arise within the context of part 2 as to whether or not the—as yet not fully defined—category of “international crimes” constitutes the only category of internationally wrongful acts which entail a non-neutral position of *every* other State. Furthermore, it would seem to the Special Rapporteur that some further analysis of the relationship between the concept of “international crime” and the concept of “international *jus cogens*” is required in order to clarify the legal content of State responsibility. On the “regional” plane, for instance, one may note a certain similarity in the Vienna Convention between articles 41 and 58, on the one hand, and articles 53, 64 and 71, on the other hand. *Jus cogens*, or something like it, also plays a role in articles 18, paragraphs 2 and 29, paragraph 2 of the draft articles on State responsibility and in the proposed article 33, paragraph 3(a) of that draft. The persistency of certain primary legal relationships, “changing circumstances” notwithstanding, also underlies article 62, paragraph 2(a) of the Vienna Convention as well as articles 11 and 12 of the Vienna Convention on Succession of States in Respect of Treaties. Finally, as will be discussed below, the persistency of certain primary obligations for a State, their breach by another State notwithstanding, underlies, *inter alia*, article 60, paragraph 5 of the Vienna Convention. There seem to be, in other words, different types and consequences of *jus cogens*. For the moment, it seems sufficient to note

⁴¹ See p. 51 above, document A/CN.4/318/Add.5–7, para. 81.

⁴² See footnote 24 above.

that a “non-neutral position” of a third State, or even of every third State, is a “legal consequence” of a wrongful act that is not necessarily reserved for such wrongful acts as constitute international crimes.

67. On the other hand, looking at the list of possible international crimes in article 19, paragraph 3, it would seem *a priori* clear that the legal consequences of those crimes are not necessarily identical; indeed, the principle of proportionality would not allow such automaticity. Here again, reference may also be made to Mr. Ago’s proposal for article 33, which, in its paragraph 3, rightly singles out the prohibition of aggression as particularly immune against the excuse of state of necessity.

68. One of the more general questions which arise in the context of the third type of exception is whether or not the non-neutral position of the third State, and in particular its right to take a counter-measure, is dependent upon a collective decision taken in respect of the wrongful act of the guilty State. As we have seen, the real counter-measure of termination of a multilateral treaty as a consequence of a material breach of the treaty by one of the parties to it is reserved for a collective (even unanimous) decision of the other parties to the treaty.

69. The question is addressed, it would seem, in an advisory opinion of the International Court of Justice mentioned before.⁴³ The situation of the Court had to deal with in this opinion was a very special one, involving the status of a territory (Namibia) which was, and is, not part of the territory of a State. This basic fact may have decisively influenced the Court’s opinion on questions of a more general character which are at issue here. In any case, the Court primarily had to answer the question of the legal consequences for States of a Security Council resolution declaring the continued presence of South Africa in Namibia to be “illegal”. In other words, a collective decision had already been taken as regards the response to a wrongful act. The Court, therefore, did not have to answer the question of what the legal situation would have been if no Security Council resolution had been passed after the termination of the Mandate by the General Assembly of the United Nations.

70. On the other hand, it would seem significant that the Court in a way assimilated the Security Council resolution to a judgement which had the effect of “putting an end to an illegal situation” (para. 117 of the advisory opinion—an express reference to one of the Court’s own earlier judgements, in the *Haya de la Torre* case). In other words, one might perhaps construe the advisory opinion in such a way that the Security Council resolution was considered by the Court as nothing more than an official pronouncement (“judgement”) that South Africa had not fulfilled its obligations arising from the withdrawal of the

Mandate, and that, consequently, its continued presence was illegal. Thus construed, the question of the existence and content of “new legal relationships” between South Africa and other States would have been left open by the Security Council resolution. Starting from this construction, one might say that the Court had to indicate, and did indicate, what those “new legal relationships” were under the rules of general international law. In this perspective it should be noted, in the first place, that the Court declares in respect of the response (paragraph 120 of the opinion) that:

The precise determination of the acts permitted or allowed—what measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should be applied—is a matter which lies within the competence of the appropriate political organs of the United Nations acting within their authority under the Charter.

In other words, a response by States to the wrongful act of South Africa requires a collective decision. Nevertheless, the Court also, as we have seen above, does itself indicate some types of response of individual States, but this is done by way of “interpretation” of the Security Council resolution—that is, as responses already indicated by a collective decision.

71. This, then, rather seems to confirm the statement that a collective decision is required before third States can take any action under a “new legal relationship”, created by a wrongful act, between the guilty State and third States. But this confirmation is still open to doubt since, apart from the fact that in the case of Namibia there is no “injured” State, the Court only deals with *mandatory* responses of States. Obviously, a duty of a third State not to act in conformity with its international obligations towards a guilty State cannot be easily assumed. At most one could require a State which is not an injured State to refrain from giving support *a posteriori* to the wrongful act, and this requirement might even prevail over obligations of the third State towards the guilty State. As a matter of fact, we have seen that most of the conduct considered by the Court as “inconsistent with the declaration of illegality and invalidity” made in the Security Council’s resolution, and consequently prohibited by that resolution, was conduct to which no State was obliged anyway (entering into new treaty relations etc.).⁴⁴ Furthermore, article 27 of the draft articles on State responsibility already qualifies:

Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, as “an internationally wrongful act”. Surely such aid or assistance must have been rendered before or during the wrongful act, and a specific link of “intention” is required. Nevertheless a duty to refrain from voluntary acts which constitute support *a posteriori* of a wrongful act may be considered to be justified by similar considerations.

72. The point is, however, that a third State may itself commit an internationally wrongful act in

⁴³ For reference, see footnote 33 above.

⁴⁴ Para. 55 above.

refraining from what could be construed as support *a posteriori* of a wrongful act. A right (let alone a duty) of a State which is not a State injured by the wrongful act to do so seems sufficiently exceptional as to be made dependent upon a collective decision to that effect.

73. The requirement of a collective decision, suggested above, seems all the more justified in cases where the response of the third State is more than a mere refusal of support *a posteriori* of the wrongful act. In this connection, passing reference has been made earlier⁴⁵ to a possible measure of response consisting not only of a refusal to recognize the result of a wrongful act, but actually substituting that result by a fictitious situation which would have materialized if the guilty State had acted in conformity with its international obligations. Such substitution is a measure of "self-help" which is in principle inadmissible under international law, unless the State taking such measure of response thereby merely exercises a pre-existing right purportedly infringed by the wrongful act of another State (in other words, simply does not recognize the infringement). Thus, for instance, if a coastal State, in its national legislation, requires previous authorization for the pure passage of foreign fishing boats through its economic zone, another State is allowed to ignore that legislation. If, however, the coastal State, under a treaty is obliged to give in respect of its economic zone licences to the fishermen of another State and does not fulfill this obligation, that other State may not act as if the obligation had been fulfilled. (cf. also the advisory opinion of the International Court of Justice of 3 March 1950,⁴⁶ where the Court declared: "...nowhere has the General Assembly received the power to change, to the point of reversing, the meaning of a vote of the Security Council.") Furthermore, in some specific cases, the rules of international law do admit "self-help", albeit generally only if covered by a collective decision to that effect.

74. Up till now we have discussed the possible "right" of the third State to a non-neutral position in respect of a wrongful act committed by another State. The next step in the *scala* of legal consequences is obviously a possible *duty* of third States to take a non-neutral position. In general, such a duty could only be justified by the necessity of ensuring the "credibility" of a primary rule itself, regardless of the relationship between the guilty State and the injured State involved in the breach of that primary rule. We have seen that the International Court of Justice accepted, in its advisory opinion on the legal consequences for States of the continued presence in South Africa in Namibia,⁴⁷ the possibility of such a duty

(even, to a certain extent, incumbent upon non-member States of the United Nations, if not directly, then at least in the sense of a "non-recognition" by the Member States of the United Nations of the result of conduct of a non-member State which is not in conformity with that "duty": see para. 126 of the Advisory Opinion). It is true that the Court derived this duty from the (collective) decision of the Security Council itself, and that the particular legal status of the territory involved cannot but have influenced the advisory opinion. Indeed, the Court founded the duty of all the Member States of the United Nations on Articles 24 and 25 of the Charter, i.e. on the "primary responsibility for the maintenance of international peace and security" conferred on the Security Council, and apparently leaves to the Security Council full discretion to "deem" (para. 109 of the opinion) that responsibility to be involved irrespective of the nature of the international obligation breached by a State, and perhaps even if no such breach had been established (see also para. 112 of the opinion). In a sense, this opinion finds its counterpoint in Article 94, paragraph 2, of the Charter, which empowers the Security Council "if it deems necessary", to make recommendations or decide upon measures to be taken to give effect to a judgement of the International Court of Justice. In this provision, it seems, the mere fact that a "party to a case fails to perform the obligations incumbent upon it under a judgement rendered by the Court" is sufficient, whether or not such a failure in fact compromises the maintenance of international peace and security. One might, therefore, consider Articles 24 and 25 of the Charter (but not Art. 94, para. 2) to fall outside the scope of "legal consequences of an internationally wrongful act" (and of course Art. 94, para. 2, as falling within the scope of the "implementation" of State responsibility). Be that as it may, one cannot, it would seem, exclude *a priori* a duty of States under rules of general international law to act (or to refrain from otherwise admissible acts) in response to a breach of an international obligation, in particular when such a breach constitutes an "international crime" in the sense of article 19 of the draft articles on State responsibility, even if such breach does not, in fact, involve international peace and security. Again, a collective decision to that effect would seem to be a prerequisite for establishing such duty, and the rule of proportionality should at all times be observed.

75. A duty of all States to adopt specific conduct in response to an internationally wrongful act obviously includes a duty of the injured State to adopt such conduct. In other words, it takes away the normal faculty of the injured State to waive its rights to a response. This consequence seems in keeping with article 29, paragraph 2, of the draft articles on State responsibility. On the other hand, such duty of all States may well imply, at least for some States, a "sacrifice" of some of their interests, such sacrifice being required in order to ensure the credibility of the

⁴⁵ See para. 54 above.

⁴⁶ Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion: *I.C.J. Reports 1950*, p. 10.

⁴⁷ For reference, see footnote 33 above.

primary rule breached by the wrongful act. The question arises whether, under certain circumstances, another sacrifice may be required, in particular a loss of a right (as contrasted with a mere faculty). This question has been very briefly addressed in the Commission on the occasion of the discussions relating to articles 29 and 30. Since article 29—concerning consent—provides that consent only precludes the wrongfulness of the act in relation to the State which has given the consent, and article 30 does not contain a similar wording, the question was put as to whether, under article 30, “a measure legitimate under international law” taken by State A against a guilty State B might also preclude the wrongfulness of that measure in relation to State C. In other words, the question is: does international law legitimate measures of response to a wrongful act of a State, even if such measures of response are not in conformity with an obligation of the State taking such a measure, as against an “innocent” State?

76. In the first instance, the question must be answered in the negative. However, here again there might be exceptions, corresponding to those discussed above.⁴⁸ Thus it may be that a legitimate counter-measure of State A in its relationship with State B would in fact have no effect if it were not accompanied by measures designed to prevent their evasion through dealings in the relationship between State A and State C or their substitution by dealings in the relationship between State C and State B. This fact in itself could not, it seems, justify either interference by State A in the relationship between State C and State B, or a measure not in conformity with the rules governing the relationship between State A and State C, unless the measure is based on a collective decision in which State A and State C participate, and this collective decision imposes a legal duty on State C to take corresponding measures, or at least to render its assistance in the carrying out of such measures. In the particular context of measures taken under Chapter VII of the Charter of the United Nations, articles 48 to 50 seem to reflect such a rule (see also Article 2, para. 5 of the Charter).

77. Among the legal consequences of a wrongful act, a special position is taken by measures taken within the framework of an international organization in respect of the rights of a member State of such organization under its “rules of the organization” (in the sense of art. 2, para. 1(j), of the draft articles on treaties concluded between States and international organizations or between international organizations)⁴⁹ in consequence of an internationally wrongful act of that member State. The constituent instruments (or other “rules of the organization”) of several international organizations provide for suspension of a member State from the exercise of (some of) its rights and

privileges of membership, or even expulsion, in case of such member State having committed a breach of its international obligations (e.g., Articles 5, 6 and 19 of the Charter of the United Nations). It is to be noted, however, that there are also provisions for such measures of suspension in cases where there is not a (direct) breach of an obligation under international law, but rather an attitude of a member State in defiance of resolutions, validly taken by organs of the organization which, in themselves, do not create legal obligations for the member State concerned nor are founded on an internationally wrongful conduct of that State. Thus, for example, article II, section 1, of the International Air Services Transit Agreement of 1944⁵⁰ envisages an ultimate suspension of membership rights in a case where a member State had failed to give reasonable attention to a recommendation made by the Council of ICAO in consequence of a complaint by another member State, such complaint being founded not on a wrongful act of the former member State, but on hardship caused to the latter member State by an act which is in itself not illegal. (See, on this particular clause, the judgement of the International Court of Justice of 18 August 1972;⁵¹ the overlapping of a “complaint” and an “application” is discussed in paras. 21 to 24 of the judgement).

78. Indeed, the membership of an international organization may well entail a general obligation of “solidarity”, the concrete contents of which cannot be defined in advance, while on the other hand the consequences to be drawn from a breach of that obligation are rather a matter of political discretion of the other members, exercised through the competent organs of the organization. For this reason, the Special Rapporteur is inclined to advise the Commission not to deal with this matter within the framework of Part 2 of the draft articles on State responsibility. Another reason is that—to the extent that wrongful acts and legal consequences thereof are involved—the “sanction” of suspension of membership rights or expulsion from an international organization is rather the ultimate means of enforcing a decision of the competent organs of that organization, acting by way of “settlement of disputes” in the largest sense; thus the matter seems to be more related to the subject-matter that will be dealt with in part 3 of the draft articles on State responsibility.

79. Having drawn up a catalogue of possible “new legal relationships established by a State’s wrongful act”⁵² (obligation of the guilty State, rights of the injured State, rights of third States, obligations of third States), we now must turn to the problem of proportionality between the wrongful act and the “response”

⁴⁸ See paras. 62 *et seq.*

⁴⁹ See *Yearbook... 1979*, vol. II (Part Two), p. 138, document A/34/10, chap. IV, sect. B.1.

⁵⁰ United Nations, *Treaty Series*, vol. 84, p. 389.

⁵¹ Appeal Relating to the Jurisdiction of the ICAO Council, *Judgment: I.C.J. Reports 1972*, p. 46.

⁵² See *Yearbook... 1971*, vol. II (Part One), p. 211, document A/CN.4/246 and Add.1–3, para. 43.

thereto. Logically the first question which arises in this context is whether the response—being itself either a limitation of rights or a breach of an obligation under international law—is admissible at all under international law and, if so, under what circumstances (other than the mere fact of the breach of any international obligation by the guilty State). This question even arises as regards the new legal relationship consisting of a new obligation of the guilty State. Thus, for instance, under article 18, paragraph 2, of the draft articles on State responsibility, an act internationally wrongful at the time when it was performed “ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law”. Incidentally, one might compare this rule with the one laid down in article 71, paragraph 2, of the Vienna Convention, since it might well be that the act internationally wrongful at the time when it was performed did have this quality by virtue of an international obligation embodied in a treaty. There would seem to be some contradiction between subparagraph (b) of the provision just referred to and article 18, paragraph 2, of the draft articles on State responsibility, at least if one considers the new legal obligation of the guilty State which was established at the time the wrongful act was committed as a “right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination”. Surely, to the extent that this new obligation is an obligation to pay damages (*ex tunc*) to the injured State, one might wonder if the maintenance of that obligation is “in itself in conflict with the new peremptory norm of general international law”. Indeed, one might envisage at least the possibility that a new peremptory norm of general international law does not purport to have such retroactive effect. The case seems to be somewhat analogous to those dealt with in article 31, paragraph 1, and article 32, paragraph 1, of the draft articles on State responsibility. In those cases the Commission recognized that, although the wrongfulness of the act is precluded, there might still be an obligation of the State having committed the act to pay damages to the injured State since, in general, there seems to be no reason for the injured State to bear the full burden of the consequences of a situation of *force majeure*, fortuitous event or distress (even if the guilty state in question has not “contributed to the occurrence of the situation...”).

80. Be that as it may, it is clear that a *restitutio in integrum* (*ex nunc*) and *a fortiori* a guarantee against repetition of the conduct (*ex ante*) are excluded in the situation envisaged in article 18, paragraph 2, of the draft articles on State responsibility. Furthermore, if there is still an obligation of the—no longer guilty—State to pay damages, such damages cannot include any amount of *lucrum cessans* beyond the date the new peremptory norm came into force (nor, obviously, have any “punitive” element). One can hardly imagine

a new peremptory norm of international law not having at least this degree of retroactivity.

81. In connection with the admissibility of the new legal relationship under international law, reference must be made to the possibility that the primary rule itself describes what the legal consequences of certain conduct should be. Thus one can easily imagine a primary rule of conventional international law—i.e., a treaty which obliges a State party to the treaty to pay an “adequate indemnity” to the national of another State party to the treaty in case the former State proceeds to expropriation of property of that national. This being a primary rule, it is clear that under that rule it is not the expropriation in itself, but the non-payment of the “appropriate indemnity”, which constitutes an internationally wrongful act. It would seem equally clear that this internationally wrongful act cannot establish a new duty of the guilty State to pay damages amounting to more than appropriate indemnity (plus possibly a normal percentage as compensation for the fact that the prescribed payment has not taken place at the prescribed moment).

82. The case just mentioned is certainly not the only instance of a primary rule the content of which determines an element of the new legal relationship that is established by international law as a consequence of the breach of that primary rule. Indeed, more generally, if a primary rule is established by a treaty, that treaty may itself determine, at least as between the parties to the treaty, and subject to any rule of *jus cogens* to the contrary, the legal consequences of a breach of an obligation under that treaty. As regards the legal consequence, consisting of a right of the injured State to terminate or suspend the operation of the treaty, this principle underlies article 60, paragraph 4, of the Vienna Convention.

83. We discussed above⁵³ the case of a new peremptory norm of general international law having an impact on the new legal relationship normally established as a consequence of an internationally wrongful act. Apart from *jus cogens* in the sense of article 53 of the Vienna Convention, there are other primary rules of international law with special effects. Thus, for example, Article 103 of the Charter of the United Nations, while not laying down the rule that an international agreement imposing obligations *in abstracto* which may *in concreto* conflict with obligations under the Charter are void, nevertheless proclaims that, in such an event, the latter obligations shall prevail. This rule cannot but have an impact on the legal consequences of a breach of the obligation under that other international agreement. Obviously, the fulfilment of the obligations under the Charter can never be considered as an act entailing the same legal consequences as an internationally wrongful act. The question is, rather: does it, under all circumstances, not

⁵³ See paras. 79 and 80.

entail any of the normal consequences of a breach of an obligation under an international agreement? The Special Rapporteur is inclined to answer this question in the positive sense. There can be, it would seem, no doubt on this score if the "obligations under the present Charter" are, in fact, obligations imposed by the Security Council on a State to apply a certain measure of response to an internationally wrongful act of another State. Article 103 of the Charter certainly envisages just such a case. But the same conclusion seems to be valid as regards other obligations *in concreto*, imposed by the Security Council—or, for that matter, by another organ of the United Nations—in accordance with the Charter. Furthermore, there certainly are other obligations directly imposed by the Charter on each individual State and which must be considered as *jus cogens*, even as *jus cogens* with full retroactive effect. On the other hand, it would clearly go too far to construe every conceivable duty of a State in relation with its being a party to the United Nations Charter as an international obligation under the Charter in the sense of Article 103. Where to draw the line is obviously not a matter to be dealt with in the context of the present report.

84. As a matter of fact, the Charter of the United Nations primarily involves the creation of a new "entity" (or a new "subject" of international law) standing in legal relationship with the States, under rules of international law. The legal existence of this international organization cannot but have an impact on the legal consequences of internationally wrongful acts of States in their relations with other States. In the opinion of the Special Rapporteur, it is this impact of the legal relationship between the United Nations and its Member States on the relationships between Member States which is the subject-matter of Article 103 of the Charter.

85. In this connection, we must turn our attention to other examples of international organizations in the larger sense of the word. We have already noted before that, under article 60, paragraph 2, of the Vienna Convention, a material breach of a multilateral treaty by one of the parties entitles the other parties by unanimous agreement to take certain measures of response, notably, a measure comparable to a suspension or expulsion of the defaulting State from the group of States parties to the multilateral agreement (art. 60, para 2(a)(i)). Still in respect of multilateral treaties, articles 41 and 58 of the Vienna Convention deal with the limits of the possibility of two or more parties to a multilateral treaty creating a legal relationship *inter se* which is at variance with the legal relationships envisaged by the multilateral treaty. Even if those articles are not intended to proclaim that the agreement to this effect between two or more parties to the multilateral treaty which oversteps the limits of the possibilities envisaged in those articles is void *ab initio*, there is sufficient analogy between the matter dealt with in these articles (i.e., with what could be called "regional" *jus cogens*) and the effect of a peremptory

norm of general international law to justify putting the question of the possible impact of such multilateral treaties on the "normal" legal consequences of an internationally wrongful act. Indeed, we have already dealt with⁵⁴ one aspect of this question. It appeared there that even a material breach of a multilateral treaty by one of the parties (a guilty State) does not entitle another party (the injured State) to terminate the treaty—even in the relations between itself and the guilty State—but only to suspend the operation of the treaty. But even such unilateral suspension, one would presume, could, particularly in combination with the material breach by another party, create a legal situation which is comparable with the one created by an agreement between the two States involved. Does this fact have an impact on the normal entitlement of the injured State not to fulfil its obligations under the treaty in respect of the guilty State? The Special Rapporteur is inclined to give a positive answer to this question, article 60, paragraph 2(b) of the Vienna Convention notwithstanding, at least if the multilateral treaty is not simply a "unification" of the contents of bilateral legal relationships, and with the proviso that the right of the injured State under article 60, paragraph 2(b) revives if the parties other than the defaulting State fail to take the adequate measure of response by unanimous agreement. Furthermore, the right of the injured State as a "party other than the defaulting State" under article 60, paragraph 2(c) remains valid.

86. Treaties, even bilateral ones, along with determining substantive rights and obligations of the parties, often create a *mechanism of consultation and negotiation* in respect of their interpretation and application. Does the resulting duty to negotiate inhibit a party from taking a countermeasure in response to conduct of another party which the first party considers to be in breach of an obligation under that treaty? This question was dealt with in a recent arbitral award⁵⁵ and answered there in the negative.

87. In the same award, the tribunal discussed the question whether the provision, in the treaty, of *an arbitral or judicial machinery which can settle disputes* relating to the interpretation and application of the treaty, entails a prohibition of counter-measures. Since the award has not yet been published, it may be useful to cite here *in extenso* the relevant considerations of the tribunal.

94. However, the lawfulness of such counter-measures has to be considered still from another viewpoint. It may indeed be asked whether they are valid in general, in the case of a dispute concerning a point of law, where there is arbitral or judicial machinery which can settle the dispute. Many jurists have felt that while arbitral or judicial proceedings were in progress, recourse to

⁵⁴ See para. 64 above.

⁵⁵ Case concerning the Air Services Agreement of 27 March 1946 (United States *v.* France) (to appear in: United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), p. 417).

counter-measures, even if limited by the proportionality rule, was prohibited. Such an assertion deserves sympathy but requires further elaboration. If the proceedings form part of an institutional framework ensuring some degree of enforcement of obligations, the justification of counter-measures will undoubtedly disappear, but owing to the existence of that framework rather than solely on account of the existence of arbitral or judicial proceedings as such.

95. Besides, the situation during the period in which a case is not yet before a tribunal is not the same as the situation during the period in which that case is *sub judice*. So long as a dispute has not been brought before the tribunal, in particular because an agreement between the Parties is needed to set the procedure in motion, the period of negotiation is not over and the rules mentioned above remain applicable. This may be a regrettable solution, as the Parties in principle did agree to resort to arbitration or judicial settlement, but it must be conceded that under present-day international law States have not renounced their right to take counter-measures in such situations. In fact, however, this solution may be preferable as it facilitates States' acceptance of arbitration or judicial settlement procedures.

96. The situation changes once the tribunal is in a position to act. To the extent that the tribunal has the necessary means to achieve the objectives justifying the counter-measures, it must be admitted that the right of the Parties to initiate such measures disappears. In other words, the power of a tribunal to decide on interim measures of protection, regardless of whether this power is expressly mentioned or implied in its statute (at least as the power to formulate recommendations to this effect), leads to the disappearance of the power to initiate counter-measures and may lead to an elimination of existing counter-measures to the extent that the tribunal so provides as an interim measure of protection. As the object and scope of the power of the tribunal to decide on interim measures of protection may be defined quite narrowly, however, the power of the Parties to initiate or maintain counter-measures, too, may not disappear completely.⁵⁶

88. It may be recalled that under the Vienna Convention the procedure of conciliation specified in the annex to that Convention may be set in motion after the application by a party of article 60 of the Convention (Termination or suspension of the operation of a treaty as a consequence of its breach), in accordance with the procedure prescribed in articles 65 and 66 of that Convention. Under paragraph 4 of the annex to that convention, the Conciliation Commission "may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement". This would seem to include a power of the Commission to draw the attention of the parties to interim measures such as the suspension, in whole or in part, of the counter-measure taken under article 60. Obviously this power does not inhibit the right to take and maintain the counter-measure. Furthermore, as we have seen in discussing the advisory opinion of the International Court of Justice in the Namibia case,⁵⁷ there may be special treaty relationships in which a competent organ of an international organization can act without any third-party procedures of testing the existence of a breach being required either before or after the taking of the counter-measure.

⁵⁶ *Ibid.*, pp. 445–446.

⁵⁷ See para. 58 above.

89. Indeed, it is quite possible that, in a treaty establishing an international organization, the substantive rights and obligations of the parties are so closely connected with the object and purpose of the organization as a whole that the right of one member State to suspend the operation of the treaty in whole or in part on the ground that another member failed to fulfil its obligation disappears altogether and is replaced by the power of the organization to take the measures it considers necessary in the situation created by the alleged breach (or, for that matter, created by a member State's conduct which is not illegal at all).⁵⁸

90. Apart from the procedural restraints on the taking of counter-measures, there are obviously *substantive* obligations of States which may not be breached even in response to a previous internationally wrongful act of another State. Thus, to mention only two examples, article 60, paragraph 5 of the Vienna Convention recalls the existence of "provisions relating to the protection of the human person contained in treaties of a humanitarian character", and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations⁵⁹ proclaims that "States have a duty to refrain from acts of reprisal involving the use of force". In this connection, article 19 of the draft articles on State responsibility comes to mind. Indeed, at first sight one could hardly imagine an "international crime" to be justified as a counter-measure against any breach of an international obligation, even a breach which constitutes itself an international crime. It would seem, however, that a note of caution is in order here. As a matter of fact, several fundamental obligations of States are formulated in such a way that exceptions are explicitly or implicitly provided for, which may include situations of response to a particular course of conduct of another State or States. Thus, to take an obvious example, the Definition of Aggression adopted by the General Assembly of the United Nations⁶⁰ contains a clause (art. 6) stating that:

Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

Reference may also be made to a general clause, which was introduced in the 1970 Declaration of Principles of International Law cited above and which since then has been included in several other instruments dealing with fundamental obligations of States, to the effect that:

In their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles.

These and other clauses—notably, clauses safeguarding the powers of the Security Council under the

⁵⁸ See paras. 77 and 78 above.

⁵⁹ General Assembly resolution 2625 (XXV), annex.

⁶⁰ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

Charter—seem to exclude any automatic assumption that all international obligations “essential for the protection of fundamental interests of the international community”, or even all these obligations the breach of which, in isolation, is “recognized as a crime”, are immune under international law from being justifiably breached. Indeed, some fundamental obligations of every State as a member of the international community of States are predicated upon the effective maintenance of “law and order” within that community.

91. On the other hand, there are several obligations under international law the breach of which is not considered to be an “international crime” by the international community as a whole, but which are nevertheless of such a peremptory character that their breach can never be justified as a counter-measure against an internationally wrongful act. Thus, obviously, a violation of internationally protected human rights in one State cannot justify a violation of those rights in another State. Nor is the breach of an obligation relating to the protection of the human environment justifiable as a counter-measure against a similar breach by another State. In both cases, it would seem, the international obligations involved are not primarily inter-State obligations but rather parallel obligations of States for the protection of “extra-State” interests. There is clearly here an analogy with the situation referred to above⁶¹ where the relationships between member States of an international organization are, as it were, superseded by their parallel obligations towards that organization. The difference, or course, is that the “extra-State” interests protected here cannot (always) be allocated to a subject of international law, which inversely is the reason for assimilating these parallel obligations to obligations between States. Incidentally, as we have seen before,⁶² the International Court of Justice in its advisory opinion on Namibia expressly excluded from the duty not to recognize the situation as lawful such counter-measures as would damage the “injured entity”, i.e. the population of Namibia itself.

92. Apart from international obligations the breach of which can never be justified as a counter-measure against any internationally wrongful act, there are, it seems, international obligations which are of such a character that a breach of the obligation can only be justified as a consequence of an internationally wrongful act which violates the same obligation. One could call this a requirement of “qualitative proportionality” (in contradiction to the “quantitative proportionality” discussed below). This category of international obligations lies, as it were somewhere between the “parallel obligations” discussed above and the “reciprocal obligations” resulting from bilateral treaties. What comes to mind here are obligations

resulting from an international regime. Indeed, it would seem that those obligations cannot be treated in quite the same way as other international obligations, inasmuch as counter-measures in this field tend to destroy the regime itself and should, as such, only be allowed against wrongful acts already tending in the same direction. It is tempting to point here to analogies with the immunity of “international regimes” against other circumstances which normally may have an impact on international obligations, particularly conventional ones. Thus it may be noted that, under article 62, paragraph 2 of the Vienna Convention, “A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty... if the treaty establishes a boundary”. Furthermore, articles 11 and 12 of the Vienna Convention on Succession of States in Respect of Treaties⁶³ exclude “frontier regimes” and “other territorial regimes” from the normal “clean-slate” rule. Finally, in article 33 of the draft articles on State responsibility proposed by Mr. Ago,⁶⁴ it is envisaged that there may be conventional instruments which implicitly exclude the invoking of “state of necessity” in order to excuse a breach. All these provisions seem to tend towards the recognition of certain types of obligations which have a particular persistency. Of course, there is a basic difference between the circumstances dealt with in those provisions and an internationally wrongful act (although, inversely, those circumstances may not be invoked if they are the result of a wrongful act of the State wishing to invoke them). Nevertheless, in the opinion of the Special Rapporteur, the Commission might well wish to refer in part 2 of the draft articles to such particular categories of international obligations.

93. In this connection, one might also point to new forms of international regimes resulting from the “filling-in” by multilateral and even by bilateral treaties of a general set of legal principles accepted as such by the international community. Here again, such international regimes may have an impact on the possibility of invoking breaches of international obligations lying *outside* the field covered by that international regime as a ground for a counter-measure *within* that field. Thus, in the opinion of the Special Rapporteur, multilateral and even bilateral agreements intended to “fill in” the requirement of establishing a new international economic order might well be regarded as creating legal obligations that (unless, of course, the agreement itself provides otherwise) cannot be terminated or suspended on the ground of an alleged wrongful act which in itself has no bearing on the fulfilment of the object and purpose of such agreements.

94. The requirement of qualitative proportionality may also have an impact on the modalities of

⁶¹ See para. 89.

⁶² Para. 56 above.

⁶³ For reference, see footnote 40 above.

⁶⁴ See p. 51 above, document A/CN.4/318/Add.5-7, para. 81.

quantitative proportionality. In the award mentioned above,⁶⁵ the Tribunal stated, *inter alia*:

83. It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach; this is a well-known rule. In the course of the present proceedings, both Parties have recognised that the rule applies to this case, and they both have invoked it. It has been observed, generally, that judging the “proportionality” of countermeasures is not an easy task and can at best be accomplished by approximation. In the Tribunal’s view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. 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 counter-measures; it will 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. Neither Party has provided the Tribunal with evidence that would be sufficient to affirm or reject the existence of proportionality in these terms, and the Tribunal must be satisfied with a very approximative appreciation.⁶⁶

And, in connection with the admissibility of counter-measures when a machinery for consultation and even dispute settlement is provided for, the Tribunal said:

90. Indeed, it is necessary carefully to assess the measuring of counter-measures in the framework of proportionality. Their aim is to restore equality between the Parties and to encourage them to continue negotiations with mutual desire to reach an acceptable solution. In the present case, the United States of America holds that a change of gauge is permissible in third countries; that conviction defined its position before the French refusal came into play; the United States counter-measures restore in a negative way the symmetry of the initial positions.

91. It goes without saying that recourse to counter-measures involves the great risk of giving rise, in turn, to a further reaction, thereby causing an escalation which will lead to a worsening of the conflict. Counter-measures therefore should be a wager on the wisdom, not on the weakness of the other Party. They should be used with a spirit of great moderation and be accompanied by a genuine effort at resolving the dispute. But the Arbitral Tribunal 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, especially where such counter-measures are accompanied by an offer for a procedure affording the possibility of accelerating the solution of the dispute.

92. That last consideration is particularly relevant in disputes concerning air service operations: the network of air services is in fact an extremely sensitive system, disturbances of which can have wide and unforeseeable consequences.⁶⁷

95. More generally, one might argue that the proportionality between wrongful act and legal consequence is always “qualitative”, inasmuch as “the scales

of justice” are involved. Indeed, the choice between the various possible legal consequences enumerated above will always be influenced by the seriousness of the actual wrongful act as well as by the seriousness of the actually applied sanction, but there can never be an exact “weighing” as in the case of physical objects. Thus, even in measuring, for example, the amount of damages to be paid in case of the wrongful taking of the property of an alien, questions arise as to the elements to be taken into account.⁶⁸ On the other side of the *scala* of legal consequences, the allowable degree and duration of the response to an aggression are difficult to determine *in abstracto*. The same problem of translating quantity in terms of quality and vice versa arises in regard to the determination of the “points” where a wrongful act not only creates an obligation of the guilty State to *restitutio in integrum*, but entitles the injured State to counter-measures, or creates a right for third States to take a non-neutral attitude, or even creates a duty of third States to take such an attitude (compare also the notion of “collective self-defence”).

96. These difficulties are increased by the obvious correlation between the content of a primary rule, imposing an obligation on a State, and the content of the new legal relationships established by international law as a consequence of a breach of that obligation, including the question of coincidence of the “parties” to the rule and the “parties” to the relationship. As a matter of fact, the change from rule to relationship and vice versa is a question bothering the law of torts in various national legal systems. Whether the breach of an obligation imposed by legislation constitutes a wrongful act in the relationship between the guilty person and anyone having a material interest in the performance of that obligation (sometimes called the question of “relativity” of the wrongful act) is often doubtful. Contrariwise, the breach of an obligation imposed by a contract may nowadays well be considered a wrongful act vis-à-vis a person who has a material interest in the performance of that obligation but who is not a party to the contract. The two problems just referred to reflect structural changes in a national society, the legal relevance of which is not always easy to determine. It is submitted that this is even more valid for the determination of the legal relevance of structural changes in the international community of States.

97. In dealing with part 2 of the draft articles on State responsibility, the Commission is thus faced primarily with a *problem of method* which is caused not only by the circumstance just mentioned but also by the relative paucity of “hard” legal materials in this field. Indeed, while there are many decisions of international tribunals dealing with damages, there is little on counter-measures of injured States, and even less on responses of third States. Actually, the more

⁶⁵ See footnote 55 above.

⁶⁶ United Nations, *Reports of International Arbitral Awards*, vol. XVIII (op. cit.), pp. 443–444.

⁶⁷ *Ibid.*, pp. 444–445.

⁶⁸ See para. 81 above.

serious the breach of an international obligation, the less likely it is to find an objective legal appraisal of the allowable responses to such a breach. Furthermore, whereas already in 1961 the Special Rapporteur, Mr. F.V. García Amador, noted in his sixth report on State responsibility that, in respect of the duty to make reparation, “the diplomatic and arbitral practice, as also the writings of the authorities thereon, are at present in a state of complete anarchy”,⁶⁹ the practice of States in relation to counter-measures is (also) dictated to a large extent by purely political factors.

98. The problem of method then, in the view of the present Special Rapporteur, is the following. It is relatively easy to formulate a catalogue of possible “new legal relationships” established by international law as consequences of an internationally wrongful act, and even to arrange this catalogue in a *scala* of strength. When one comes, however, to the choice between those consequences (that is, the question of the legal admissibility of one consequence or another), there is no escape from the necessity to draw up a scale of values, both as regards the values affected by the breach and as regards the values affected by the response. A mere statement that there should be “proportionality” between response and breach simply leaves the question fully open. On the other hand, drawing up a scale of values obviously means operating in the field of primary rules, an operation the Commission has, in general, studiously avoided in drafting part 1 of the draft articles on State responsibility. The main exception to this “neutral” approach of the Commission is, of course, article 19 of the draft articles: the qualification of some internationally wrongful acts as “international crimes”. But even there it seems clear that the international crimes listed (as possible examples) in paragraph 3 of the draft article cannot each entail the same new legal relationships.⁷⁰

99. A possible way out could be the Commission proceeding by way of approximation. Starting on the one side from a *scala* of possible responses and on the other from the general rule of proportionality between the actual breach and the actual response, and recognizing on the one hand that a bilateral treaty, a multilateral treaty or a rule “recognized by the international community of States as a whole” may explicitly or implicitly determine the content of proportionality, and on the other hand that the seriousness of the situation created by the actual breach may entail moving to a stronger actual response, the Commission could give examples of “normal” implications of proportionality. Such examples could then deal with the following heads of limitation of possible responses:

(a) Normal limitations by virtue of the particular protection given by a rule of international law to the object of the response;

(b) Normal limitations by virtue of a linkage, under a rule of international law, between the object of the breach and the object of the response;

(c) Normal limitations by virtue of the existence of a form of international organization *lato sensu* covering the situation, resulting from an actual breach, and a possible response thereto.

100. This approach, it would seem, has the advantage of flexibility. The examples to be given by the Commission would indeed be no more than examples, since it seems impossible to cover all situations which may arise in practice by hard and fast, quasi-automatic rules. Furthermore, they would be examples of normal implications of proportionality. The rapid development of rules of international law in bilateral, regional and world-wide international relations seems to preclude a more abstract approach.

101. A final point on which the Commission has to decide is the question whether part 2 of the draft articles on State responsibility should address the matter of the loss of the right to invoke the new legal relationship established by the rules of international law as a consequence of a wrongful act, because of the passage of time, estoppel, waiver, failure to contribute to a limitation of the actual damage caused by the wrongful act, or any other conduct of the injured State or third State involved creating a situation in which the invoking of the new legal relationship might be considered an abuse. The Special Rapporteur is somewhat hesitant to embark on this course within the framework of the preparation of part 2 since, in any case, these matters are rather connected with part 3, on the “implementation” of international responsibility. It should, however, be noted that, as regards the counter-measure of termination or suspension of the operation of a treaty, article 45 of the Vienna Convention contains a provision on the loss of the right to invoke a material breach of a treaty as a ground for this counter-measure. Furthermore, article 61, paragraph 2 and article 62, paragraph 2(b) of that Convention, as well as articles 31, paragraph 2, 32, paragraph 2 and the newly proposed article 33, paragraph 2 and—in another context—articles 27 and 28 of the draft articles on State responsibility, deal with related matters of the “contribution” of a State to a situation, having consequences for the new legal relationships arising therefrom. In all those cases, however, the “contribution” is a conduct prior to the establishment of the new legal relationship. All in all, the present Special Rapporteur is inclined to suggest for inclusion in part 2, at the utmost, a provision analogous to article 45 of the Vienna Convention.

⁶⁹ *Yearbook... 1961*, vol. II, p. 2, document A/CN.4/134 and Add.1, para. 1.

⁷⁰ See para. 67 above.

**QUESTION OF TREATIES CONCLUDED BETWEEN STATES
AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO
OR MORE INTERNATIONAL ORGANIZATIONS**

[Item 3 of the agenda]

DOCUMENT A/CN.4/327*

**Ninth 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**

Draft articles, with commentaries (concluded**)

[Original: French]
[28 February 1980]

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** For the preceding draft articles presented by the Special Rapporteur, see the third to eighth reports (*Yearbook . . . 1974*, vol II (Part One), p. 135, document A/CN.4/279; *Yearbook . . . 1975*, vol II, p. 25, document A/CN.4/285; *Yearbook . . . 1976*, vol. II (Part One), p. 137, document A/CN.4/290 and Add.1; *Yearbook . . . 1977*, vol. II (Part One), p. 119, document A/CN.4/298; *Yearbook . . . 1978*, vol. II (Part One), p. 247, document A/CN.4/312; *Yearbook . . . 1979*, vol. II (Part One), p. 125, document A/CN.1/319, respectively).

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ABBREVIATIONS

I.C.J.	International Court of Justice
<i>I.C.J. Reports</i>	<i>I.C.J. Reports of Judgments, Advisory Opinions and Orders</i>
ILO	International Labour Organisation
UNESCO	United Nations Educational, Scientific and Cultural Organization

Introduction

This report completes the submission in first reading of the draft articles adapting the articles of the Vienna Convention on the Law of Treaties¹ to the special case of treaties concluded between States and international organizations or between two or more international organizations. At its previous sessions,² the Commission adopted articles 1 to 60.³ This report concerns articles 61 to 80 and completes the first reading of the draft articles. The Special Rapporteur did not feel it necessary to provide draft articles corresponding to articles 81 to 85 of the Vienna Convention, which concern final provisions. It is not the custom for the Commission to make proposals concerning final provisions in the drafts it prepares; that task has always been left to the conferences responsible for preparing a draft convention. Moreover, the content of any eventual final clauses will depend entirely on the final form to be given to the draft and on the way in which international organizations will be associated with its entry into force, questions which will be settled at a later stage.

¹ For the text of the Convention (hereinafter referred to as "Vienna Convention"), see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.5), p. 287.

² For the earlier work of the Commission on this subject, see *Yearbook . . . 1974*, vol. II (Part One), pp. 290 *et seq.*, document A/9610/Rev.1, chap. IV; *Yearbook . . . 1975*, vol. II, pp. 169 *et seq.*, document A/10010/Rev.1, chap. V; *Yearbook . . . 1977*, vol. II (Part Two), pp. 95 *et seq.*, document A/32/10, chap. IV; *Yearbook . . . 1978*, vol. II (Part Two), pp. 123 *et seq.*, document A/33/10, chap. V; *Yearbook . . . 1979*, vol. II (Part Two), pp. 137 *et seq.*, document A/34/10, chap. IV.

³ For the text of the articles adopted so far by the Commission, see *Yearbook . . . 1979*, vol. II (Part Two), pp. 138 *et seq.*, document A/34/10, chap. IV, sect. B.1.

Draft articles with commentaries (*concluded*)

PART V. INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES (*concluded*)

General considerations

The articles which are the subject of this report relate to the end of part V of the Vienna Convention and to rules which concern procedure rather than substance. In these latest articles the Special Rapporteur had no difficulty in remaining faithful to the basic guideline laid down from the outset by the Commission: to depart as little as possible from the text of the Vienna Convention. Some of the proposed articles (61, 64, 68, 71, 72, 75 and 80) do not differ from the articles of the Vienna Convention relating to the same subject; most of the other articles (65, 69, 70, 74, 76, 77, 78 and 79) differ from the articles of the Vienna Convention only in respect of minor drafting that were

usually required because of the need to mention international organizations as well as States. Only a few articles (62, 63, 67 and 73) involve a question of principle that is either new or has already arisen in connection with other articles, and only article 66 required consideration in depth.

SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES (*concluded*)

*Article 61. Supervening impossibility of performance*⁴

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or

⁴ The text is the same as that of the corresponding provision of the Vienna Convention.

withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Commentary

Despite its title, article 61 of the Vienna Convention does not cover all cases of "*force majeure*", but only those resulting from "the permanent disappearance or destruction of an object indispensable for the execution of the treaty". The Commission, and subsequently the United Nations Conference on the Law of Treaties, considered that the question of *force majeure* was more closely related to the problem of international responsibility. The general definition of *force majeure* and its effects adopted by the Commission in 1979⁵ may be considered more satisfactory than that embodied in the Convention: there is no reason to limit the effects of *force majeure* on a treaty to the specific case of the disappearance or destruction of an object. However, in order to remain faithful to a line of conduct which involves abstaining from any effort to improve the text of a convention definitively adopted for treaties between States, the solution adopted in the Vienna Convention has been retained. Article 61 of that Convention required no drafting change in order to become applicable to the treaties covered by the present draft.

Article 62. Fundamental change of circumstances⁶

1. A fundamental change of circumstances which has occurred with regard to those existing at the time

⁵ Article 31 of the draft articles on State responsibility:

"Force majeure and fortuitous event"

"1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

"2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility." (*Yearbook . . . 1979*, vol. II (Part Two), p. 122, document A/34/10, chap. III, sect. B.2, art. 31.)

⁶ Corresponding provision of the Vienna Convention:

"Article 62. Fundamental change of circumstances"

"1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the

of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty concluded between several States and one or more international organizations and establishing a boundary.

3. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

4. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Commentary

(1) Article 62 of the Vienna Convention was one of those which required the greatest reflection and attention in the Commission in order to achieve in its wording a balance between two contradictory requirements; the need to ensure respect for the binding force of treaties and the need to permit the elimination of treaties which have become inapplicable as a result of a fundamental change in the circumstances existing at the time of their conclusion. The wording finally chosen by the Commission was not only adopted

conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

"(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

"(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

"2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

"(a) if the treaty establishes a boundary; or

"(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

"3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty."

almost unanimously by the Commission itself⁷ but, after the insertion of paragraph 3 and a number of drafting changes, was adopted at the Conference on the Law of Treaties by a very large majority of States.⁸

(2) There is no reason to call this successful compromise in question again as regards the treaties of international organizations; these treaties, like treaties between States, are covered entirely by the rule *pacta sunt servanda* and by the need to take into account changes of circumstances that give rise to fundamental transformations. There is no need to change the substance of article 62 in order to adapt it to the treaties of international organizations. It would not even be necessary to make drafting changes in the article if paragraph 2(a) did not raise indirectly a problem calling in question the capacity of international organizations.

(3) The text of paragraph 2(a) of article 62 could have been left intact in draft article 62 without making any change, even a drafting change. However, that would have implied that a treaty between two or more organizations could “establish a boundary”. But can it be admitted that an international organization can modify the status of a territory in respect of the territorial sovereignty exercised therein?

(4) The question must be defined clearly. There is no doubt that paragraph 2(a) of article 62 covers not only delimitation treaties, but also so-called treaties of cession.⁹ We are concerned here with all the treaties relating to territorial status, and the term “territory” should be construed solely in the specific and traditional sense of “State territory”. This paragraph, which is based on judicial precedents, was introduced because of the great political importance of everything relating to State territory. It is not necessary to debate the point whether certain organizations possess, in an analogical sense, a “territory” (customs territory,

postal territory). What is certain is that the inclusion in draft article 62 of a paragraph 2(a) identical to that included in article 62 of the Vienna Convention would imply that organizations could dispose of the territory of certain States by means of treaties. Territory, however, is so closely linked to State sovereignty that it is inconceivable that States would abandon to an organization the right to dispose of their territorial rights without losing the status of State; the entity which would thus dispose of the territorial rights of States would have itself become a federal State. Of course, it could be observed that an international organization has in fact disposed of certain territories, as the General Assembly did in the case of the former Italian colonies by virtue of an explicit provision (Art. 23) of the Treaty of Peace with Italy of 10 February 1947.¹⁰ Furthermore, there is no doubt that States can make the future of part of their territories dependent on a decision of an international organization (or of a jurisdictional body), but it is quite a different thing to delegate to such entities the right to dispose of their territory *by treaty*. That is why the Special Rapporteur refrained from including a provision that, by reason of the general character of its wording, would imply that international organizations possessed such a power.

(5) Nevertheless, without straining the bounds of imagination too far, it is conceivable that several States (at least two) might settle a territorial problem by means of a treaty and that an international organization (or even several) might be party to such a treaty because the treaty would entrust certain functions to the organization or make the latter responsible for certain guarantees. In such a case the organization although a party to the treaty, would not have a status comparable to that of the States between which the territorial settlement occurred, but its presence as a party to the treaty should not prevent the States which had “established a boundary” from coming within the scope of the rule set forth in paragraph 2(a) of article 62. That solution is in keeping with article 3(c) of the Vienna Convention; it is important to set it out once again in order to leave no doubt about the scope of draft article 62, which does not apply to treaties establishing boundaries.

(6) Article 62, paragraph 2 of the Vienna Convention has therefore been reworded. Subparagraphs (a) and (b) have become separate paragraphs, paragraphs 2 and 3 respectively. As a result, paragraph 3 of article 62 has become, without change, paragraph 4 of draft article 62. The new paragraph 2 of the draft article has been reworded so as to cover only treaties concluded between several States and one or more international organizations; according to the preceding explanations, these are the only treaties falling within the scope of the present draft articles that could be considered as “establishing a boundary”.

⁷ *Yearbook ... 1966*, vol. I (Part One), p. 130, 842nd meeting, para. 53.

⁸ See *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 121 22nd plenary meeting, para. 47.

⁹ The expression “treaty *establishing* a boundary” was substituted for “treaty *fixing* a boundary” by the Commission, in response to comments of Governments, as being a broader expression which would embrace treaties of cession as well as delimitation treaties. (*Yearbook ... 1966*, vol. II, p. 259, document A/6309/Rev.I, part II, chap. II, draft articles on the law of treaties and commentaries, art. 59, para. (11) of the commentary.)

It will be noted, however, that articles 11 and 12 of the Vienna Convention on Succession of States in Respect of Treaties, of 23 August 1978, are much more precise as regards the definition of territorial questions (*Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.79.V.10), p. 185.

¹⁰ United Nations, *Treaty Series*, vol. 49, p. 3.

Article 63. Severance of diplomatic or consular relations¹¹

The severance of diplomatic or consular relations between States parties to a treaty does not affect the legal relations established between those States by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Commentary

Diplomatic and consular relations exist only between States. As is well known, the permanent representations of States to international organizations do not establish diplomatic relations, but relations that are not reciprocal. Consequently, for the treaties which are the subject of the present draft articles, a rule similar to that set forth in article 63 of the Vienna Convention could apply only to a special group of treaties: those to which at least two States and one or more organizations are parties. The wording of article 63 of the Vienna Convention has therefore been amended slightly so that the text of draft article 63 applies only to this case. As in the case of paragraph 2 of article 62, this provision is in keeping with article 3(c) of the Vienna Convention.

Article 64. Emergence of a new peremptory norm of general international law (jus cogens)¹²

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

Commentary

This draft article requires no substantive or drafting changes in order to be applicable to the treaties of international organizations.

SECTION 4. PROCEDURE

Article 65. Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty¹³

1. A party which, under the provisions of the present articles, invokes either a defect in its consent to

¹¹ Corresponding provision of the Vienna Convention:

“Article 63: Severance of diplomatic or consular relations

“The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.”

¹² The text is the same as that of the corresponding provision of the Vienna Convention.

¹³ Corresponding provision of the Vienna Convention:

“Article 65: Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State or an international organization has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Commentary

(1) Article 65 of the Vienna Convention establishes for the settlement of disputes a procedure based on notification, moratorium and recourse to the means indicated in Article 33 of the Charter. Both in the Commission and at the Conference on the Law of Treaties it was emphasized that this protection was not sufficient, but as the Commission noted in its final report, the solution adopted gave “a substantial

“1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

“2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

“3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

“4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

“5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.”

measure of protection against purely arbitrary assertions of the nullity, termination or suspension of the operation of a treaty".¹⁴ Similar views were expressed at the Conference, which finally adopted this text by 106 votes to none with 2 abstentions.¹⁵ There is no reason in principle why the solution adopted for treaties between States should not be extended to treaties of international organizations.

(2) Two minor drafting changes have been made in article 65 of the Vienna Convention: the first concerns the words "the present Convention", which have been replaced by "the present articles"; the second consists in inserting the words "or an international organization" after the words "a State" in paragraph 5.

[Article 66. Procedures for judicial settlement, arbitration and conciliation¹⁶

1. When, in the case of a treaty between several States and one or more international organizations, the objection provided for in paragraphs 2 and 3 of article 65 is raised by one or more States with respect to another State and under paragraph 3 of article 65 no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) Any State party to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration.

(b) Any State party to a dispute concerning the application or the interpretation of any of the other articles in part V of the present articles may set in

motion the procedure specified in the annex (section I) to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

2. When the objection provided for in paragraphs 2 and 3 of article 65 is raised by one or more international organizations parties to the treaty or involves one or more international organizations parties to the treaty and under paragraph 3 of article 65 no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) Any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may ask one of the bodies competent under the terms of Article 96 of the Charter to request an advisory opinion from the International Court of Justice, unless the parties by common consent agree to submit the dispute to arbitration; the parties shall regard the advisory opinion of the Court as binding;

(b) Any one of the parties to a dispute concerning the application or the interpretation of any of the other articles of part V of the present articles may set in motion the procedure specified in the annex (section II) to the present articles by submitting a request to that effect, as appropriate, to the Secretary-General of the United Nations or to the President of the International Court of Justice.]

Commentary

(1) Unlike article 65, article 66 was not drafted by the Commission, but is the result of action taken during the course of the United Nations Conference on the Law of Treaties which made it possible to avoid a serious crisis that was jeopardizing the outcome of the Conference; however, after various incidents and very lively discussion, article 66 failed to receive the same degree of support as article 65, since it was adopted by only 61 votes to 20, with 26 abstentions.¹⁷ In view of the political opposition to the text, the Special Rapporteur could have concluded that it was not up to the Commission to consider, at the current stage of its work, the problem of the settlement of disputes, which could, moreover, quite naturally be included in the final clauses usually reserved for direct consideration by Governments. In order to take account of this view, the value of which he fully appreciates, the Special Rapporteur has placed the whole of article 66 in square brackets so as to draw the attention of the Commission to the objections that may be raised to the very principle of the text.

(2) The Special Rapporteur has nevertheless prepared a draft article, for two main reasons. First, it is necessary to bear in mind a consideration already mentioned above in the commentary to draft article 65.

¹⁴ *Yearbook . . . 1966*, vol. II, p. 263, document A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties and commentaries, art. 62, para. (6) of the commentary.

¹⁵ See *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (op. cit.), p. 136, 25th meeting, para. 43.

¹⁶ Corresponding provision of the Vienna Convention:

"Article 66: Procedures for judicial settlement, arbitration and conciliation

"If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

"(a) any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

"(b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations."

¹⁷ See *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (op. cit.) p. 193, 34th meeting, para. 72.

In the case of treaties to which several States and one or more organizations are parties, disputes may occur involving the States only, the organizations parties to the treaty not being parties to the dispute. In such a case, it may be considered that the spirit of paragraph (c) of article 3 of the Vienna Convention, which contains a reservation regarding "the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties", should be respected. It seems natural that in this particular case the solutions contained in article 66 of the Vienna Convention should apply. To that end, the Special Rapporteur has included in draft article 66 a paragraph 1 which applies to that case the solutions contained in article 66 of the Vienna Convention. However, other cases remain, such as that of disputes concerning a treaty concluded only among international organizations, or cases involving a treaty concluded between one or more States and one or more international organizations but in which the dispute involves one State and one or more international organizations, several States and one or more international organizations, or several international organizations. The common feature of all these cases is that the objection is raised by or with respect to one or more organizations.

(3) Paragraph 2 covers this other group of cases. It is clear that the two procedures provided for in article 66 of the Vienna Convention cannot apply, at least in the terms set forth in that text, to the cases currently under consideration. The first procedure is based on the possibility of the dispute being unilaterally referred to the International Court of Justice by means of a written application. However, it is a well-known fact that only States can be parties in contentious cases before the Court; an organization cannot be summoned before the Court and cannot refer a dispute to the Court. The second procedure envisaged, conciliation, does not raise such basic objections, but it quickly appears that the machinery set up in article 66 and the annex to which it refers require adaption in order to be applicable to the cases under consideration. Was it worthwhile to seek to modify those two procedures to make them applicable to proceedings instituted by or against international organizations?

(4) The Special Rapporteur believed that it was worthwhile. As regards recourse to the Court there are, as will be seen below, indirect channels already provided for in practice which make it possible to avoid the obstacle, at least partially. As regards conciliation, it is sufficient to amend the annex, and the Special Rapporteur attached more importance to conciliation than to recourse to the Court. First of all, the objections raised concerned primarily the latter, which was moreover limited to the application and the interpretation of only two articles. Secondly, the development of the codification of international law since the conclusion of the Vienna Convention has shown that Governments seem ready to favour

recourse to conciliation. That is the second main reason why the Special Rapporteur felt it necessary to prepare draft article 66.

(5) Indeed, two important Conventions based on the work of the International Law Commission place great emphasis on conciliation as a means of settling disputes concerning their application or interpretation. These are the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, of 14 March 1975¹⁸ (art. 85) and the Vienna Convention on Succession of States in Respect of Treaties, of 23 August 1978,¹⁹ (art. 42 and annex), which follow the Vienna Convention on the Law of Treaties quite closely. This seems to indicate a favourable attitude to recourse to conciliation. It is true that in these two conventions it is a question only of conciliation between States, and not between international organizations or between States and international organizations,²⁰ but that is because these texts are concerned only with disputes between States. It is also true that under these two conventions conciliation is much more general in scope than under the Vienna Convention, which provides for conciliation only in connection with the application and the interpretation of part V, and this could be regarded as a reason for abandoning the idea of transposing article 66 to the present draft and preparing instead an entirely new text bearing a closer resemblance to the solutions embodied in the 1975 and 1978 conventions. The Special Rapporteur does not reject the latter solution *a priori*, but in seeking to remain as faithful as possible to the text of the Vienna Convention, according to the general method adopted by the Commission, he thought it would be quite useful to transpose to the treaties of international organizations the solutions adopted for treaties between States, even if a broader and less restrictive solution with respect to conciliation were subsequently to be adopted.

(6) In addition to these general considerations concerning the structure of draft article 66, some explanation of the solutions proposed in paragraph 2 is called for. With regard to subparagraph (a), the solution envisaged is that of recourse, in so far as possible, to an advisory opinion of the Court. Solutions of this nature have been adopted with regard to the

¹⁸ *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations* vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207.

¹⁹ For reference, see footnote 9 above.

²⁰ It would have been necessary to cover such disputes in the first of these conventions, concerning the representation of States in their relations with international organizations, if the idea had been accepted that the organization cannot remain indifferent if a dispute arises between a member State and the host State and that it must therefore take sides in law concerning the dispute; but although the Convention gives some attention to this idea in the phase of the dispute preceding conciliation, it takes another course with regard to the latter.

Administrative Tribunals of the United Nations and the ILO, and have given rise to a well-known series of decisions by the International Court of Justice.²¹ Solutions of this kind are also to be found in certain treaties that are often referred to: the Convention on the Privileges and Immunities of the United Nations of 13 February 1946²² (sect. 30); the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations of 26 June 1947²³ (sect. 21), the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947²⁴ (sect. 32); and the Convention on the Representation of States in their Relations with International Organizations of an International Character of 14 March 1975²⁵ (art. 85, para. 6). In practice, it has become clear that all these provisions have drawbacks, or at least limitations. The first limitation consists in the fact that it is not easy to state in advance and in a general manner which organ of which organization will be called upon to request an opinion from the Court. If in a given case the organization concerned is one which has received from the General Assembly of the United Nations the right to request an opinion from the Court, it would normally be that organization which should bring the matter before the Court, but the case may involve organizations which have not received that right. If they belong to the "United Nations family", they could seek to arrange directly or indirectly through their member States a debate in a United Nations organ empowered to request an opinion; in the case of regional organizations, the outcome is even more doubtful. Furthermore, even supposing that an organ empowered to request an opinion from the Court agrees to debate the matter, it remains perfectly free to request the opinion or not to request it; any course which deprives that organ of the absolutely discretionary nature of its decision is inconceivable.

(7) That is the reason why the provision concerning the advisory opinion machinery in paragraph 2 of article 66 has been couched in very general terms: reference is made therein to Article 96 of the Charter, which opens up a wide range of possibilities without going into detail.²⁶ In order to emphasize that the

organ to which the dispute is referred is free to request an opinion from the Court or not to do so it is stated that the party to the dispute "may ask one of the bodies competent . . . to request an opinion"; it would also have been possible to use the term "may recommend to . . .".²⁷ Lastly, it is provided that the opinion of the Court will be binding upon the parties: some of the aforementioned texts adopt the same solution, while others say nothing about the effects of the opinion.²⁸

(8) With regard to the conciliation procedure, it will be necessary to introduce fairly substantial changes, notably by drawing a distinction between the two cases which are the subjects of paragraphs 1 and 2 of article 66 respectively. This question will be examined below in connection with the annex to the present articles. Provision has been made in paragraph 2 for intervention in certain cases by the President of the International Court of Justice instead of the Secretary-General of the United Nations, because it is not impossible that the United Nations might be a party to a conciliation procedure and that, in that case, some of the functions of the Secretary-General would have to be entrusted to someone having no connection with either of the parties involved.

Article 67. Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty²⁹

1. The notification provided for under article 65, paragraph 1, must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

"2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

This is the solution adopted in section 30 of the Conventions of 1946 (sect. 30) and 1947 (sect. 32) mentioned above.

²⁷ According to para. 6 of art. 85 of the 1975 Vienna Convention, the Conciliation Commission "may recommend to the Organization, if the Organization is so authorized in accordance with the Charter of the United Nations, to request an advisory opinion . . .".

²⁸ The aforementioned Conventions of 1946 and 1947, and the 1947 agreement, state that the opinion is binding; the 1975 Convention does not so state.

²⁹ Corresponding provision of the Vienna Convention:
"Article 67: Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty"

"1. The notification provided for under article 65, paragraph 1, must be made in writing.

"2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 and 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers."

²¹ Effects of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion (*I.C.J. Reports 1954*, p. 47); Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints made against the United Nations Educational, Scientific and Cultural Organization, Advisory Opinion (*I.C.J. Reports 1956*, p. 77); Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion (*I.C.J. Reports 1973*, p. 166).

²² United Nations, *Treaty Series*, vol. 1, p. 30.

²³ *Ibid.*, vol. 11, p. 11.

²⁴ *Ibid.*, vol. 33, p. 261.

²⁵ For reference, see footnote 18 above.

²⁶ Article 96:

"1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If an instrument emanating from a State is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers. An instrument emanating from an international organization shall be accompanied by the production of the powers of the representative of the organization communicating it.

Commentary

(1) Article 67 establishes procedural guarantees which must be extended to treaties of international organizations. To that end, the text of the Vienna Convention must be supplemented by a rule which defines, in a manner parallel to the last sentence, concerning representatives of States, the situation of representatives of an international organization making the envisaged communication. It is easy to define the content of this rule.

(2) In fact, the content of the communication in question carries the same weight as communications concerning consent to be bound by a treaty, but in the contrary sense, since this communication concerns the withdrawal, or at least the suspension, of that consent. As regards communications by representatives of States, article 67 is based on a strict rule, stricter than that embodied in article 7 of the Vienna Convention. Apart from the case of persons representing the State *ipso facto* in virtue of their functions, article 7 provides for two solutions: the production of appropriate powers or dispensation with the presentation of powers if it appears from practice or from other circumstances that such was the intention of States. On the other hand, in the case of the termination or suspension of a treaty, article 67 *does not mention this implicit dispensation with powers resulting from practice or from other circumstances*. Turning to the case of international organizations, we see that paragraph 4 of draft article 7 already adopted by the Commission³⁰ does not mention persons representing international organizations *ipso facto* in virtue of their functions; it mentions only persons producing appropriate powers or persons who, according to practice or other circumstances, must be considered as representing the organization. Since this latter category has

been eliminated in the case of States, it must also be eliminated in the case of organizations as regards the termination or suspension of a treaty.

(3) Such is the solution adopted in draft article 67 with regard to the representatives of international organizations: it deals with the representatives of organizations and those of States in a symmetrical manner and is logically sound. The conclusion of a treaty extends over a certain period of time, during which practices and circumstances bring the representatives of States into contact with one another and entail consent, tacit acceptance and recognition; the termination of the effects of a treaty, on the other hand, is brought about by a unilateral process and has more serious consequences: it is quite natural that the requirements concerning powers should be more stringent in this case. If international organizations seem to be treated more strictly than States, this is due simply to one undeniable fact: they have no Head of State, no Head of Government and no Minister for Foreign Affairs, and thus far their structures have not been sufficiently similar for it to be said that all of them, without exception, have, under various names, an agent who represents them in their relations with other entities in a uniform manner.

Article 68. Revocation of notifications and instruments provided for in articles 65 and 67³¹

A notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect.

Commentary

This article of the Vienna Convention resulted from the desire to facilitate the protection of treaties to the greatest possible extent, and did not give rise to much discussion either in the Commission or at the Conference. There is no reason why a similar article should not be adopted in the case of the treaties of international organizations; no drafting changes are required. Only one comment, relating to the commentary to article 67, is required. Article 68 does not state what form the "revocation" of an instrument communicated in application of paragraph 2 of article 67 should take, and the question is undoubtedly important in the case of the instruments of international organizations. Although there is no legal rule, let alone a general principle, relating to "contrary action" in the law of treaties, the Special Rapporteur believes that an instrument can be "revoked" only by another instrument of the same nature and character; in other words, the formal rules provided for in article 67 are also applicable to the "revocation" mentioned in article 68.

³⁰ Para. 4 of draft article 7 [see footnote 3 above] reads as follows:

"4. A person is considered as representing an international organization for the purpose of communicating the consent of that organization to be bound by a treaty if:

"(a) He produces appropriate powers; or

"(b) It appears from practice or from other circumstances that that person is considered as representing the organization for that purpose without having to produce powers."

³¹ The text of this draft article is the same as that of the corresponding article of the Vienna Convention.

SECTION 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

*Article 69. Consequences of the invalidity of a treaty*³²

1. A treaty the invalidity of which is established under the present articles is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed.

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of the consent of a State or an organization to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State or that organization and the parties to the treaty.

Commentary

Article 69 of the Vienna Convention was adopted without opposition at the Conference on the Law of Treaties. Its provisions are the logical outcome of earlier provisions, and its extension to cover the treaties of international organizations gives rise to no objection. Only two drafting changes have been introduced for the purposes of the present draft articles. The first, in paragraph 1, is purely transitory and provisional;

³² Corresponding provision of the Vienna Convention:

“Article 69: Consequences of the invalidity of a treaty

“1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

“2. If acts have nevertheless been performed in reliance on such a treaty:

“(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

“(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

“3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

“4. In the case of the invalidity of a particular State’s consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.”

the second, in paragraph 4, involves the insertion of a reference to an international organization in addition to the reference to a State.

*Article 70. Consequences of the termination of a treaty*³³

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State or an international organization denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State or that international organization and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Commentary

Article 70 of the Vienna Convention was adopted unanimously at the Conference and calls for the same comments as article 69. The only drafting changes made in the draft article are the replacement in paragraph 1 of the words “the present Convention” by “the present articles” and by the insertion in paragraph 2 of a reference to an international organization, in addition to the reference to a State.

*Article 71. Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law*³⁴

1. In the case of a treaty which is void under article 53, the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which

³³ Corresponding provision of the Vienna Convention:

“Article 70: Consequences of the termination of a treaty

“1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

“(a) releases the parties from any obligation further to perform the treaty;

“(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

“2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.”

³⁴ The text of this draft article is the same as that of the corresponding article of the Vienna Convention.

conflicts with the peremptory norm of general international law; and

(b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Commentary

Article 71 of the Vienna Convention was adopted without difficulty in the Commission; at the Conference some voted against it and others abstained, mainly for the same reasons as were given for opposing articles 53 and 64. But once the two latter articles have been accepted, there is no reason for not extending article 71 to cover the treaties of international organizations.

Article 72. *Consequences of the suspension of the operation of a treaty*³⁵

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(b) does not otherwise affect the relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

³⁵ Corresponding provision of the Vienna Convention:
“Article 72: *Consequences of the suspension of the operation of a treaty*”

“1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

“(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of suspension:

“(b) does not otherwise affect the legal relations between the parties established by the treaty.”

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.”

Commentary

Article 72 of the Vienna Convention, which was adopted almost unanimously by the Commission and at the Conference on the Law of Treaties, should be extended to cover international organizations. All that is required for that purpose is a purely provisional drafting change in paragraph 1.

PART VI. MISCELLANEOUS PROVISIONS

*Article 73. Cases of State succession, succession of international organizations, succession of a State to an international organization and succession of an international organization to a State, responsibility of a State or of an international organization and outbreak of hostilities*³⁶

The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty from a succession of States, from a succession of international organizations or from a succession of a State to an international organization or of an international organization to a State, or from the international responsibility of a State or of an international organization, or from the outbreak of hostilities between States.

Commentary

(1) The purpose of article 73 of the Vienna Convention is to define the limits of the codification it embodies by making a reservation relating to a number of fields which it does not cover. There was never any doubt that the reservation should apply to State succession and the international responsibility of States. But should the case of outbreak of hostilities be included? The Commission hesitated, and answered this question in the negative.³⁷ Of course, in traditional international law there is a problem concerning the effect of war upon treaties; that effect, the scope of which has been hotly debated, is linked to “the state of war” rather than to recourse to armed force, and the Commission considered that that case was “wholly outside the scope of the general law of treaties to be codified in the present articles; and that no account should be taken of that case or any mention made of it in the draft articles”.³⁸ In fact the Commission did not

³⁶ Corresponding provision of the Vienna Convention:
“Article 73: *Cases of State succession, State responsibility and outbreak of hostilities*”

“The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.”

³⁷ See *Yearbook ... 1966*, vol. II, p. 267, document A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties and commentaries, para. (2) of the commentary to art. 69.

³⁸ *Ibid.*, p. 268.

wish, by making a reservation of that kind, to lend credence to the idea that there was any place in the current system of international laws for a "state of war" or any similar situation. The United Nations Conference on the Law of Treaties, without criticizing the Commission for its discretion, considered that a problem existed that could not be studied in all its aspects within the limited framework of the codification with which the Conference was concerned, but that made it necessary to include a reservation.³⁹

(2) It was necessary to recall this incident at the Conference to show clearly that in introducing reservations such as those embodied in article 73 the Commission is merely recalling the existence of several sets of problems which the Convention does not cover and on which it takes no position. The three subjects covered by reservations in article 73 of the Vienna Convention must also be covered in the case of the treaties of international organizations, but with a modification that calls for some explanation.

(3) With regard to the subject of State responsibility, it must necessarily be extended to cover the responsibility of international organizations; the relevant problems have been mentioned in the course of the Commission's work, but thus far no effort has been made to codify them. With regard to the outbreak of "hostilities between States", it might be wondered whether the reference to "States" does not impose an unnecessary limitation. The Special Rapporteur did not think so. There is currently a definite tendency to admit that rules of international law (*jus in bello*) apply to armed conflicts that do not pit one State against another, as in the 1977 Additional Protocols⁴⁰ to the 1949 Geneva Conventions for the protection of war victims.⁴¹ But the current case does not involve *jus in bello*; neither does it involve determining—what seems for the moment highly debatable—whether an international organization could be a party to an armed conflict; rather, it involves defining the cases in which there might remain a trace of what was formerly called the effect of war on treaties, and from that standpoint it can be acknowledged that if any trace of

that effect remains it can only be in an armed conflict *between States*. That is why the formula used in the Vienna Convention can be retained.⁴²

(4) On the other hand, the formula relating to "succession of States" must be enlarged by mentioning other similar situations, namely the succession of international organizations, the succession of a State to an organization and the succession of an organization to a State. The use of the term "succession" is not intended to imply that the situations mentioned here raise problems identical to those of State succession, but only to stress that these problems relate to the transformation of a subject of law and the substitution of one subject of law for another with respect to a right or an obligation. These problems exist, as do those relating to State succession; the aim is not to solve them, or even to analyse them, but merely to recall that the present draft articles contain a reservation in regard to their solution and make no attempt to solve them. Certain examples will be cited, but not elaborated upon.

(5) The transitions from the League of Nations to the United Nations, from the Permanent Court of International Justice to the International Court of Justice, from the Permanent Central Opium Board to the International Narcotics Control Board and from the Organization for European Economic Co-operation to the Organization for Economic Co-operation and Development are classic cases, and there are others.⁴³ In the case of a customs union administered by an international organization, is the customs union bound by the tariff agreements concluded by its member States with third States? If the union is dissolved, do its member States remain bound by the tariff agreements it concluded with third States? This is not the place to review these problems and others of the same nature, but simply to justify the wording proposed for the title and the body of the present draft article. This is a problem which the Commission has already encountered in connection with succession of States in respect of treaties.⁴⁴ On that occasion, it provided a strict definition of "State succession" and excluded all other "successions" from its draft, but that position was based notably on the fact that it excluded from its draft

³⁹ See, for example, the statement by the representative of Poland at the Conference:

"Contemporary writers were very circumspect in dealing with the problem, but they did not ignore it. It would be difficult for the Conference to enter into all the aspects of the problem, but the convention on the law of treaties, which was to be a codifying instrument, could not ignore the existence of the problem. Article 69 should therefore . . . include a reservation . . .". (*Official Records of the United Nations Conference on the Law of Treaties, First session, Summary records of the plenary meetings of the Committee of the Whole* (United Nations Publication, Sales No. E.68.V.7), p. 452, 76th meeting of the Committee of the Whole, para. 17.)

⁴⁰ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts* (Geneva, 1974–1977) (Bern, Federal Political Department, 1978), vol. I, pp. 115–184. Text reproduced in A/32/144, annexes I and II.

⁴¹ United Nations, *Treaty Series*, vol. 75, p. 2.

⁴² The 1978 Vienna Convention on Succession of States in Respect of Treaties [see footnote 9 above] likewise contains a reservation in article 39 concerning the case of "outbreak of hostilities between States".

⁴³ Internal administrative agencies have become international organizations as a result of decolonization and the ensuing independence of the dependent territories that they grouped together. The question also arises as to whether closed international organizations with a few member States retain their legal identity after withdrawals that call in question the reason for their existence.

⁴⁴ See *Yearbook . . . 1974*, vol. II (Part One), pp. 11–13, document A/CN.4/278 and Add.1–6, paras. 42–48, and p. 66, paras. 369–372; also *ibid.*, pp. 253–254, document A/9610/Rev.1, chap. II, sect. D, paras. (3)–(5) of the commentary to arts. 30–32.

those international treaties not concluded between States. In the present draft articles it is necessary to include a reservation concerning all types of "succession".

Article 74. Diplomatic and consular relations and the conclusion of treaties⁴⁵

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States and one or more international organizations. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Commentary

This article of the Vienna Convention, which resulted from action initiated at the Conference, supplements article 63 and calls for the same comments. In order to adapt this article to the treaties of international organizations, it is necessary to insert words indicating that this draft article covers only the treaties concluded by States without diplomatic or consular relations *and one or more international organizations*.

Article 75. Case of an aggressor State⁴⁶

The provisions of the present articles are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

Commentary

(1) The reasons that led the Commission to prepare the article which became article 75 of the Vienna Convention by a vote of 100 votes to none, with 4 abstentions⁴⁷ lead to the conclusion that it is necessary to extend it to cover the treaties of international

organizations. There is no doubt that article 75 was originally oriented towards the past and that there was no example of a treaty between several international organizations or between one or more States and one or more international organizations that could have been affected by measures taken against an aggressor State. But that will not necessarily be so in the future.

(2) Moreover, according to the Definition of Aggression adopted by the United Nations General Assembly in its resolution of 14 December 1974,⁴⁸ the term "aggressor State" can cover the case of an international organization that commits aggression.⁴⁹ In adapting article 75 to the case of treaties of international organizations it is therefore not necessary to amend the term "aggressor State", and although the proposed article would be more likely to affect treaties between an international organization and one or more States, it was not felt necessary to exclude the case in which it would affect a treaty between two or more organizations. The only change made in article 75 was to replace the words "of the present Convention" by the words "of the present articles".

PART VII. DEPOSITARIES,
NOTIFICATIONS,
CORRECTIONS AND REGISTRATION

Article 76. Depositaries of treaties⁵⁰

1. The designation of the depositary of a treaty may be made by the negotiating States and the international organizations having participated in the negotiations, either in the treaty itself or in some other manner. The depositary may be one or more States, one or more international organizations or the chief administrative officer of one or more international organizations.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance.

⁴⁵ Corresponding article of the Vienna Convention:

"Article 74. *Diplomatic and consular relations and the conclusion of treaties*

"The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations."

⁴⁶ Corresponding provision of the Vienna Convention:

"Article 75. *Case of an aggressor State*

"The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression."

⁴⁷ See *Official Records of the United Nations Conference on the Law of Treaties, Second session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (op. cit.)*, p. 127, 23rd meeting, vote on article 70.

⁴⁸ Resolution 3314 (XXIX), annex.

⁴⁹ Explanatory note on article 1 of the Definition:

"In this Definition the term 'State':

"...

"(b) Includes the concept of a 'group of States' where appropriate."

⁵⁰ Corresponding provision of the Vienna Convention:

"Article 76: *Depositaries of treaties*

"1 The designation of the depositary of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

"2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depositary with regard to the performance of the latter's functions shall not affect that obligation."

In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Commentary

(1) Article 76 was adopted unanimously at the United Nations Conference on the Law of Treaties by 105 votes,⁵¹ and it can be adapted to the treaties of international organizations simply by making two changes involving the insertion of references to international organizations as well as States.

(2) The possibility of a treaty having more than one depositary was not foreseen in the draft articles prepared by the Commission. The idea of covering that eventuality was introduced at the first session of the Conference taking into consideration a practice which at that time was of recent origin (it had begun with the treaty banning nuclear weapon tests in the atmosphere, in outer space and under water, of 5 August 1963),⁵² the Conference adopted by 77 votes to none, with 5 abstentions, the principle that one or more States may be designated as depositaries of a treaty.⁵³ Although some objections were raised to this principle, the Special Rapporteur considers not only that it should be retained but that it could be extended to include more than one depositary international organization. The case of a multilateral treaty between international organizations is somewhat hypothetical; the possibility of more than one depositary being needed in a case of this kind is even more unlikely. From the standpoint of principle, however, there is no reason to ignore the possibility that there might be several depositary international organizations, and this possibility has therefore been provided for in article 76. Objections might be raised to this proposal, not only because of its rather theoretical nature but also because it was not provided for in the Vienna Convention, where it could have been mentioned in connection with treaties between States.

Article 77. Functions of depositaries⁵⁴

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting

⁵¹ *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (op. cit.)*, p. 130, 24th meeting, vote on art. 71.

⁵² United Nations, *Treaties Series*, vol. 480, p. 43.

⁵³ See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (op. cit.)*, p. 468, 78th meeting of the Committee of the Whole, paras. 62-63.

⁵⁴ Corresponding provision of the Vienna Convention:

"Article 77: Functions of depositaries

"1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

States and international organizations or the contracting international organizations, as the case may be, comprise in particular:

(a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States and international organizations entitled to become parties to the treaty;

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State or international organization in question;

(e) informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States and international organizations entitled to become parties to the treaty when the number of signatures or of instruments of ratification, formal confirmation, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(g) registering the treaty with the Secretariat of the United Nations;

"(a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

"(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;

"(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

"(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;

"(e) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

"(f) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

"(g) registering the treaty with the Secretariat of the United Nations;

"(h) performing the functions specified in other provisions of the present Convention.

"2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned."

(h) performing the functions specified in other provisions of the present articles.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention, as the case may be, of the signatory States and organizations and of the contracting States and organizations, or of the signatory organizations and the contracting organizations, or, again, where appropriate, of the competent organ of the international organization which assumes the functions of depositary.

Commentary

(1) Article 77 of the Vienna Convention is made up of the technical provisions which the Conference on the Law of Treaties finally adopted unanimously.⁵⁵ It must be extended to cover treaties of international organizations. To that end, some of its provisions must be amended to include a reference to one or more international organizations as well as the reference to one or more States. The provisions in question are paragraph 1, subparagraphs 1(b), (d), (e) and (f), and paragraph 2. Other points call for a brief comment.

(2) Paragraph 1 and 2 of article 77 of the Vienna Convention refer to "contracting States"; paragraph 2 also refers to "signatory States". Draft article 77 refers to the "contracting States and international organizations or the contracting international organizations" so as to distinguish between the two categories of treaties: those between States and international organizations and treaties between two or more international organizations. If this solution is deemed insufficient, article 77 would have to be split, purely for a question of drafting, as was done in the case of article 16.⁵⁶ Alternatively, the Commission might consider at a later stage the possibility of introducing new terms: "contracting parties" and "signatory parties" to designate respectively "the contracting States and international organizations or the contracting international organizations" and "the signatory States and international organizations or the signatory international organizations"; the text would then be less cumbersome.

(3) The list of instruments in subparagraph 1(f) has been extended to include "formal confirmation". After a fairly lively debate, the Commission decided that the term "ratification" should be replaced so far as international organizations were concerned by that of "formal confirmation" (art. 2, para. 1(b) bis; art. 11; art. 14; art. 16; art. 19 bis; art. 23; art. 23 bis).⁵⁷

⁵⁵ See *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (op. cit.), p. 130, 24th plenary meeting, vote on article 72.

⁵⁶ See footnote 3 above.

⁵⁷ *Idem*.

(4) Article 77 of the Vienna Convention states in subparagraph 1(g) that "registering the treaty with the Secretariat of the United Nations" is a function of a depositary. This provision is the result of an amendment of the United States of America, which was adopted without objections.⁵⁸ However, the wording used could be discussed, particularly in the light of article 80 of the Vienna Convention, which will be considered later. Indeed, as the Commission was to observe in its final report,⁵⁹ in United Nations practice the term "registration" cannot be used when no party to the agreement is a Member of the United Nations; the correct term in such cases is "filing and recording". The Commission nevertheless used the term "registering" in article 77. Article 80, on the other hand, is drafted more precisely since it distinguishes between "registration" and "filing and recording". Whatever the reason for this discrepancy between articles 77 and 80 of the Vienna Convention, the Special Rapporteur considered that it would be preferable to remain faithful to the text of the Vienna Convention, since that was the course the Commission had followed on other occasions.

(5) Article 77, paragraph 2, of the Vienna Convention concludes with the words "where appropriate, of the competent organ of the international organization concerned". This can only refer, within the context of the Vienna Convention, to the organization which is the *depositary* of the treaty. The same would not be true of draft article 77, which refers not only to depositary organizations but also to organizations which are parties, contracting parties or signatories to the treaty. It was therefore deemed advisable, in order to avoid possible ambiguity, to replace the term "international organization concerned" by "international organization which assumes the functions of depositary."

Article 78. Notifications and communications⁶⁰

Except as the treaty or the present articles otherwise provide, any notification or communication to be

⁵⁸ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (op. cit.), p. 202, document A/CONF.39/14, para. 657, sect. iv, (6), and *ibid.*, p. 203, para. 660, (k).

⁵⁹ *Yearbook . . . 1966*, vol. II, p. 273, document A/6309/Rev. I, part II, chap. II, draft articles on the law of treaties and commentaries, para. (1) of the commentary to art. 75:

"Under article 10 of the Regulations concerning the Registration and Publication of Treaties and International Agreements adopted by the General Assembly, the term used instead of 'registration' when no Member of the United Nations is party to the agreement is 'filing and recording', but in substance this is a form of voluntary registration."

⁶⁰ Corresponding provision of the Vienna Convention:

"Article 78: Notifications and communications

"Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

made by any State or any international organization under the present articles shall:

(a) if there is no depositary, be transmitted direct to the States and international organizations for which it is intended, or if there is a depositary to the latter;

(b) be considered as having been made by the State or international organization in question only upon its receipt by the State or international organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) if transmitted to a depositary, be considered as received by the State or international organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 77, paragraph 1(e).

Commentary

Article 78 of the Vienna Convention was adopted unanimously both in the Commission and at the Conference on the Law of Treaties;⁶¹ adapting it to the treaties which are the subject of the present draft articles requires only slight drafting changes in the introductory sentence and in subparagraphs (a), (b) and (c).

Article 79. Correction of errors in texts or in certified copies of treaties⁶²

1. Where, after the authentication of the text of a treaty, the signatory States and international organ-

(a) if there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter,

(b) be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary,

(c) if transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary in accordance with article 77, para. 1(e)."

⁶¹ See *Yearbook ... 1966*, vol. I (Part Two), p. 291, 887th meeting, para. 43; *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (op. cit.)*, p. 131, 24th plenary meeting, vote on article 73.

⁶² Corresponding provision of the Vienna Convention:

"Article 79: Correction of errors in texts or in certified copies of treaties

"1. Where, after the authentication of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected;

"(a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives,

"(b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

"(c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

izations and the contracting States and organizations or the signatory organizations and contracting organizations, as the case may be, are agreed that it contains an error, the error shall, unless the said States and organizations or, where appropriate, the said organizations decide upon some other means of correction, be corrected:

(a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives,

(b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and international organizations and the contracting States and organizations or the signatory organizations and contracting organizations, as the case may be, of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary shall make and initial the correction in the text, shall execute a *procès-verbal* specifying the rectification, and shall communicate a copy of it to the parties and to the States and organizations entitled to become parties to the treaty;

(b) an objection has been raised, the depositary shall communicate the objection to the signatory

"2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

"(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;

"(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.

"3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and the contracting States agree should be corrected.

"4. The corrected text replaces the defective text *ab initio*, unless the signatory States and the contracting States otherwise decide.

"5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

"6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy of it to the signatory States and to the contracting States."

States and international organizations and to the contracting States and organizations or to the signatory organizations and contracting organizations, as the case may be.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and organizations and the contracting States and organizations or the signatory organizations and contracting organizations, as the case may be, agree should be corrected.

4. The corrected text replaces the defective text *ab initio* unless the signatory States and international organizations, and the contracting States and organizations, or the signatory organizations and contracting organizations, as the case may be, otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy of it to the signatory States and international organizations, and to the contracting States and organizations, or to the signatory organizations and contracting organizations, as the case may be.

Commentary

Article 79 of the Vienna Convention, which is of a highly technical nature, was finally adopted unanimously at the Conference on the Law of Treaties by 105 votes;⁶³ a similar text embodying the necessary drafting changes should be included in the present draft articles. Paragraphs 1, 2(b), 3, 4 and 6 reveal the extremely cumbersome nature of the wording used to insert the appropriate references to international organizations, whether in association with States or on their own, depending upon whether a treaty between one or more States and one or more international organizations or a treaty between international organizations is involved. This problem has already been noted in the text of draft article 77;⁶⁴ its full extent becomes apparent in article 79. The neatest solution would be to introduce the new terms "signatory parties" and "contracting parties", and to define them in paragraph 1 of draft article 2. Another solution would be to divide article 79 in two, dealing separately with treaties between one or more States and one or more international organizations, on the one hand, and

treaties between international organizations, on the other, however, this would only partly correct the cumbersomeness and would entail the repetition, purely for drafting reasons of an article which is already lengthy and quite difficult for the reader. It is for the Commission to determine either now or at some later stage which solution is preferable; the Special Rapporteur has simply reproduced the solution which conforms most closely to the text of the Vienna Convention.

Article 80. Registration and publication of treaties⁶⁵

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

Commentary

Article 80 of the Vienna Convention was finally adopted unanimously by 105 votes,⁶⁶ and an identical text should be included in the draft articles. As has been observed above in connection with article 77,⁶⁷ the text of article 80 is absolutely correct from the technical standpoint since it distinguishes between registration and filing and recording, the latter procedure being reserved for treaties concluded between States non-members of the United Nations. The case of treaties concluded between international organizations is, therefore, covered, and there is no need to amend the text of the Vienna Convention in any way.

ANNEX

Procedures established in application of article 66⁶⁸

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present articles and any international organization to which the present articles have become applicable shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following

⁶³ The text is the same as that of the corresponding provision of the Vienna Convention.

⁶⁴ See *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (op. cit.)*, p. 132, 24th plenary meeting, vote on article 75.

⁶⁵ See para. (4) of the commentary to article 77, above.

⁶⁶ The annex to the Vienna Convention has no heading; it is suggested that a heading should be added in the draft articles for the sake of clarity.

⁶³ See *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (op. cit.)*, p. 132, 24th meeting, vote on article 74.

⁶⁴ See para. (2) of the commentary to art. 77, above.

paragraph. A copy of the list shall be transmitted to the President of the International Court of Justice.⁶⁹

I. CASES IN WHICH, IN REFERENCE TO A TREATY BETWEEN SEVERAL STATES AND ONE OR MORE INTERNATIONAL ORGANIZATIONS, AN OBJECTION AS PROVIDED FOR IN PARAGRAPHS 2 AND 3 OF ARTICLE 65 IS RAISED BY ONE OR MORE STATES WITH RESPECT TO ANOTHER STATE⁷⁰

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a Conciliation Commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-

General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

II. CASES IN WHICH AN OBJECTION AS PROVIDED FOR IN PARAGRAPHS 2 AND 3 OF ARTICLE 65 IS RAISED BY ONE OR MORE INTERNATIONAL ORGANIZATIONS OR WITH RESPECT TO AN INTERNATIONAL ORGANIZATION⁷¹

2 *bis*. The request referred to in article 66 shall be submitted to the Secretary-General. However, if the request is made by or directed against the United Nations, it shall be submitted to the President of the International Court of Justice. The Secretary-General or, as appropriate, the President of the International Court of Justice, shall bring the dispute before a Conciliation Commission constituted as follows:

If one or more States constitute one of the parties they shall appoint:

(a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

One or more international organizations constituting one of the parties or the international organizations constituting both of the parties shall appoint:

(a) one conciliator, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one conciliator included in the list on an initiative other than their own.

The four conciliators chosen by the parties shall be appointed within 60 days following the date on which the Secretary-General or, as appropriate, the President of the International Court of Justice, receives the request.

The four conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General or, as appropriate, by the President of the International Court of Justice within 60 days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General or, as appropriate, by the President of the International Court of Justice either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.⁷²

3 *bis*. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the

⁶⁹ Paragraph 1 of the annex to the Vienna Convention:

"A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph."

⁷⁰ This section heading does not appear in the annex to the Vienna Convention. The text of paragraphs 2 to 7 is identical to that of the corresponding paragraphs of the annex to the Vienna convention.

⁷¹ There are no provisions in the annex to the Vienna Convention corresponding to this heading or to paragraphs 2 *bis et seq.*

⁷² The corresponding provision of the annex to the Vienna Convention is contained above in para. 2 of sect. 1 of this annex.

Commission shall be made by a majority vote of the five members.⁷³

4 bis. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.⁷⁴

5 bis. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.⁷⁵

6 bis. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General or, as appropriate, with the President of the International Court of Justice, and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.⁷⁶

7 bis. The Secretary-General shall provide the Commission either directly or, as appropriate, through the intermediary of the President of the International Court of Justice, with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.⁷⁷

Commentary

(1) The main purpose of the annex to the Vienna Convention is to set up the conciliation procedures instituted under article 66. The Special Rapporteur has prepared a draft annex for the same reasons and with the same reservations as those set forth in the commentary to draft article 66. The basic feature of the draft reflects the fact that, in many cases, it is necessary to settle disputes to which an international organization is a party; by enabling an international organization as such to become a party to a treaty, one thereby admits that it may become a party to disputes arising from the treaty, or at least to some of them. This inference is so logical that there is no need to dwell upon it at length. However, as was pointed out earlier, only in rare instances have procedures been set up to enable an organization as such to appear as a party to a dispute.

(2) With regard to the conciliation machinery, the only machinery envisaged for this case, it was necessary to distinguish between instances in which an organization is involved and those in which no organization is involved, because this affects some of the operating conditions of the bodies responsible for conciliation, although the conciliation process itself remains basically the same. If one considers separately the cases involving an international organization, one

finds certain cases in which the organization raises an objection to the claim of a State or of an organization, as provided for under article 65, as well as the opposite case in which the claim of an organization is contested by a State or by an organization. The distinction thus introduced does not coincide with the basic distinction, applicable to *treaties* but not to *disputes*, differentiating treaties concluded between one or more States and one or more organizations from treaties concluded between several organizations.

(3) As to the structure of the annex, there were several possible ways of solving the problems raised by the need for two types of provisions: those that are common to all disputes and those especially applicable to one category or the other. The structure adopted was chosen because it follows the text of the Vienna Convention as closely as possible, while clearly bringing out the new problems created by the emergence of international organizations as parties to a dispute. As in the Vienna Convention, the annex begins with a provision common to all disputes, namely that dealing with the constitution of a list of conciliators, which is contained in paragraph 1. All the other paragraphs are divided into two sections (I and II); those in section II follow the same pattern as those in section I and are numbered in the same manner, with the word *bis* following the paragraph number. Section I is devoted exclusively to disputes between States; it reproduces unchanged paragraphs 2 to 7 of the annex to the Vienna Convention. Section II is devoted to other cases, that is, to those in which the objection provided for under article 65 is raised by or with respect to an organization. Changes have been made in some paragraphs, compared to the annex to the Vienna Convention (and to sect. I of this annex), while no changes have been made in other paragraphs (3 *bis*, 4 *bis* and 5 *bis*). It is these changes that call for commentary.

(4) One of the first problems, which is apparent in the three amended paragraphs of section II (as well as in para. 1), stems from the fact that the United Nations may be a party to a dispute arising from a treaty to which it is a party. However, the key figure in the conciliation procedure envisaged in the annex to the Vienna Convention is the Secretary-General of the United Nations. This arrangement must be changed, at least in part, for cases in which the United Nations is a party to the dispute; one cannot be a party to a dispute and, at the same time, be an impartial participant in the conciliation machinery dealing with the dispute. An effort has been made in the draft annex to find a solution for this special case by having the President of the International Court of Justice replace the Secretary-General in all tasks that involve impartiality in conciliation—but only in these tasks—thus maintaining the uniformity of the conciliation machinery.

(5) Accordingly, the drawing up of the list of conciliators which constitutes the stage of the conciliation process preceding the emergence of any

⁷³ Text identical to that of the corresponding provision of the annex to the Vienna Convention and of para. 3 of sect. I above.

⁷⁴ Text identical to that of the corresponding provision of the annex to the Vienna Convention and of para. 4 of sect. I above.

⁷⁵ Text identical to that of the corresponding provision of the annex to the Vienna Convention and of para. 5 of sect. I above.

⁷⁶ The corresponding disposition of the annex to the Vienna Convention is contained in para. 6 of sect. I above.

⁷⁷ The corresponding disposition of the annex to the Vienna Convention is contained in para. 7 of sect. I above.

dispute is the same for all disputes, as was indicated earlier; it is set forth at the beginning of the draft annex, in paragraph 1. This paragraph contains a few drafting changes, compared to paragraph 1 of the annex of the Vienna Convention, in order to provide for international organizations "to which the present articles have become applicable".⁷⁸ As to the task of the Secretary-General of the United Nations, his role is not altered in any way, even in the event of a dispute to which the United Nations is a party. Provision has merely been made for the Secretary-General to transmit the list in question to the President of the International Court of Justice, who is thus in a position to play his role at any time, should it become necessary.

(6) However, as regards the referral of matters to the Conciliation Commission and even the constitution of the Commission itself (para. 2 *bis*), the President of the International Court of Justice will replace the Secretary-General if the United Nations is involved. By the same token, when a request for conciliation has been made to the President of the International Court of Justice, the relevant report of the Conciliation Commission will also be deposited with him (para. 6 *bis*).

(7) As to any assistance and facilities the Conciliation Commission may require, it did not seem very practical to ask the International Court of Justice to provide them when the President of that body is associated with the conciliation, since the means of the Court are limited from the standpoint both of finance and of equipment and staff. Accordingly, provision has been made, in this case as well, for the Secretary-General to furnish assistance and facilities to the Conciliation Commission; however, he will do so through the intermediary of the President of the Court (para. 7 *bis*). It was thought that the inclusion in the procedure of a distinguished individual of unquestionable impartiality would be sufficient guarantee, in the eyes of a party to a dispute with the United Nations, of the neutral nature of whatever services the Secretary-General might be requested to provide.

(8) Another practical problem, as regards international organizations, is created by the fact that it is not possible to refer to the nationality of the conciliators. When referring to States, the Vienna Conven-

tion and, consequently, the present articles, provide that one of the conciliators appointed by a State party to a dispute shall be of the nationality of that State and the other shall not. In the case of international organizations, the draft annex contains the following solution: an organization party to a specific dispute designates one conciliator, who may or may not be included in the list, and another conciliator who must necessarily be included in the list but who must have been appointed by a State or by a different organization, thus excluding conciliators appointed by the organization in question.

(9) In conclusion, if one subjects the draft annex to close scrutiny, it is possible to criticize certain aspects of the system thus established. In some respects, the system seems too limited: if, in fact, conciliation has all the merits attributed to it, why limit it to disputes involving part V of the draft articles? Is not the Vienna Convention thus being followed too slavishly? Was not the machinery of the Vienna Convention devised merely to resolve a political crisis that had arisen during the United Nations Conference on the Law of Treaties but that today is very much a thing of the past? Might it not be better to extend the field of application of conciliation and, at the same time, to establish it on different bases, as was done in other codification conventions concluded since 1969? Another cause for criticism may perhaps reside in the complexity of the proposed machinery: since one cannot rule out the possibility that the United Nations might become a party in a case of conciliation, would it not be preferable as a general rule to dissociate conciliation from the Secretary-General of the United Nations?

(10) Although the Special Rapporteur was aware of such criticism, it is not for him, nor perhaps for the Commission, to recommend that Governments should select one method of settling disputes in preference to another. However, the exercise of adapting the system of the Vienna Convention to disputes to which international organizations are parties is not futile. It is useful for Governments to have a clear and accurate picture of the different possibilities; moreover, since the Vienna Convention has already entered into force, and since these articles may become the subject of a convention, it is particularly important that the two conventions should differ from each other only in cases and for reasons that have been carefully examined. It is already quite presumptuous to imagine that the present effort could contribute anything new. In order to emphasize the "exploratory" nature of the present draft annex, the entire text has been placed within square brackets.

⁷⁸ This wording makes it possible to avoid prejudging the process whereby the present articles will eventually become applicable to organizations (through a convention or by unilateral declaration).

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

[Agenda item 4]

DOCUMENT A/CN.4/329 AND ADD.1

Replies of Governments to the Commission's questionnaire

[Original: English/French]
[10 March and 3 July 1980]

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Introduction

1. By paragraph 4(e) of section I of resolution 3315 (XXIX) of 14 December 1974, the General Assembly recommended that the International Law Commission should continue its study of the law of the non-navigational uses of international watercourses, taking into account General Assembly resolutions 2669 (XXV) of 8 December 1970 and 3071 (XXVIII) of 30 November 1973 and other resolutions concerning the work of the Commission on the topic, and comments received from Member States on the questions referred to in the annex to chapter V of the report of the Commission on the work of its twenty-sixth session.¹ Comments received from Member States pursuant to resolution 3315 (XXIX) were issued in document A/CN.4/294 and Add.1.²

2. By paragraph 5 of its resolution 31/97 of 15 December 1976, the General Assembly urged Member States that had not yet done so to submit to the Secretary-General their written comments on the subject of the law of the non-navigational uses of international watercourses.

3. By a circular note dated 18 January 1977, the Secretary-General invited Member States that had not yet done so to submit as soon as possible their written comments referred to in resolution 31/97.

4. At the Commission's thirtieth session, replies received to this note were circulated in document A/CN.4/314.³ An additional reply to the Secretary-General's note was reproduced in document A/CN.4/324 and circulated at the thirty-first session.⁴

5. The General Assembly, by paragraph 4(d) of section I of resolution 33/139 of 19 December 1978, recommended that the Commission should continue its work on the law of the non-navigational uses of international watercourses.

6. At its thirty-first session, in 1979, in view of the importance of the topic and the need to have at its disposal the views of as many Governments of Member States as possible, the Commission decided again to request, through the Secretary-General, the Governments of Member States which had not already done so to submit their written comments on the questionnaire formulated by the Commission in 1974.⁵

7. The Secretary-General, by a circular note dated 18 October 1979, invited the Governments of Member States which had not yet already done so, to submit, as soon as possible their written comments on the Commission's questionnaire.

8. The General Assembly, by paragraph 4(d) of resolution 34/141 of 17 December 1979, recommended that the Commission continue its work on the topic, taking into account the replies from Governments to the questionnaire prepared by the Commission and the views expressed on the topic in debates in the General Assembly.

9. By 3 July 1980, new replies to the questionnaire prepared by the Commission had been received from the Governments of the following States: Greece, Luxembourg, Niger and the Syrian Arab Republic. These replies are reproduced in the present document, which has been organized along the same lines as documents A/CN.4/294 and Add.1, A/CN.4/314 and A/CN.4/324, that is, giving first the general comments and observations and then the replies to the specific questions reproduced below.

10. The text of the questionnaire is as follows:

- A. What would be the appropriate scope of the definition of an international watercourse, in a study of the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand?
- B. Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of non-navigational uses of international watercourses?
- C. Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of the pollution of international watercourses?
- D. Should the Commission adopt the following outline for fresh water uses as the basis of its study:
 - (a) Agricultural uses:
 1. Irrigation;
 2. Drainage;
 3. Waste disposal;
 4. Aquatic food production;
 - (b) Economic and commercial uses:
 1. Energy production (hydroelectric, nuclear and mechanical);
 2. Manufacturing;
 3. Construction;
 4. Transportation other than navigation;
 5. Timber floating;
 6. Waste disposal;
 7. Extractive (mining, oil production, etc.);
 - (c) Domestic and social uses:
 1. Consumptive (drinking, cooking, washing, laundry, etc.);
 2. Waste disposal;
 3. Recreational (swimming, sport, fishing, boating, etc.)?
- E. Are there any other uses that should be included?
- F. Should the Commission include flood control and erosion problems in its study?
- G. Should the Commission take account in its study of the interaction between use for navigation and other uses?
- H. Are you in favour of the Commission taking up the problem of pollution of international watercourses as the initial stage in its study?
- I. Should special arrangements be made for ensuring that the Commission is provided with the technical, scientific and economic advice which will be required, through such means as the establishment of a Committee of Experts?

¹ *Yearbook...1974*, vol. II (Part One), p. 301, document A/9610/Rev.1.

² *Yearbook... 1976*, vol. II (Part One), p. 147.

³ *Yearbook... 1978*, vol. II (Part One), p. 253.

⁴ *Yearbook... 1979*, vol. II (Part One), p. 178.

⁵ *Ibid.*, vol. II (Part Two), p. 169, document A/34/10, para. 148.

I. General comments and observations

Greece

[Original: French]
[8 June 1979]

The question of the law of the non-navigational uses of international watercourses is of vital importance to Greece. This law, which affects friendly relations among States, and, in particular, neighbourly intercourse, has many components and is overdue for codification in the interest of the international community. Greece hopes that the Commission, in keeping with its long-standing tradition, will perform a useful exercise in the codification and progressive development of the law on this subject as quickly as it can.

Luxembourg

[Original: French]
[5 June 1980]

An example that deserves mention is the Commission internationale pour la Protection de la Moselle contre la pollution, which was set up to guarantee the conservation of the waters of the Moselle and to ensure adequate co-operation by the competent authorities. The task of the Moselle Commission is to ensure co-operation between the three contracting Governments with a view to protecting this watercourse from pollution. In addition, the Commission collaborates with the following international commissions: (a) Commission internationale pour la protection de la Sarre contre la pollution; (b) Commission internationale pour la protection du Rhin contre la pollution; (c) Commission de la Moselle (for navigation).

II. Replies to specific questions

Question A

What would be the appropriate scope of the definition of an international watercourse, in a study of the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand?

Greece

[Original: French]
[8 June 1979]

“International watercourse” traditionally means any watercourse—usually rivers, but also canals and lakes—separating or flowing through the territories of two or more States. This definition, however, has for some time been obsolete and has been superseded by the modern concept of an international drainage basin. This basic concept, which is broader (it also embraces the tributaries of the international river and ground water), makes for more rational and effective regulation of the legal relationships which should exist among States sharing the waters of such a basin, so as to ensure, for example, that from the qualitative or quantitative angle, the use of such waters by a State does not damage the right of other riparian States to the same waters.

Luxembourg

[Original: French]
[5 June 1980]

It can be inferred from the questionnaire that in the first instance this is a matter of defining an international watercourse. Since, in addition to the watercourse itself, the manifold uses of the tributaries also influence the flow, quality and degree of pollution of the water, it is essential to broaden the concept of an

international watercourse to include the geographical concept of a national or international drainage basin. In other words, to ensure rational use of the water, the entire catchment area will have to be regarded in that way by all countries contiguous to or forming part of it, even when the tributaries in question are very distant. All the countries concerned must therefore collaborate in drawing up a general plan for the utilization of the catchment area's resources.

Accordingly, a study will first have to be made of the various legal regimes governing the watercourse and its tributaries, and of the national laws regulating the use of their waters. It will also be necessary to study the economic, political and legal treaties concluded by countries on the joint use of waters forming a frontier between them.

As the rational exploitation of all water resources is closely dependent on the degree of pollution of the water, the elimination of such pollution is a prime requirement. An excessive salt content, for example, makes irrigation water unfit for use. The countries concerned will therefore have to modify their water-purification and preventive-measures legislation with this aim in view. International treaties must lay down permitted levels of pollution with provision for inspection of the degree of pollution, control of polluters, and enforcement measures in the event of non-compliance with the regulations.

Niger

[Original: French]
[25 January 1980]

The definition of an international watercourse should be very broad and exhaustive, for instance, along the lines of the definition proposed by the Helsinki Conference of the International Law

Association in 1966.⁶ Such a definition would cover necessary inter-State relations and would specify the rights and obligations of all the parties in all fields, including that of pollution.

Syrian Arab Republic

[Original: English]
[12 January 1980]

An international watercourse is a watercourse which passes through several neighbouring countries or forms natural common boundaries between them; each country has free use of the water.

Question B

Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of non-navigational use of international watercourses?

Greece

[Original: French]
[8 June 1979]

Reply to questions B and C

Given the reply to question A, Greece's reply to questions B and C is in the affirmative. The concept of an international drainage basin is, because of its practical, unitary (despite frontiers) and functional nature, an excellent basis for a study of the legal aspects of non-navigational uses of international watercourses and the pollution of such watercourses.

Luxembourg

[Original: French]
[5 June 1979]

In this context, the geographical concept of an international drainage basin seems the appropriate basis for a study of the legal aspects of non-navigational uses.

Niger

[Original: French]
[25 January 1980]

The geographical concept of an international drainage basin seems appropriate, subject to a prior definition of such a basin as covering the entire catchment area, but also taking into account the replenishment of adjacent ground-water levels.

Syrian Arab Republic

[Original: English]
[12 January 1980]

Yes.

Question C

Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of the pollution of international watercourses?

Greece

[See above, question B, Greece.]

Luxembourg

[Original: French]
[5 June 1980]

The geographical concept of an international drainage basin seems the appropriate basis for a study of the legal aspects of pollution of international watercourses.

Niger

[Original: French]
[25 January 1980]

The concept of an adjacent protective zone should be added to the concept of an international drainage basin. The criteria for such a zone would have to be defined.

Syrian Arab Republic

[Original: English]
[12 January 1980]

Yes.

Question D

Should the Commission adopt the following outline for fresh water uses as the basis of its study:

(a) *Agricultural uses:*

1. *Irrigation;*
2. *Drainage;*
3. *Waste disposal;*
4. *Aquatic food production;*

(b) *Economic and commercial uses:*

1. *Energy production (hydroelectric, nuclear and mechanical)*
2. *Manufacturing;*
3. *Construction;*
4. *Transportation other than navigation;*
5. *Timber floating;*
6. *Waste disposal;*
7. *Extractive (mining, oil production, etc.);*

(c) *Domestic and social uses:*

1. *Consumptive (drinking, cooking, washing, laundry, etc.);*
2. *Waste disposal;*
3. *Recreational (swimming, sport, fishing, boating, etc.)?*

⁶ *Yearbook... 1974*, vol. II (Part Two) pp. 357 *et seq.*, document A/CN.4/274, Part Four, sect.C.1.

Greece

[Original: French]
[8 June 1979]

Reply to questions D and E

Greece has no specific comments. On the whole, the list of uses, which is not exhaustive, is acceptable. Since, however, these uses are often mutually incompatible, to formulate legal principles for them requires that they be studied from the quantitative (uses affecting flow) and qualitative (uses tainting the water or impairing its quality) angles.

Luxembourg

[Original: French]
[5 June 1980]

The outline prepared by the Commission can serve as a basis for the study in question.

Niger

[Original: French]
[25 January 1980]

The outline proposed as the basis for the study seems satisfactory. However, the Niger would like the special needs of disadvantaged areas contiguous to watercourses, such as arid regions of the Sahelian type, to be taken into consideration.

Syrian Arab Republic

[Original: English]
[12 January 1980]

Yes.

Question E

Are there any other uses that should be included?

Greece

[See above, question D, Greece.]

Luxembourg

[Original: French]
[5 June 1980]

The enumeration of fresh water uses is fairly complete and provides a sound basis for the study in question.

Niger

[Original: French]
[25 January 1980]

No.

Syrian Arab Republic

[Original: English]
[12 January 1980]

We do not see any other uses that should be included.

Question F

Should the Commission include flood control and erosion problems in its study?

Greece

[Original: French]
[8 June 1979]

Greece's reply to this question is also in the affirmative.

Luxembourg

[Original: French]
[5 June 1980]

If water resources are to be rationally exploited, the Commission will necessarily have to extend its study to related problems such as flood control, regulation of water levels by means of dams and dykes, erosion, soil conservation measures on farms situated in the drainage basin, the effect on water levels of various kinds of vegetation (forest, pasture, crop-land), conservation of nature, watercourse management, public health, effects on fish life and migration, etc.

In addition, the Commission should consider the establishment of water reserves for regulating flow during low-water periods to make good water losses due to evaporation in cooling towers or resulting from irrigation or crop spraying.

Niger

[Original: French]
[25 January 1980]

Yes.

Syrian Arab Republic

[Original: English]
[12 January 1980]

Yes.

Question G

Should the Commission take account in its study of the interaction between use for navigation and other uses?

Greece

[Original: French]
[8 June 1979]

Yes, it would definitely be advisable to take account of the interaction between use for navigation and other uses.

Luxembourg

[Original: French]
[5 June 1980]

Multiple-purpose water use involves co-ordination between navigation and other water users.

Niger

[Original: French]
[25 January 1980]

Yes.

Syrian Arab Republic

[Original: English]
[12 January 1980]

It is of considerable interest to do so.

Question H

Are you in favour of the Commission taking up the problem of pollution of international watercourses as the initial stage in its study?

Greece

[Original: French]
[8 June 1979]

If the two questions cannot be studied simultaneously, the study of the uses of international watercourses should take precedence over the study of the pollution of such watercourses.

Luxembourg

[Original: French]
[5 June 1981]

Since most agricultural, domestic and social uses are only possible if the water is wholesome, it is above all essential to resolve first the problem of watercourse pollution.

Niger

[Original: French]
[25 January 1980]

It would appear that a detailed study of the use of watercourses should disclose which sectors are most

adversely affected by pollution. Once this information was obtained, it would serve as a basis for solving the problem of pollution, which would be studied next.

Syrian Arab Republic

[Original: English]
[12 January 1980]

Not necessary.

Question I

Should special arrangements be made for ensuring that the Commission is provided with the technical, scientific and economic advice which will be required through such means as the establishment of a Committee of Experts?

Greece

[Original: French]
[8 June 1979]

In view of the complexity of the issue, Greece has no objection, if the Commission considers it necessary. If such a committee of experts is established, Greece would like to belong to it.

Luxembourg

[Original: French]
[5 June 1980]

A committee of experts for gathering all the necessary technical, scientific, economic and legal advice does not seem essential, since States Members of the United Nations are morally bound, by virtue of their membership, to provide the Organization with the information it requests of them.

Niger

[Original: French]
[25 January 1980]

The establishment of a committee of experts would be useful, but arrangements should be made for contacts between the committee and Member States (either directly or through the Commission and the United Nations).

Syrian Arab Republic

[Original: English]
[12 January 1980]

Yes.

DOCUMENT A/CN.4/332 AND ADD.1*

**Second report on the law of the non-navigational uses
of international watercourses,
by Mr. Stephen M. Schwebel, Special Rapporteur**

[Original English]
[24 April and 22 May 1980]

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ABBREVIATIONS

FAO	Food and Agriculture Organization of the United Nations
I.C.J.	International Court of Justice
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
ILA	International Law Association
P.C.I.J.	Permanent Court of International Justice
<i>P.C.I.J., Series A</i>	<i>P.C.I.J., Collection of Judgments</i> [through 1930]
<i>P.C.I.J., Series A/B</i>	<i>P.C.I.J., Judgments, Orders and Advisory Opinions</i> [from 1931]
UNEP	United Nations Environment Programme

CHAPTER I

Status of work on the topic

A. The Special Rapporteur's first report

1. A first report to the Commission on the law of the non-navigational uses of international watercourses was introduced by the Special Rapporteur in 1979, at the Commission's thirty-first session.¹ Chapter I of the report dealt with the uncommon physical characteristics of water, that most common of chemical compounds. The nature of the hydrologic cycle, the limited capacity of water to purify itself and the factors governing the volume and flow of water were examined in order to ascertain the physical characteristics and limitations that must be taken into account if legal principles regarding water use are to be effective.

2. Chapter II of the first report took up the thorny question of the proper scope of a study of the non-navigational uses of the waters of international watercourses. It indicated that, in order to ensure harmony between the physical laws governing water and the legal rules governing the use of fresh water, the drainage basin must be taken as the unit for the formulation of such rules. It recognized, however, the divergencies in views among States on that fundamental issue of scope, and the position of a number of States that acceptance of the basin concept would go beyond what should be accepted at this time. In their view, earlier concepts, such as the definition in the Final Act of the Congress of Vienna (1815)² of

international rivers for the purpose of navigation only should be preserved and generally applied. Prior discussions in the Commission and in the Sixth Committee of the General Assembly regarding international watercourses had established the strength with which those divergent views were held. Accordingly, the report suggested that an effort should be made to move ahead with the preparation of articles, to the extent possible, without an initial definition of an international watercourse.

3. The great diversity of watercourses was discussed in chapter III of the report. It was recognized that there was a need for a method of dealing with watercourse problems that would permit the development of principles of general applicability within a framework sufficiently flexible to allow adaptation to the unique aspects of individual watercourses. To that end, chapter III proposed a series of articles on "user agreements". A user agreement would be applicable to a specific watercourse, and all States which contributed to or made use of the water of that watercourse could become parties to the agreement, whether or not they became parties to the draft articles which, it was contemplated, the Commission would produce.

4. Chapter IV contained a series of draft articles providing for the collection and exchange of data relating to the quantity, rate of flow and withdrawal of fresh water from international watercourses. Requirements for collection and exchange of data on water quality, however, would be dealt with in user agreements.

5. In presenting his first report to the Commission, the Special Rapporteur emphasized that the articles

¹ *Yearbook . . . 1979*, vol. II (Part One), p. 143, document A/CN.4/320.

² For the text of the Final Act, see A. Oakes and R. B. Mowat, eds., *The Great European Treaties of the Nineteenth Century* (Oxford, Clarendon Press, 1918), p. 37.

put forward were not offered for the purpose of adoption by the Commission; they were very tentatively submitted as food for thought, not consumption, to illustrate a proposed methodology to be followed in seeking to resolve some of the problems presented by this extremely complicated subject and to obtain the views of the Commission on the merits of that approach.

B. Comment in the Commission on the Special Rapporteur's first report

6. The Commission did not take up the proposed articles with a view to their adoption, revision or rejection but instead engaged in a general discussion of the proposals that had been put forward.

7. The statements of Commission members indicated that there was broad support for the concept advanced by the Special Rapporteur of a "framework convention" which would "set out general, residual principles of law of the non-navigational uses of international watercourses", and would be supplemented by "user" or "system" agreements in which the States of a particular watercourse would provide for the detailed arrangements, rights and obligations governing the uses of the watercourse in question.³

8. A substantial number of questions were raised regarding both the manner in which those principles should be developed and the meaning and scope of the terms "user agreement" and "user State", and whether the term "user" was adequate to reflect the varying situations that would arise.⁴

9. Support was voiced by some members for formulation of principles that would deal with specific uses such as irrigation, hydroelectric production and domestic consumption. Other members of the Commission proposed development of "a set of norms and rules applicable to all kinds of uses of such watercourses".⁵ A few members doubted that the subject was ripe for codification.⁶

10. In the closing debate, the Special Rapporteur suggested that it would be possible to take up, as the next step, any one of four aspects of the topic:

- (a) principles respecting specific uses;
- (b) rules on abuses of water and effects of the uses of water, such as pollution;
- (c) general principles applicable to the uses of water;

³ See *Yearbook . . . 1979*, vol. II (Part Two), p. 166, document A/34/10, para. 134.

⁴ See, for example, the statements by Mr. Riphagen (*ibid.*, vol. I, p. 111, 1554th meeting, para. 45) and Mr. Jagota (*ibid.*, p. 115, 1555th meeting, paras. 25–27).

⁵ *Ibid.*, vol. II (Part Two), p. 165, document A/34/10, para. 125.

⁶ *Ibid.*, para. 133.

(d) institutional arrangements for international co-operation regarding international watercourses.⁷

There was no consensus in the Commission on a preferred course of action. Discussion centred on principles relating to specific uses and principles applying to uses in general.⁸

C. Comment on the topic in the Sixth Committee of the General Assembly

1. A FRAMEWORK AGREEMENT

11. In the course of the review of the report of the Commission on its thirty-first session by the Sixth Committee of the General Assembly, the subject of international watercourses received considerable comment. Some 45 States expressed views on various aspects of the subject. Those comments, in general, supported the proposal that the Commission should produce a set of articles which would provide a legal framework for the negotiation of treaties to govern the use of water of individual watercourses by the watercourse States. No State directly disagreed with that proposal, although a few States expressed the view that it would be premature to proceed with the proposal pending further development of the law of international watercourses.⁹

12. Twenty-three States supported the development of a framework agreement without qualification and an additional four States approved the approach, but with certain reservations.

13. Among the former, the representative of Venezuela, speaking on behalf of the signatories to the Andean Pact,¹⁰ cited the Treaty on the River Plate Basin (Brasilia, 23 April 1969).¹¹ In particular, he drew attention to article VI of the Treaty, which stated that the parties thereto might conclude bilateral or multi-lateral arrangements with a view to furthering the general aim of developing the river basin.¹²

⁷ *Ibid.*, para. 145.

⁸ *Ibid.*, para. 146.

⁹ See for example the statement of the representative of Turkey (*Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 51st meeting, paras. 49–50; and *ibid.*, *Sessional fascicle*, corrigendum).

¹⁰ Cartagena Agreement (Subregional integration agreement (Andean Pact)) (Bogotá, 26 May 1969). Signatory States: Bolivia, Colombia, Ecuador, Peru, Venezuela. See American Association of International Law, *International Legal Materials* (Washington D.C.), vol. VIII, No. 5 (Sept. 1969), p. 910.

¹¹ To be printed in United Nations, *Treaty Series*, vol. 875. See also *Yearbook . . . 1974*, vol. II (Part Two), pp. 291–292, document A/CN.4/274, paras. 60–64.

¹² *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 44th meeting, para. 18; and *ibid.*, *Sessional fascicle*, corrigendum.

14. The representative of Jordan, while characterizing the approach of a framework agreement to be coupled with user agreements as "very interesting", was concerned that the "framework convention" envisaged "should not be so general as to defeat what surely must be one of the purposes of codification, namely, uniformity of the applicable law". He stated that political reasons might debar bilateral water agreements.¹³

15. The representative of Bangladesh considered that the Commission should "develop and codify the relevant principles of international law, lay down procedures for their application and... development, giving equal treatment to upper and lower riparian States". He declared that his delegation "strongly supported the formulation of general, universal rules on the law of the non-navigational uses of international watercourses... [which] set out rights and obligations".¹⁴

16. The representative of Uruguay, while favouring the framework agreement approach, was concerned that draft article 5 "seemed to limit the right of States to enter into bilateral agreements outside the framework of the projected convention". He also noted that draft article 6 seemed "to give general multilateral agreements precedence over specific bilateral or multilateral agreements, which was contrary to accepted principles of international law".¹⁵

17. States that did not take positions either for or against the concept of a framework agreement to be combined with individual agreements for individual international watercourses nevertheless appeared receptive to the Commission's continuing its work along those lines. For example, the representative of Canada "noted with interest the proposed formulation of a framework convention which would establish rules of general application. That would allow for the adoption of regional arrangements which, while governed by the general régime, could be adapted to the requirements of specific situations".¹⁶

18. In view of the predominant support by States in the Sixth Committee for the development of a set of draft articles that could be adopted as a "framework treaty", it is proposed that the Commission proceed to the consideration and drafting of the articles that could serve as the basis for the adoption of such a treaty.

2. GENERAL OR SPECIFIC PRINCIPLES?

19. Consideration of individual articles, nevertheless, must be preceded by a decision on which aspects

¹³ *Ibid.*, 51st meeting, para. 57; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁴ *Ibid.*, 50th meeting, paras. 34 and 35; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁵ *Ibid.*, para. 52; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁶ *Ibid.*, 41st meeting, para. 25; and *ibid.*, *Sessional fascicle*, corrigendum.

of fresh water use should be taken up as the first part of the Commission's work. Here again, the review of the topic in the Sixth Committee is instructive.

20. Of the four possibilities suggested by the Special Rapporteur at the close of the Commission's debate at its thirty-first session,¹⁷ neither general rules on abuses of water nor institutional arrangements for State co-operation received support in the Sixth Committee. The need to set up some type of organization to deal with common riparian problems was referred to by a number of representatives, but there were no proposals to give institutional arrangements a priority position.

21. With respect to the pollution of international watercourses, the representative of Finland stated that that subject did not have to be given priority because a number of international organizations and other bodies were currently engaged in developing proposals on environmental protection, including water pollution control.¹⁸ The representative of Bulgaria declared that the general rules to be prepared by the Commission might deal in particular with the aquatic environment, but he did not propose concentrating on such rules at the outset.¹⁹ Similar views were expressed by the representative of Egypt.²⁰ The representative of Ethiopia stated that it would be inadvisable for the Commission to take up the problem of pollution.²¹

22. The two remaining suggested courses of action were the preparation of articles containing principles applying the specific uses of water, such as irrigation, hydroelectric production and industrial production, or the drafting of articles that set forth principles applicable to the use of fresh water in general.

23. The preparation of a set of general principles received substantial support from the representative in the Sixth Committee who commented on that aspect of the topic. Some 26 States agreed that the Commission should proceed with the development of general principles relating to the use of the water of international watercourses. In the large majority of cases, that position did not exclude addressing principles that could be applied to particular uses. The statement of the representative of Argentina was one of that nature: "The draft should take the form of a convention containing a small number of very general principles to serve as a guide for agreements between users in particular cases."²² The representative of Niger stated

¹⁷ See para. 10 above.

¹⁸ *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 41st meeting, para. 18; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁹ *Ibid.*, 46th meeting, para. 62; and *ibid.*, *Sessional fascicle*, corrigendum.

²⁰ *Ibid.*, 51st meeting, para. 27; and *ibid.*, *Sessional fascicle*, corrigendum.

²¹ *Ibid.*, 43rd meeting, para. 21; and *ibid.*, *Sessional fascicle*, corrigendum.

²² *Ibid.*, 46th meeting, para. 54; and *ibid.*, *Sessional fascicle*, corrigendum.

that his delegation "would favour the preparation of a code of conduct to which States wishing to conclude regional agreements could refer".²³ The representative of Spain "agreed with the view of the Special Rapporteur that what was needed was a set of articles laying down principles regarding the use of international watercourses in terms sufficiently broad to be applied to all such watercourses while at the same time providing the means by which the articles could be adapted to the singular nature of an individual watercourse".²⁴

24. Representatives of a few States commented directly upon the issue. The representative of Iraq stated that

what was desirable was a set of norms and rules applicable to all kinds of uses of international watercourses rather than rules formulated strictly on the basis of an examination of the individual uses of such watercourses. It was, in fact, only logical to start with the formulation of general rules from which specific rules applicable to a particular use could subsequently be derived.²⁵

25. The representative of India advanced a different view: "The Commission should give priority to drafting articles on the particular non-navigational uses of international watercourses."²⁶ But the representative of Denmark "hoped for the formulation of an umbrella agreement consisting of rules of a general nature which could be supplemented by specific rules for individual waterways".²⁷ The representative of France favoured the formulation of general rules and added:

Moreover, if those rules covered particular uses of the water of international watercourses, they should only be of a residuary nature. The proposal put forward by the Special Rapporteur that "user agreements" should supplement a general convention was therefore promising.²⁸

The representative of Bulgaria supported the development of general rules, but "did not rule out the elaboration, on the basis of general rules and principles, of specific rules which might be applied to regional or specific conditions in international river systems".²⁹

26. The Sixth Committee debate indicated that the Commission should begin its work by seeking to produce a set of legal principles that would be generally applicable to the use of the water of international

watercourses for purposes other than navigation. That position was advanced by the great majority of representatives as the preferable course, although without any indication of substantial opposition to the Commission's taking up instead the development of principles relating to specific uses. Nevertheless, there was sufficient concordance of view within the Sixth Committee that its opinion should be given considerable weight in reaching a decision on how to proceed. At the same time, the Commission should consider whether there were substantial grounds supporting work upon specific uses rather than upon the uses of water in general.

D. Advantages of initial development of general principles

27. The development of principles and rules tied to specific uses has one obvious advantage. The case for principles can be presented in a specific context, such as irrigation requirements, and the content of any principle can be judged with a reasonably accurate understanding of its consequences and its relationship to other—related—principles and rules. A similar illustration would be a principle that any watercourse State that builds a dam or other control structure in an international watercourse that contains a fish population of economic importance shall construct this work so as to ensure the conservation of the fish stock. Application of this rule to a river where a dam is proposed downstream from the spawning grounds of salmon would require devices such as fish ladders to permit the fish to reach the spawning grounds and to ensure that the new generation of fish could return to the sea.

28. A general principle relating to all uses is necessarily more abstract and its consequences less predictable than a rule tailored to deal with a particular consequence of a specific use. The core article of the resolution adopted in September 1961 by the Institut de droit international at its Salzburg session on the utilization of non-maritime international waters except for navigation is an example of extremely broad language:

Article 2

Every State has the right to utilize waters which traverse or border its territory, subject to the limits imposed by international law and, in particular, those resulting from the provisions which follow.

This right is limited by the right of utilization of other States interested in the same watercourse or hydrographic basis.³⁰

29. The essential legal rule expressed is that the rights of a State are limited by the rights of other States. This is a postulate of international law so basic that it is unchallengeable. The remaining articles in the Institute's

²³ *Ibid.*, para. 32; and *ibid.*, *Sessional fascicle*, corrigendum.

²⁴ *Ibid.*, 44th meeting, para. 8; and *ibid.*, *Sessional fascicle*, corrigendum.

²⁵ *Ibid.*, 38th meeting, para. 45; and *ibid.*, *Sessional fascicle*, corrigendum.

²⁶ *Ibid.*, 51st meeting, para. 65; and *ibid.*, *Sessional fascicle*, corrigendum.

²⁷ *Ibid.*, 48th meeting, para. 3; and *ibid.*, *Sessional fascicle*, corrigendum.

²⁸ *Ibid.*, para. 16; and *ibid.*, *Sessional fascicle*, corrigendum.

²⁹ *Ibid.*, 46th meeting, para. 62; and *ibid.*, *Sessional fascicle*, corrigendum.

³⁰ *Annuaire de l'Institut de droit international*, 1961 (Basel), vol. 49, No. II (1962), p. 382. See also *Yearbook . . . 1974*, vol. II (Part Two), p. 202, document A/5409, para. 1076.

resolution deal with procedures for the settlement of disputes. These provisions are useful and cast some additional light on how rights of utilization may be exercised. However, they do not clarify what these rights are or what principles are applied to reconcile conflicting uses.

30. The building up of a body of rules dealing with specific uses could provide the basis for subsequently drafting general principles that would provide workable solutions for competing uses. However, this method has its drawbacks. It could result in the Commission becoming involved in disputes over detail that could not be easily resolved in the absence of an applicable general rule. In addition, the adoption at an early stage of articles containing rules generally applicable to watercourse use has the advantage of informing the members of the Commission of the general context in which more detailed rules may be developed. It is reasonable that Commission members should be concerned about adopting a rule dealing with specific activities without knowledge of how the rule

fits into a general scheme of things. That concern was raised by Sir Francis Vallat in his comment on future work on international watercourses at the thirty-first session:

It was important that the Commission [members] should not be asked to decide on isolated articles and that they should be able to see the articles in perspective. He hoped the Special Rapporteur would be able to broaden that perspective in time for the Commission's next session.³¹

31. While determination of the best organization of work on the subject is beset with uncertainties, there are thus sound reasons for postponing the development of rules for specific uses and for turning instead to a study of general principles of law that might be adopted as draft articles of a treaty to govern the uses of the water of international watercourses. This study will therefore proceed on that basis, fortified by the general support that this approach received in the Sixth Committee.

³¹ *Yearbook . . . 1979*, vol. I, p. 116, 1555th meeting, para. 34.

CHAPTER II

Reconsideration of draft articles submitted by the Special Rapporteur in his first report

A. Scope of the topic

1. SHOULD THERE BE A DEFINITION OF THE INTERNATIONAL WATERCOURSE?

32. Before proceeding to an examination of general principles governing the use of the water of international watercourses, the Commission should reconsider the articles that were put forward during its thirty-first session as a basis for discussion. The articles were the subject of considerable comment both in the Commission and in the Sixth Committee of the General Assembly. The nature of the comments ranged from approval to disapproval, particularly with regard to certain details of some of the proposals. Nevertheless, there was general agreement on the need for provisions that would set forth the scope of the draft articles, define the relationship of the Commission's work to agreements on individual watercourses and deal with the collection and exchange of essential information.

33. Debate both in the Commission and in the Sixth Committee confirmed the cleavage of opinion between adherents of the 1815 Vienna formula³² of contiguous and successive rivers and supporters of a broader concept, such as that of river basin, drainage basin or

hydrographic basin. The issue was discussed at length in the report submitted to the Commission by the former Special Rapporteur, Mr. Kearney, in 1976,³³ and in the first report of the current Special Rapporteur.³⁴ The proposal in the latter report was to adopt as article 1 a working definition of scope,³⁵ which would leave that basic decision for determination when the substantive context of the draft articles had been at least partially developed.

34. A new element was the expression of view in both the Commission and the Sixth Committee that the scope of the articles should be fixed at an early stage. In the Commission, Mr. Njenga questioned whether the decision to defer a definition of international watercourses was a wise one: "since the very content of the rules would depend upon the way in which an international watercourse was defined, it was essential for the Commission to consider that matter at the earliest opportunity".³⁶ Mr. Thiam also expressed the view that the Commission should define what it meant by watercourses.³⁷

³³ *Yearbook . . . 1976*, vol. II (Part One), p. 184, document A/CN.4/295.

³⁴ *Yearbook . . . 1979*, vol. II (Part One), pp. 151 *et seq.*, document A/CN.4/320, paras. 37 *et seq.*

³⁵ *Ibid.*, p. 144, para. 2.

³⁶ *Ibid.*, vol. I, p. 120, 1556th meeting, para. 23.

³⁷ *Ibid.*, p. 231, 1578th meeting, para. 6.

³² See para. 2 and footnote 2 above.

35. In the Sixth Committee of the General Assembly, the representative of France advanced the view that “the question of defining the term ‘international watercourse’ must not paralyse the work of the Commission, but a solution to the problem must not be postponed for too long since it affected both the scope and the content of the process of codification”.³⁸ The representative of Kenya

urged the Commission to consider the definition of an international watercourse at the earliest opportunity. In considering the acceptability of any draft articles formulated, the question as to whether the articles referred to successive or contiguous rivers or to the broader international drainage basin would be of decisive importance to Governments.³⁹

The representative of Niger considered that, while the Commission had been wise not to define an international watercourse, “some clarification was now required” and “a choice had to be made”. However, his delegation did not consider that “the choice of one concept rather than the other should necessarily apply to the draft articles as a whole; the choice should be made for each individual article”.⁴⁰

36. The representative of the Soviet Union held that adoption of a definition could not be postponed and suggested that the term “international watercourse” “must be taken to mean waters flowing along a certain course”.⁴¹ The representative of Japan, on the other hand, considered that a decision on the definition of international watercourses should be postponed.⁴² The representative of India stated that the definition of an international watercourse could be dealt with by the Commission at a later stage. “perhaps by incorporating it in an optional clause”.⁴³ The other representatives who alluded to the topic did not comment specifically on the question of timing and presumably are prepared to leave the matter to the discretion of the Commission.

37. The force of the position that a definition of international watercourses has a direct bearing upon the content of the principles that the Commission may adopt cannot be denied. If the issue involved were merely a formal one, there would not have been the amount of dispute regarding the elements of the definition that has taken place within the Commission and in the General Assembly. Interests of States inevitably will be affected by the meaning adopted for the term “international watercourse”, and States thus

have a substantial reason for wanting to know what the principal effect will be of adopting one definition as opposed to another. But in the light of the difficulties posed by reaching agreement on a definition, the Commission decided in 1976 that the definition of “international watercourse” need not be pursued at the outset of the work.⁴⁴

38. In preparing his first report, the Special Rapporteur thus sought to avoid proposals that would favour adoption of a definition. Nevertheless, draft articles 1 and 2,⁴⁵ which were put forward to illustrate the type of minimal provisions necessary to allow the Commission to move forward in the absence of a definition of an international watercourse, were the object of some criticism both in the Commission and in the Sixth Committee as going beyond the Commission’s terms of reference.

39. The criticisms of article 1 were concentrated on paragraph 1, which provided:

The present articles apply to the uses of the water of international watercourses, and to associated problems such as flood control, erosion, sedimentation and salt water intrusion.

2. USE OF THE WATER OF THE WATERCOURSE

40. Objection has been made that the Commission should be concerned not with the uses of the water of international watercourses but only with the uses of the watercourses. Yet it is difficult to see the utility of drawing a distinction between use of the watercourse and use of the water of the watercourse.

41. In the Commission, in an effort to explain that distinction, illustrations were given of uses of watercourses other than use of the water of watercourses: navigation, timber floating and production of energy.⁴⁶ Yet each of these activities involves the use of water and is traditionally so regarded. The common element—if energy production is given a highly restricted meaning—is that the use takes place “between the banks” of the watercourse or, as in the case of mill-ponds, immediately adjacent thereto. Such a definition would exclude all uses that depend upon the diversion or abstraction of water from the watercourse, including many power generation facilities. These excluded uses would encompass practically all use of water for irrigation and other agricultural production, nuclear and fossil fuel energy production, manufacturing, construction, mining and other extraction activities, and domestic and municipal consumption. It is essentially navigational uses that may often be largely limited to activity “within” the watercourse (apart from locks and canals, pumped

³⁸ *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 48th meeting, para. 16; and *ibid.*, *Sessional fascicle*, corrigendum.

³⁹ *Ibid.*, 43rd meeting, para. 6; and *ibid.*, *Sessional fascicle*, corrigendum.

⁴⁰ *Ibid.*, 46th meeting, para. 34; and *ibid.*, *Sessional fascicle*, corrigendum.

⁴¹ *Ibid.*, 42nd meeting, para. 13; and *ibid.*, *Sessional fascicle*, corrigendum.

⁴² *Ibid.*, para. 5; and *ibid.*, *Sessional fascicle*, corrigendum.

⁴³ *Ibid.*, 51st meeting, para. 65; and *ibid.*, *Sessional fascicle*, corrigendum.

⁴⁴ *Yearbook ... 1976*, vol. II (Part Two), p. 162, document A/31/10, para. 164.

⁴⁵ *Yearbook ... 1979*, vol. II (Part One), p. 144, document A/CN.4/320, para. 2.

⁴⁶ *Ibid.*, vol. I, p. 229, 1577th meeting, para. 15.

storage and regulating impoundments on tributaries), but the Commission is not charged with dealing with essentially navigational uses.

42. These multiple uses, which would be excluded by so narrow a definition, were specifically mentioned in the proposed outline of uses included in the questionnaire to States drafted by the Commission in 1974 and approved by the General Assembly for submission to States in its resolution 3315 (XXIX) of 14 December 1974. None of the replies from States proposed exclusion of those uses and a substantial number of States proposed additional uses based upon the use of water removed from the watercourses.⁴⁷ Additional replies have continued to come in from States, supporting the outline of uses proposed in the questionnaire. The discussion in the General Assembly, and the General Assembly's resolutions on the work of the Commission, have proceeded on the assumption that the draft articles would deal with the uses which it has recently been proposed to exclude.

43. Paragraph 61 of the Special Rapporteur's first report states that, in draft article 1, the phrase "uses of the water of international watercourses" has been adopted rather than "the uses of international watercourses", as in General Assembly resolution 2669 (XXV). The change is stated to have been proposed for the purpose of emphasis and is not considered to be essential. Paragraph 62 of the report enlarges briefly on this change by stating that the reference to water "places the accent on the fact that it is the water which plays the central and decisive role in the development of these draft articles".

44. However, the highly restrictive interpretation of the phrase "uses of international watercourses" that has been advanced makes it important to decide which phrase is to be used in article 1. It appears essential to use the words "uses of the water of international watercourses" in order to avoid dispute and confusion over what uses the Commission is dealing with.

45. For the same reason, it is also important that the Commission adopt an appropriate formulation of article 1 in the course of its thirty-second session. While it may be possible to postpone, at least for the current session, a choice between either the drainage basin concept or the 1815 Vienna formula,⁴⁸ it is not reasonable to proceed on a basis that is so unstructured that members of the Commission cannot be sure whether they are dealing with uses such as irrigation or domestic use, despite the fact that inclusion of such uses has been accepted from the outset of the Commission's work and overwhelmingly endorsed by States.

⁴⁷ For an analysis of replies by Governments to the Commission's questionnaire, see *Yearbook ... 1976*, vol. II (Part One), pp. 168-174, document A/CN.4/294 and Add.1, questions D and E.

⁴⁸ See para. 2 and footnote 2 above.

3. PROBLEMS ASSOCIATED WITH THE USE OF THE WATER

46. A second objection to article 1, paragraph 1, actually indicates the need for adoption of the article. A few representatives in the Sixth Committee raised objections to the final phrase of the paragraph: "and to associated problems such as flood control, erosion, sedimentation and salt water intrusion". The representative of the Byelorussian SSR stated that the draft "included subjects which had no bearing on the topic under discussion, such as flood control and erosion".⁴⁹ The representative of the USSR stated that "problems such as the control of floods, erosion and sedimentation, which were matters separate from the uses of the watercourses, were outside the limits of the subject".⁵⁰

47. The questionnaire prepared by the Commission in 1974 contained as question F: "Should the Commission include flood control and erosion problems in its study?" There was substantial unanimity among the States replying to that question that the Commission should deal with those subjects.⁵¹ A number of States suggested, as additional subjects, sedimentation and salt water intrusion, both in the replies to the questionnaire and in the debate in the Sixth Committee.⁵² The report of the Commission on the work of its twenty-eighth session states that flood control, erosion problems and sedimentation should be included in the study.⁵³ As the first report of the present Special Rapporteur makes clear, salt water intrusion was added because it is a similar problem affecting the use of fresh water.⁵⁴

48. It should also be noted that at the thirty-first session of the Commission the position was advanced that "it would be dangerous to extend the study to lakes, even though some lakes connected waterways".⁵⁵ If the term "international watercourse" is subject to such limited interpretation as this, then the term is not adequate for the drafting of articles by the Commission. The exclusion of lakes (and canals) would raise serious questions regarding the relationship of the draft articles to important watercourses. Lake Chad, Lake Léman, the Canadian-United States Great Lakes and Lake Titicaca are among those that come to mind.

⁴⁹ *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 44th meeting, para. 25; and *ibid.*, *Sessional fascicle*, corrigendum.

⁵⁰ *Ibid.*, 42nd meeting, para. 13; and *ibid.*, *Sessional fascicle*, corrigendum.

⁵¹ See *Yearbook ... 1976*, vol. II (Part One), pp. 174-176, document A/CN.4/294 and Add.1.

⁵² See for example the replies of the Netherlands and Poland (*ibid.*, p. 175).

⁵³ *Ibid.*, vol. II (Part Two), p. 162, document A/31/10, para. 166.

⁵⁴ *Yearbook ... 1979*, vol. II (Part One), p. 157, document A/CN.4/320, para. 58.

⁵⁵ *Ibid.*, vol. I, p. 229, 1577th meeting, para. 14.

4. OTHER DEFINITIONAL PROBLEMS

49. Other consequential questions of definition are raised by objections in the Commission and in the Sixth Committee regarding the term "user State", which is defined in draft article 2 in the Special Rapporteur's first report as "a State which contributes to and makes use of water of an international watercourse".

50. In the Commission, Mr. Njenga was concerned whether the two elements of the phrase "contributes to and makes use of" were separate or cumulative. He submitted that Egypt, for example, "did not contribute to the waters of the Nile, but it none the less made use of those waters".⁵⁶ Mr. Ushakov viewed article 2 as based on the concept of the "international drainage basin".⁵⁷ The same view was expressed in the Sixth Committee by the representatives of Brazil⁵⁸ and the Soviet Union.⁵⁹

51. In his first report, the Special Rapporteur stated, with regard to draft articles 2 ("User States"), 3 ("User agreements") and 4 ("Definitions"),⁶⁰ that the articles were proposed "without prejudice to the question whether it is a river, the river system or the drainage basin that is in point".⁶¹ He also made it amply clear that the draft articles submitted did not answer the question whether the water of an international course comprised groundwater as well as surface water, and whether it embraced tributaries.⁶²

B. Draft articles

1. DRAFT ARTICLE 1: "SCOPE OF THE PRESENT ARTICLES"

52. Both draft articles 1 and 2 submitted in the first report⁶³ should be revised to deal, as far as is required, with the problems that have been examined. A formula to make it clear that an international watercourse is not to be regarded merely "as a pipe carrying water", in the graphic words of the representative of Thailand in the Sixth Committee,⁶⁴ is required to avoid being bogged down in recurring discussions over what uses

of water are to be dealt with and whether lakes (and canals) are included. The Special Rapporteur suggests that this aim could be achieved by referring in paragraph 1 of article 1 to "international watercourse systems". This would be the only material change in the proposed draft article, which would then read:

Article 1. Scope of the present articles

1. The present articles apply to the uses of the water of international watercourse systems and to problems associated with international watercourse systems, such as flood control, erosion, sedimentation and salt water intrusion.

2. The use of water of international watercourses for navigation is within the scope of these articles in so far as provisions of the articles respecting other uses of water affect navigation or are affected by navigation.

2. THE INTERNATIONAL WATERCOURSE "SYSTEM"

53. The word "system" is frequently used in connection with "river". Article 331 of the Treaty of Versailles provides:

Article 331

The following rivers are declared international:

The Elbe (*Labe*) from its confluence with the Vltava (*Moldau*), and the Vltava (*Moldau*) from Prague;
The Oder (*Odra*) from its confluence with the Oppa;
The Niemen (*Russtrom-Memel-Niemen*) from Grodno;
The Danube from Ulm;

and all navigable parts of these river systems which naturally provide more than one State with access to the sea...; together with lateral canals and channels constructed either to duplicate or to improve naturally navigable sections of the specified river systems, or to connect two naturally navigable sections of the same river...⁶⁵

54. There are a number of other references in the Treaty of Versailles to river systems, for example article 362, which, in dealing with the proposed extension of the jurisdiction of the Central Rhine Commission, refers to "any other parts of the Rhine river system which may be covered by the General Convention provided for in article 338 above."⁶⁶

55. The term "river system" is also employed in the Convention instituting the definitive status of the Danube (Paris, 1921). Article 1 of the Convention provides for freedom of navigation on the navigable course of the Danube and "over all the internationalized river system". Article 2 states that:

The internationalized river system referred to in the preceding article consists of:

The Morava and the Thaya where, in their courses, they form the frontier between Austria and Czechoslovakia;
The Drave from Barcs;

⁵⁶ *Ibid.*, p. 120, 1556th meeting, para. 26.

⁵⁷ *Ibid.*, p. 119, para. 17.

⁵⁸ *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 45th meeting, para. 30; and *ibid.*, *Sessional fascicle*, corrigendum.

⁵⁹ *Ibid.*, 42nd meeting, para. 14; and *ibid.*, *Sessional fascicle*, corrigendum.

⁶⁰ *Yearbook ... 1979*, vol. II (Part One), p. 144, document A/CN.4/320, para. 2.

⁶¹ *Ibid.*, p. 166, para. 91.

⁶² *Ibid.*, p. 156, para. 55.

⁶³ *Ibid.*, p. 144, para. 2.

⁶⁴ *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 40th meeting, para. 50; and *ibid.*, *Sessional fascicle*, corrigendum.

⁶⁵ *British and Foreign State Papers, 1919*, vol. CXII (London, H.M. Stationery Office, 1922), p. 173.

⁶⁶ *Ibid.*, p. 184.

The Tiza from the mouth of the Szamos;
The Maros from Arad;
Any lateral canals or waterways which may be
constructed...⁶⁷

Similar uses of the term "river system" are to be found in other multilateral treaties dealing with freedom of navigation in European rivers.

56. The principles of law governing the uses of international rivers and lakes adopted by the Inter-American Bar Association at its Tenth Conference, held in November 1957 in Buenos Aires, uses the term "system" in a reformulation of the 1815 Vienna definition. The Conference resolved:

That the following general principles, which form part of existing international law, are applicable to every watercourse or system of rivers or lakes (non-maritime waters) which may traverse or divide the territory of two or more States; such a system will be referred to hereinafter as a "system of international waters."⁶⁸

57. The term "river systems" also appears in basic scholarly texts. H. S. Smith, for example writes: "The study of practice leads irresistibly to the conclusion that it is impossible to lay down any general rule as to the priority of interests upon all river systems".⁶⁹ It is found in State practice, for example in the memorandum issued by the United States Department of State in the course of the negotiations with Canada on the Columbia River.⁷⁰ It is widely employed in scientific and technical writings and is commonly used in hydrographic descriptions and analysis. For example:

All river systems appear to have basically the same type of organization. The river system is dynamic in that it has portions that move and can cause events and create changes. There is not only unity displayed by important similarities between rivers in different settings, but also an amazing organization of river systems. This in part results from a delicate balance between the forces of erosion and the forces of resistance. The manner in which a channel moves across the valley floor, eroding one bank and building a nearly flat flood plane on the other, all the while maintaining a cross section similar in shape and size, is another aspect of the dynamic equilibrium that appears to characterize many channel systems...⁷¹

58. These examples of the use of the word "system" in relation to watercourses or rivers or international waters indicate its usage and utility as a term that will not foreclose ultimate adoption either of the drainage

basin concept or of a more limited definition of the international watercourse. At the same time, it cannot be used to support an argument that a watercourse has to be considered as a water pipe; it is not as limited as that. "International watercourse system" is a formula that provides a neutral working basis for the formulation of the key general principles that should apply to the use of the water of international watercourses. It is admittedly unclear at this stage of the Commission's work on the topic what the scope of the "international watercourse system" is; however, in view of the considerations set out above, that is a virtue of the phrase.

3. DRAFT ARTICLE 2: "SYSTEM STATES"

59. The utility of the term "international watercourse system" can be demonstrated in connection with the objections that have been raised to draft article 2 in the rendering submitted in the Special Rapporteur's first report. Instead of the dual requirement of contribution and use of water which gave rise to critical comment, the following article is now proposed:

Article 2. System States

For the purpose of these articles, a State through whose territory water of an international watercourse system flows is a system State.

60. The requirement laid down in the draft article is a geographic one which is simpler both to state and to apply than one based upon contribution to and use of the water. The test is one that relies upon the determination of physical facts. The key physical fact—whether some water in an international watercourse system flows through the territory of a particular State—is determinable by simple observation in the vast majority of cases.

61. The formulation proposed differs from that in article III of the Helsinki Rules on the Uses of the Waters of International Rivers,⁷² which defines a "basin State" as "a State the territory of which includes a portion of an international drainage basin". The use of the phrase "drainage basin" in conjunction with the precise definition of such a basin in article II of the Helsinki Rules provides a hydrographic background for the definition which is at present lacking for the proposed draft articles. At the same time, the reference to the flow of water through the territory of the system State is intended as a reference to the hydrographic unity of the watercourse.

62. The formulation is not intended to determine the issue whether a State from whose territory ground water moves into an international watercourse system

⁶⁷ League of Nations, *Treaty Series*, vol. XXVI, p. 177.

⁶⁸ *Inter-American Bar Association, Proceedings of the Tenth Conference held at Buenos Aires from 14 to 21 November 1957* (Buenos Aires, 1958), vol. 1, p. 246. See also *Yearbook... 1974*, vol. II (Part Two), p. 208, document A/5409, para. 1092.

⁶⁹ H.S. Smith, *The Economic Uses of International Rivers* (London, King, 1931), p. 143.

⁷⁰ United States of America, "Legal aspects of the use of systems of international waters with reference to the Columbia-Kootenay river system under customary international law and the Treaty of 1909", Memorandum of the State Department, 85th Congress, 2nd Session, document No. 118 (Washington, D.C., U.S. Government Printing Office, 1958), p. 89.

⁷¹ W.C. Walton, *The World of Water* (London, Weidenfeld and Nicolson, 1970), pp. 212–213.

⁷² ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1976), pp. 478–533. See also *Yearbook... 1974*, vol. II (Part Two), pp. 357–359, document A/CN.4/274, para. 405. The rules are hereinafter referred to as "Helsinki Rules".

is or is not a "system State". The word "flow" in its customary usage might seem to exclude groundwater because the movement of groundwater is usually that of seepage through permeable materials. None the less, "flow" is used in a technical sense in discussing groundwater. The movement of water in the saturated interstices of permeable rocks, for example, is known as a "laminar flow", even though under natural conditions a rate of movement of more than a few feet a day is quite unusual and some such movements may come to only a few feet a year.⁷³ The decision whether a State that contributes only groundwater to a watercourse system is or is not a system State should be determined as a corollary to whether (a) the drainage basin concept is to be ultimately agreed upon as the measure of the scope of the draft articles or (b) if not, whether any provisions respecting groundwater should be included in the draft articles and, if so, what provisions.

63. Provisions of this character are consistent with the suggestion made by the representative of India in the Sixth Committee: "Since the main issues concerning the scope of the articles would concern tributaries and groundwater, articles could also be drafted to cover those aspects."⁷⁴ Dealing with problems of scope in this manner would also meet the views of those representatives who said it was essential that the provisions defining the scope of the articles be made as clear as possible.

4. DRAFT ARTICLE 3: "MEANING OF TERMS"

64. Pending such a decision, it would be useful to call to the attention of States that in the draft articles themselves a basic issue remains open, and what its major elements are. For this purpose a third draft article on meaning of terms is proposed that will not contain, at least at this juncture, any substantive provisions, but instead a statement of the unsettled issue:

Article 3. Meaning of terms

[To be supplied subsequently.]

[This article does not attempt to set forth any definitions of terms used in the draft articles because of a decision to leave open, temporarily, the question of the scope of articles. There are differences whether an international watercourse system should be considered as comprising:

- (a) only boundary waters and the main streams of watercourses crossing boundaries; or
- (b) river basins, including tributaries, whether or not solely within a system State; or

⁷³ Walton, *op. cit.*, p. 146.

⁷⁴ *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 51st meeting, para. 65; and *ibid.*, *Sessional fascicle*, corrigendum.

(c) drainage basins, including all water whether surface or underground within the geographic limits of a watershed, moving towards a common terminus; or

(d) some combination of the above.

Pending a decision on the foregoing issue, only terms not affected by the absence of a decision will be defined.]

5. SUPPLEMENTING A FRAMEWORK TREATY BY SYSTEM AGREEMENTS

65. Chapter III of the first report of the Special Rapporteur recognized the diversity of watercourses and the consequent difficulty of drafting general principles that would apply universally to the various watercourses throughout the world. It pointed out that, for optimum development, each international watercourse required a regime tailored to its particular requirements, which should be the subject of an international agreement. It also pointed out that the historical record illustrated the difficulty of reaching satisfactory agreements on the use of the water of individual international watercourses without the benefit of generally accepted legal principles regarding the uses of such water. As a solution, the first report proposed preparation of a framework treaty that would provide the legal context within which interested States would be able to conclude treaties for individual watercourses.⁷⁵

66. This plan was received favourably by the large majority of the States that commented on the proposal in the Sixth Committee. The representatives of 26 States⁷⁶ agreed that a framework or umbrella treaty, coupled with individual watercourse agreements, was a sound method of dealing with the problems arising from the diversity of watercourse systems.

67. The representative of Finland indicated some doubt whether the framework convention necessarily had to be supplemented by user agreements.⁷⁷ The representatives of Brazil⁷⁸ and Turkey⁷⁹ appeared to consider that a decision on adopting this method of work was premature.

68. Some States expressed specific concerns. For example, the representative of Jordan said that, while

⁷⁵ *Yearbook . . . 1979*, vol. II (Part One), pp. 165–166, document A/CN.4/320, paras. 86–91.

⁷⁶ Argentina, Bangladesh, Bolivia, Colombia, Denmark, Ecuador, Egypt, Ethiopia, France, Hungary, India, Iraq, Jordan, Kenya, Morocco, Netherlands, Niger, Pakistan, Peru, Syrian Arab Republic, Tunisia, Venezuela, United Kingdom, United States of America, Uruguay, Zaire.

⁷⁷ *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 41st meeting, para. 16; and *ibid.*, *Sessional fascicle*, corrigendum.

⁷⁸ *Ibid.*, 45th meeting, para. 30; and *ibid.*, *Sessional fascicle*, corrigendum.

⁷⁹ *Ibid.*, 51st meeting, para. 50; and *ibid.*, *Sessional fascicle*, corrigendum.

the approach might ensure flexibility, his delegation thought "that the 'framework convention' envisaged should not be so general as to defeat what surely must be one of the purposes of codification, namely, uniformity of the applicable law".⁸⁰ The representative of Jordan put his finger upon what is one of the most difficult aspects of the codification of water law: how the need for legal conformity can be balanced against physical diversity. The framework or umbrella treaty is one method of approaching this problem, but it will be necessary in developing a series of articles to bear constantly in mind the need for local or regional flexibility in the concrete case.

6. DRAFT ARTICLE 4: "SYSTEM AGREEMENTS"

69. A decision to employ the approach of a framework convention is important to the orderly development of a set of articles. In the light of the widespread support for the proposal, the following article is suggested:

Article 4. System agreements

1. These articles shall be supplemented, as the needs of an international watercourse system may require, by one or more system agreements.

2. A system agreement may be entered into with respect to an entire international watercourse system, or with respect to any part thereof, provided that the interests of all system States are respected therein.

70. Article 4 is a revised and expanded version of draft article 3 proposed in the first report, which was limited to introducing the concept of "user agreements".⁸¹ The proposed article 4 deals with two questions of principle that were left open in the first report. The first is the extent to which there is an obligation upon system States to negotiate and conclude a system agreement. The second is whether a system agreement should apply to the entire watercourse system or whether system agreements may be entered into for subsystems and other parts of the system.

71. Paragraph 1 of article 4 lays down a general principle that the framework treaty is to be supplemented by system agreements. In view of the diversity of watercourses and the need to adapt arrangements for the use of water to the specific conditions of the individual watercourses and to the varying requirements of the system States, the practical need for such agreements has long been recognized and can scarcely be argued. Moreover, in so far as such agreements may be necessary to prevent or resolve disputes between States, at any rate if such disputes are likely to

endanger the maintenance of international peace and security, the States concerned may be under an obligation under Article 33 of the Charter of the United Nations to seek to conclude such agreements. In such cases, they are incontestably under an obligation to seek a solution to such disputes by peaceful means.

72. It may further be maintained that an obligation to seek to conclude system agreements flow from the requirements of customary international law in the light of its current development.

7. THE *North Sea Continental Shelf* CASES

73. There is an analogy between the obligation of States to negotiate in good faith, which the International Court of Justice found to exist in the *North Sea Continental Shelf* cases⁸² in the continental shelf context, and the obligation of States to negotiate in good faith agreements with regard to the use of the water of international watercourse systems.

74. Members of the Commission are familiar with the important judgements of the Court in the *North Sea Continental Shelf* cases. It may accordingly suffice to recall that the cases essentially concerned the claims of two States that the application of the equidistance rule for delimitation of the continental shelf was required *erga omnes*. The two States—the Netherlands and Denmark—maintained that the equidistance rule, contained in a multilateral convention to which they were parties, had passed into customary international law. The third State involved, the Federal Republic of Germany, which was not a party to the convention, maintained that it was not bound by the equidistance rule but was entitled to a just and equitable share of the shelf based upon its geographical situation in the North Sea.

75. The Court held that the use of the equidistance method of delimitation of the shelf in those circumstances was not obligatory, since

[it] would not be consonant with certain basic legal notions which... have from the beginning reflected the *opinio juris* in the matter of delimitation; those principles being that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles. On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the delimitation of adjacent continental shelves—that is to say, rules binding upon States for all delimitations;—in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal regime of the continental shelf in this field, namely:

(a) the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method

⁸⁰ *Ibid.*, para. 57; and *ibid.*, *Sessional fascicle*, corrigendum.

⁸¹ *Yearbook* ... 1979, vol. II (Part One), p. 144, document A/CN.4/320, para. 2.

⁸² *I.C.J. Reports* 1969, p. 3.

of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it;

(b) the parties are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied—for this purpose the equidistance method can be used, but other methods exist and may be employed, alone or in combination, according to the areas involved;

(c) for the reasons given..., the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State.⁸³

76. In discussing the obligation to negotiate set forth in paragraph (a), the Court traced the obligation to the statement in the "Truman Proclamation" of 28 September 1945 that delimitation of lateral boundaries "shall be determined by the United States and the State concerned in accordance with equitable principles".⁸⁴ The Court continued, with respect to the obligation to negotiate:

...the Court would recall... that the obligation to negotiate... merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for peaceful settlement of international disputes. There is no need to insist upon the fundamental character of this method of settlement, except to point out that it is emphasized by the observable fact that judicial or arbitral settlement is not universally accepted.

...Defining the content of the obligation to negotiate, the Permanent Court, in its Advisory Opinion in the case of *Railway Traffic between Lithuania and Poland*, said that the obligation was "not only to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements", even if an obligation to negotiate did not imply an obligation to reach agreement (*P.C.I.J., Series A/B, No. 42, 1931, at p. 116*).⁸⁵

77. The Court thus states an obligation to negotiate with a view to arriving at an agreement on the continental shelf boundary. Does international law impose a similar obligation upon States as regards the apportionment of the use of that most vital of natural resources, water?

78. In discussing the criteria to be applied in determining boundaries on the continental shelf, the Court relied upon a number of circumstances, which point to the similarity of the basic issues involved in delimitation of the continental shelf and in balancing uses in an international watercourse:

The institution of the continental shelf has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal regime. The continental shelf is, by definition, an area physically extending the territory of most coastal states into a species of platform which has attracted the attention first of geographers and hydrographers and then of jurists. The importance of the

geological aspect is emphasized by the care which, at the beginning of its investigation, the International Law Commission took to acquire exact information as to its characteristics, as can be seen in particular from the definitions to be found on page 131 of volume I of the *Yearbook of the International Law Commission* for 1956. The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point-up the whole notion of the appurtenance of the continental shelf to the State whose territory it does in fact prolong.

Another factor to be taken into consideration in the delimitation of areas of continental shelf as between adjacent States is the unity of any deposits. The natural resources of the subsoil of the sea in those parts which consist of continental shelf are the very object of the legal regime established subsequent to the Truman Proclamation. Yet it frequently occurs that the same deposit lies on both sides of the line dividing a continental shelf between two States, and since it is possible to exploit such a deposit from either side, a problem immediately arises on account of the risk of prejudicial or wasteful exploitation by one or other of the States concerned. To look no farther than the North Sea, the practice of States shows how this problem has been dealt with, and all that is needed is to refer to the undertakings entered into by the coastal States of that sea with a view to ensuring the most efficient exploitation or the apportionment of the products extracted—(see in particular the agreement of 10 March 1965 between the United Kingdom and Norway, article 4; the agreement of 6 October 1965 between the Netherlands and the United Kingdom relating to "the exploitation of single geological structures extending across the dividing line on the continental shelf under the North Sea"; and the agreement of 14 May 1962 between the Federal Republic and the Netherlands concerning a joint plan for exploiting the natural resources underlying the area of the Ems Estuary where the frontier between the two States has not been finally delimited). The Court does not consider that unity of deposit constitutes anything more than a factual element which it is reasonable to take into consideration in the course of the negotiations for a delimitation.⁸⁶

79. The unity of deposits of natural resources of the continental shelf, while a substantial factor, is dwarfed by the unity of water in a watercourse. The need for agreements between the States concerned to ensure "the most efficient exploitation or the apportionment" of water can hardly be less than is the need to take into account the unity of any deposits in reaching agreement upon a continental shelf boundary.

80. The nature of the two situations is sufficiently analogous so that, if there is an obligation of international law to negotiate continental shelf boundaries taking the unity of resource deposits into account, there is equally an obligation under international law to negotiate with respect to the apportionment of the use of water. In each case, the legal regime responds to unique physical conditions. The continental shelf is a geological fact, being the natural prolongation of the land mass beneath the sea. In the case of fresh water, it is the hydrologic cycle of the water which is nature's governing fact, which provides

⁸³ *Ibid.*, pp. 46–47.

⁸⁴ *Ibid.*, p. 33.

⁸⁵ *Ibid.*, pp. 47–48.

⁸⁶ *Ibid.*, pp. 51–52.

a volume of water moving continuously through the States in a watercourse system to the sea. While the physical conditions differ, the need to take account of these physical characteristics, and to seek agreement on resource disposition, is plainly analogous.

8. THE *Fisheries Jurisdiction* CASES

81. This conclusion is reinforced by the judgements of the International Court of Justice in the *Fisheries Jurisdiction* cases.⁸⁷ What were the respective rights in the exploitation of a natural resource—the stock of fish off the Icelandic coast—as between a claim by Iceland based upon jurisdiction over fisheries and claims by the United Kingdom and the Federal Republic of Germany based, *inter alia*, upon historic fishing rights off the Icelandic coast?

82. For present purposes, it is not necessary to examine the parallel *Fisheries Jurisdiction* cases beyond their impact on the duty to negotiate. With respect to that issue, the Court recognized the exceptional dependence of Iceland on its fisheries. It then stated:

The preferential rights of the coastal State come into play only at the moment when an intensification in the exploitation of fishery resources makes it imperative to introduce some system of catch limitation and sharing of those resources, to preserve the fish stocks in the interests of their rational and economic exploitation. This situation appears to have been reached in the present case. In regard to the two main demersal species concerned—cod and haddock—the Applicant has shown itself aware of the need for a catch limitation which has become indispensable in view of the establishment of catch limitations in other regions of the North Atlantic. If a system of catch limitation were not established in the Icelandic area, the fishing effort displaced from those other regions might well be directed towards the unprotected grounds in that area.⁸⁸

It also found that the Federal Republic of Germany and the United Kingdom had special and historic fishing rights off the Icelandic coast and that these had been recognized by Iceland. Assertion of a right to exclude all fishing activities of foreign vessels in the 50-mile zone was not in accord with the concept of preferential rights, which “implies a certain priority, but cannot imply the extinction of the concurrent rights of other States”.⁸⁹ The Court then said “that in order to reach an equitable solution of the present dispute it is necessary that the preferential fishing rights of Iceland... be reconciled with the traditional fishing rights of the Applicant”.⁹⁰ The Court stated further:

Neither right is an absolute one: the preferential rights of a coastal State are limited according to the extent of its special dependence on the fisheries and by its obligation to take account of the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by reason of the coastal State’s special dependence on the fisheries

and its own obligation to take account of the rights of other States, including the coastal State, and of the needs of conservation.⁹¹

83. The manner in which the coastal State’s right and the other fishing States’ rights are to be reconciled is described as follows:

It is implicit in the concept of preferential rights that negotiations are required in order to define or delimit the extent of those rights, as was already recognized in the 1958 Geneva Resolution on Special Situations relating to Coastal Fisheries, which constituted the starting point of the law on the subject. This resolution provides for the establishment, through collaboration between the coastal State and any other State fishing in the area, of agreed measures to secure just treatment of the special situation.

The obligation to negotiate thus flows from the very nature of the respective rights of the Parties; to direct them to negotiate is therefore a proper exercise of the judicial function in this case. This also corresponds to the Principles and provisions of the Charter of the United Nations concerning peaceful settlement of disputes. As the Court stated in the *North Sea Continental Shelf* cases:

“... this obligation merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods of the peaceful settlement of international disputes” (*I.C.J. Reports 1969*, p. 47, para. 86).⁹²

84. It is no less clear that an obligation to negotiate flows from the respective rights of States in the water of an international watercourse system. The movement of the water through the territory of one State into the territory of another, when considered in the light of the never ceasing changes in the amount of water available as a result of variations in the hydrologic cycle and the need for full and friendly co-operation among States to ensure the best use of this critical natural resource, is a special situation—indeed a unique natural condition—that can be dealt with only by agreements among the system States arrived at through negotiations carried on in good faith.

85. The judgements of the International Court of Justice in the *North Sea Continental Shelf* and the *Fisheries Jurisdiction* cases consequently indicate that there is a general principle of international law that requires negotiations among States in dealing with international fresh water resources. Draft Article 4 codifies this obligation in the context of the framework treaty.

9. THE *Lac Lanoux* CASES

86. Moreover, the existence of a general principle of law requiring negotiations among States in dealing with fresh water resources is explicitly supported in the fresh

⁸⁷ *I.C.J. Reports 1974*, p. 3 and p. 175.

⁸⁸ *Ibid.*, p. 27.

⁸⁹ *Ibid.*, pp. 27–28.

⁹⁰ *Ibid.*, p. 30.

⁹¹ *Ibid.*, p. 31.

⁹² *Ibid.*, p. 32.

water context by the arbitral award in the *Lac Lanoux* case.⁹³

87. The French Government proposed to carry out certain works for utilization of the waters of the lake, waters which flowed into the Carol river and into the territory of Spain. Consultations and negotiations on the proposed diversion of waters from the lake took place between the Governments of France and Spain intermittently from 1917 to 1956. Finally France decided upon a plan of diversion which entailed the full restoration of the diverted waters before the Spanish frontier. Spain nevertheless feared that the proposed works would adversely affect Spanish rights and interests, contrary to the Treaty of Bayonne of 26 May 1866 between France and Spain and an Additional Act of the same date. Spain claimed that, in any event, under the Arbitration Treaty concluded with France on 10 July 1929, such works could not be undertaken without the previous agreement of both countries. The French and Spanish Governments, having decided by an agreement signed at Madrid on 19 November 1956 to submit the case for arbitration, Spain asked the arbitral tribunal to declare that France would be in breach of the Treaty of Bayonne of 26 May 1866 and of the Additional Act of the same date if it implemented the diversion scheme without Spain's agreement, while France maintained that it could legally proceed without such agreement.

88. The *Lac Lanoux* case contains a great deal of high interest to the law of the non-navigational uses of international watercourses. For present purposes, however, only elements of it bearing on the obligation of States to negotiate the apportionment of the waters of an international watercourse will be addressed.

89. It is first of all important to note that that obligation was uncontested, and was acknowledged by France not merely by reason of the terms of the Treaty of Bayonne and its Additional Act but as a principle to be derived from the authorities.⁹⁴ Moreover, while the arbitral tribunal based certain of its holdings relating to the obligation to negotiate on the terms of the Treaty of Bayonne and the Additional Act,⁹⁵ it by no means confined itself to the interpretation of their terms. In holding against the Spanish contention that Spain's agreement was a precondition of France's proceeding, the tribunal addressed the question of the obligation to negotiate as follows:

In fact, to evaluate in its essence the need for a preliminary agreement, it is necessary to adopt the hypothesis that the States concerned cannot arrive at an agreement. In that case, it would have to be admitted that a State which ordinarily is competent has lost the right to act alone as a consequence of the unconditional

and discretionary opposition of another State. This is to admit a "right of consent", a "right of veto", which at the discretion of one State paralyses another State's exercise of its territorial competence.

For this reason, international practice prefers to resort to less extreme solutions, limiting itself to requiring States to seek the terms of an agreement by preliminary negotiations without making the exercise of their competence conditional on the conclusion of this agreement. Thus reference is made, although often incorrectly, to "an obligation to negotiate an agreement". In reality, the commitments thus assumed by States take very diverse forms, and their scope varies according to the way in which they are defined and according to the procedures for their execution: but the reality of the obligations thus assumed cannot be questioned, and they may be enforced, for example, in the case of an unjustified breaking off of conversations, unusual delays, disregard of established procedures, systematic refusal to give consideration to proposals or adverse interests, and more generally in the case of infringement of the rules of good faith.

...

... In fact, States today are well aware of the importance of the conflicting interests involved in the industrial use of international rivers and of the necessity of reconciling some of these interests with others through mutual concessions. The only way to achieve these adjustments of interest is the conclusion of agreements on a more and more comprehensive basis. International practice reflects the conviction that States should seek to conclude such agreements; there would thus be an obligation for States to agree in good faith to all negotiations and contacts which should, through a wide confrontation of interests and reciprocal goodwill, place them in the best circumstances to conclude agreements...⁹⁶

As stated above, draft article 4 codifies the obligation to negotiate in the context of the framework treaty.

10. DRAFT PRINCIPLES OF CONDUCT IN RESPECT OF SHARED NATURAL RESOURCES

90. It should finally be noted that the "Draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States", prepared by an Intergovernmental Working Group of Experts under the auspices of UNEP,⁹⁷ support a requirement for negotiations among States in dealing with fresh water resources. The relevance to that proposition of the following draft principles is obvious:

Principle 2

In order to ensure effective international co-operation in the field of the environment concerning the conservation and harmonious utilization of natural resources shared by two or more States, States sharing such natural resources should endeavour to conclude bilateral or multilateral agreements between or among themselves in order to secure specific regulation of their conduct in this respect, applying as necessary the present principles in a legally binding manner, or should

⁹³ United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), p. 281. See also *Yearbook ... 1974*, vol. II (Part Two), pp. 194-199, document A/5409, paras. 1055-1068.

⁹⁴ *International Law Reports 1957* (London, Butterworth, 1957), pp. 111-112.

⁹⁵ *Ibid.*, pp. 139 and 141.

⁹⁶ See *Yearbook ... 1974*, vol. II (Part Two), p. 197, document A/5409, paras. 1065-1066.

⁹⁷ See the report of the Working Group on the work of its fifth session (Nairobi, 23 January-7 February 1978) (UNEP/IG.12/2), transmitted to the Governing Council at its sixth session (Nairobi, 9-25 May 1978) in a note by the Executive Director (UNEP/GC.6/17).

endeavour to enter into other arrangements, as appropriate, for this purpose. In entering into such agreements or arrangements, States should consider the establishment of institutional structures, such as joint international commissions, for consultations on environmental problems relating to the protection and use of shared natural resources.

...
...

Principle 5

States sharing a natural resource should, to the extent practicable, exchange information and engage in consultations on a regular basis on its environmental aspects.

Principle 6

1. It is necessary for every State sharing a natural resource with one or more other States:

(a) to notify in advance the other State or States of the pertinent details of plans to initiate, or make a change in, the conservation or utilization of the resource which can reasonably be expected to affect significantly the environment in the territory of the other State or States; and

(b) upon request of the other State or States, to enter into consultations concerning the above-mentioned plans; and

(c) to provide, upon request to that effect by the other State or States, specific additional pertinent information concerning such plans; and

(d) if there has been no advance notification as envisaged in subparagraph (a) above, to enter into consultations about such plans upon request of the other State or States.

2. In cases where the transmission of certain information is prevented by national legislation or international conventions, the State or States withholding such information shall nevertheless, on the basis, in particular, of the principle of good faith and in the spirit of good neighbourliness, co-operate with the other interested State or States with the aim of finding a satisfactory solution.

Principle 7

Exchange of information, notification, consultations and other forms of co-operation regarding shared natural resources are carried out on the basis of the principle of good faith and in the spirit of good neighbourliness and in such a way as to avoid any unreasonable delays either in the forms of co-operation or in carrying out development or conservation projects.

Principle 8

When it would be useful to clarify environmental problems relating to a shared natural resource, States should engage in joint scientific studies and assessments, with a view to facilitating the finding of appropriate and satisfactory solutions to such problems on the basis of agreed data.

Principle 9

1. States have a duty urgently to inform other States which may be affected:

(a) of any emergency situation arising from the utilization of a shared natural resource which might cause sudden harmful effects on their environment;

(b) of any sudden grave natural events related to a shared natural resource which may affect the environment of such States.

2. States should also, when appropriate, inform the competent international organizations of any such situation or event.

3. States concerned should co-operate, in particular by means of agreed contingency plans, when appropriate, and mutual assistance, in order to avert grave situations, and to eliminate, reduce or correct, as far as possible, the effects of such situations or events.

...

Principle 11

1. The relevant provisions of the Charter of the United Nations and of the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations apply to the settlement of environmental disputes arising out of the conservation or utilization of shared resources.

2. In case negotiations or other non-binding means have failed to settle a dispute within a reasonable time, it is necessary for States to submit the dispute to an appropriate settlement procedure which is mutually agreed by them, preferably in advance. The procedure should be speedy, effective and binding.

3. It is necessary for the States parties to such a dispute to refrain from any action which may aggravate the situation with respect to the environment to the extent of creating an obstacle to the amicable settlement of the dispute.

11. CONDITIONAL CHARACTER OF THE OBLIGATION TO NEGOTIATE

91. Two additional points on draft article 4 require brief comment. The obligation to negotiate system agreements is not an absolute requirement. There are numerous streams that flow through the territory of more than one State that do not currently give rise to any inter-State problems regarding the use of water. There are other international streams where problems arise that are settled locally or through informal agreements. Even on a major watercourse system there may be cases in which physical conditions and the nature and extent of the use of the water are such as to accommodate existing needs of the system States.

92. These situations—and related human needs—are in a continuous state of change, however, with a consequent effect upon the obligation to seek agreement. Discussion by the International Court of Justice of the preferential rights of a coastal State by the *Fisheries Jurisdiction* case (United Kingdom v. Iceland) is relevant:

This is not to say that the preferential rights of a coastal State in a special situation are a static concept, in the sense that the degree of the coastal State's preference is to be considered as fixed for ever at some given moment. On the contrary, the preferential rights are a function of the exceptional dependence of such a coastal State on the fisheries in adjacent waters and may, therefore, vary as the extent of that dependence changes. Furthermore, as was expressly recognized in the 1961 Exchange of Notes, a coastal State's exceptional dependence on fisheries may relate not only to the livelihood of its people but to its economic development. In each case, it is essentially a matter of appraising the dependence of the coastal State on the fisheries in question in relation to that of the other State concerned and of reconciling them in as equitable a manner as is possible.⁹⁸

93. In order to take into account the problem of changing conditions, as well as situations in which agreements are not required, paragraph 1 of article 4 provides for supplementing the draft articles "as the needs of an international watercourse system may require".

⁹⁸ *I.C.J. Reports 1974*, p. 30.

12. SUBSYSTEM AGREEMENTS

94. The final point arising out of paragraph 1 which requires discussion is the reference to "one or more system agreements". It may well be an excess of caution to specify that the system States are free to deal with the problems of a system in one agreement or in a number of agreements. The thought is clearly implicit in the prior reference to the needs of the international watercourse system.

95. The issue of multiple systems agreements for an individual watercourse is also the subject of paragraph 2 of article 4. Whether a system agreement should apply to the entire watercourse or whether there may be systems agreements applying to subsystems and to individual parts of the system is of consequence when there are three or more system States, because in such cases dealing with only a part of the watercourse may have advantages of simplicity and utility. In addition, while the interests of all the System States presumably will be taken into account when only part of a two-State watercourse is the subject of a treaty, this is not necessarily the case when two States enter into an agreement which relates to a system embracing more than two States.

96. It was noted in the Special Rapporteur's first report that the Convention relating to the development of hydraulic power affecting more than one State (Geneva, 1923),⁹⁹ which was offered as a prototype of the framework treaty, contemplated the negotiation of bilateral agreements that would deal with particular parts of international watercourses rather than the whole.¹⁰⁰ The Treaty on the River Plate Basin (Brasilia, 23 April 1969) was also discussed and its article VI was quoted:

The stipulations of the present Treaty shall not inhibit the Contracting Parties from entering into specific or partial agreements, bilateral or multilateral, tending towards the attainment of the general objectives of the Basin development.¹⁰¹

97. The Special Rapporteur's first report pointed out that technical experts on the subject considered that the most efficient and beneficial way of dealing with a watercourse was to deal with it as a whole and that this approach of including all the riparian States had been followed, *inter alia*, in the treaties relating to the Amazon, the Plate, the Niger and the Chad basins. The report also pointed out that some issues arising out of watercourse pollution necessitated co-operative action throughout the entire watercourse and cited the Convention on the protection of the Rhine against chemical pollution (Bonn, 1976) as an example of a response to the need for unified treatment.¹⁰²

98. The general tenor of comments in the Sixth Committee favoured considerable latitude for States in working out agreements for individual watercourses. The representative of India remarked that "the Commission should not devote excessive attention to the question of the contents of user agreements between riparian States, which should be left to the States concerned".¹⁰³ The representative of Venezuela drew special attention to article VI of the River Plate Basin Treaty.¹⁰⁴

99. Of the 200 largest international river basins, 52 are multi-State basins, among which are many of the world's most important river basins—the Amazon, the Chad, the Congo, the Danube, the Elbe, the Ganges, the Mekong, the Niger, the Nile, the Rhine, the Volta and the Zambezi.¹⁰⁵ In dealing with multi-State systems, States have often resorted to agreements regulating only a portion of the watercourse which are effective between only some of the States situated on it.

100. The *Systematic Index of International Water Resources Treaties, Declarations, Acts and Cases by Basin* published by FAO¹⁰⁶ indicates that a very large number of watercourse treaties in force are limited to a part of the watercourse system. For example, for the period 1960–1969, the *Index* lists 12 agreements that came into force for the Rhine system. Of these 12 agreements, only one includes all the Rhine States as parties; several others, while not localized, are effective only within a defined area; the remainder deal with subsystems of the Rhine and with limited areas of the Rhine system.

101. There will be a need for subsystem agreements and for the agreements covering limited areas. In some watercourse systems, such as the Indus, the Plate and the Niger, the differences between subsystems are as marked as those between separate watercourse systems. Agreements on subsystems are likely to be more readily attainable than agreements on the watercourse system as a whole, particularly if a considerable number of States are involved. Moreover, there will always be problems whose solution is of interest to only a limited number of States of the system.

102. There does not appear to be any sound reason for excluding either subsystem or localized agreements from the application of the framework treaty. A major purpose of the framework treaty is to facilitate the negotiation of agreements on the use of water, and this purpose encompasses all agreements, whether covering an entire system or localized, whether general in nature or dealing with a specific problem. The

⁹⁹ League of Nations, *Treaty Series*, vol. XXXVI, p. 75.

¹⁰⁰ *Yearbook ... 1979*, vol. II (Part One), p. 165, document A/CN.4/320, paras. 86–87.

¹⁰¹ *Ibid.*, p. 167, para. 95 (see also footnote 11 above).

¹⁰² *Ibid.*, pp. 168–169, paras. 98–100.

¹⁰³ *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 51st meeting, para. 65; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁰⁴ *Ibid.*, 44th meeting, para. 18; and *ibid.*, *Sessional fascicle*, corrigendum. See also para. 96 above.

¹⁰⁵ See *Yearbook ... 1979*, vol. II (Part One), p. 170, document A/CN.4/320, para. 108.

¹⁰⁶ FAO, Legislative study No. 15 (Rome), 1978.

framework treaty, it is to be hoped, will provide system States with a firm common ground as a basis for negotiation—which is the great lack in watercourse negotiations at the present time. No advantage is seen in confirming the application of the framework treaty to a single system agreement embracing the entire watercourse system.

13. PARTIES TO SYSTEM AGREEMENTS

103. The Special Rapporteur's first report included an article 5 on "Parties to user agreements",¹⁰⁷ which would have allowed States not parties to the framework treaty to be parties to a user agreement, and an article 6 on "Relation of these articles to user agreements".¹⁰⁸ Both were the subject of criticism. Neither article is essential to the development of the first part of the draft articles. A decision whether provisions dealing with these matters are required can be better made when the broad structure of the draft articles has been further developed.

104. There are, however, certain aspects of the relationship of States to system agreements that should be dealt with. For this purpose it is suggested that an article be adopted which is closely connected with the problems dealt with in article 4.

14. DRAFT ARTICLE 5: "PARTIES TO THE NEGOTIATION AND CONCLUSION OF SYSTEM AGREEMENTS"

105. The following draft article is proposed:

Article 5. Parties to the negotiation and conclusion of system agreements

1. All system States are entitled to participate in the negotiation and conclusion of any system agreement that applies to the international watercourse system as a whole.

2. Each system State whose use or enjoyment of the water of an international watercourse system may be affected to an appreciable extent by the provisions of a system agreement that applies only to a part of the system is entitled to participate in the negotiation and conclusion of that agreement.

106. Paragraph 1 of the article is self-explanatory. Inasmuch as the system agreement deals with the entirety of the international watercourse system, there is no reasonable basis for excluding a system State from participating in its negotiation or from becoming a party thereto. It is true that there are likely to be system agreements that are of little interest to one or more of the system States. But since the provisions of such an agreement are intended to be applicable

throughout the system, the purpose of the agreement would be stultified if every system State were not given the opportunity to participate.

107. Article 5 deals with the right to participate in the negotiation of an agreement rather than with the duty to negotiate, which is addressed in article 4. If there is a duty to negotiate, there is a complementary right to participate in negotiations. Article 5 is limited to identification of the States which are entitled to exercise this right under the varying conditions referred to in article 4.¹⁰⁹

108. Paragraph 2 of article 5 is concerned with agreements that deal with only part of the system. It provides that all system States whose use or enjoyment of the system water may be appreciably affected by an agreement applying to only a part of the system are entitled to participate in the negotiation and to become parties to that subsystem agreement. The rationale is that, if the use or enjoyment of water by a State can be affected appreciably by the implementation of treaty provisions dealing with part of a watercourse, the scope of the agreement necessarily extends to the territory of the State whose use or enjoyment is affected.

109. Because water in a watercourse is in continuous movement, the consequences of action taken under an agreement with respect to water in a particular territory may produce effects beyond that territory. For example, States A and B, whose common border is the river Styx, agree that each may divert 40 per cent of the river flow for domestic consumption, manufacturing and irrigation purposes at a point 25 miles upstream from State C, through which the Styx flows upon leaving States A and B. The total amount of water available to State C from the river, including return flow in States A and B, will be reduced as a result of the diversion by 25 per cent from what would have been available without diversion.

110. The question is not whether States A and B are legally entitled to enter into such an agreement. It is whether a treaty that is to provide general principles for the guidance of States in concluding agreements on the use of fresh water should contain a principle that will ensure that State C has the opportunity to join in negotiations, as a prospective party, with regard to proposed action by States A and B that will substantially reduce the amount of water that flows through State C's territory.

111. There is similarity between the considerations involved in the hypothetical river Styx case and certain of the considerations involved in the *North Sea Continental Shelf* judgements.¹¹⁰ In both cases there is a unity of natural resources, which requires the negotiation of agreements to resolve the problems of exploitation. A system State must have the right to

¹⁰⁷ *Yearbook ... 1979*, vol. II (Part One), p. 144, document A/CN.4/320, para. 2.

¹⁰⁸ *Ibid.*

¹⁰⁹ See para. 69 above.

¹¹⁰ For reference, see footnote 82 above.

participate in negotiating and concluding an international agreement that may directly, and to an appreciable degree, affect the quantity or quality of water available to it.

112. The right is put forward as a qualified one. There must be an appreciable effect upon the use or enjoyment of water by a State to support participation of that State in the negotiation and conclusion of a limited system agreement.

113. Whether such a qualification is necessary and desirable should be decided principally on pragmatic grounds. If a system State is not affected by an agreement regarding a part of the system, the physical unity of the system does not of itself require that a system State should have the right to participate in the negotiation and conclusion of a limited agreement. The introduction of one or more system States whose interests are not directly concerned in the matters under negotiation would mean the introduction of unrelated interests in the negotiating process.

114. This is not to say that a system agreement dealing with the entire system or with a subsystem should exclude decision-making with regard to some or all aspects of the use of system water through procedures in which all the system States participate. For most, if not all, watercourses, the establishment of procedures for co-ordinating activities throughout the system is highly desirable and perhaps necessary, and those procedures may well include requirements for full participation by all system States in decisions that deal with only a part of the system. However, such procedures must be adopted for each watercourse system by the system States on the basis of the special needs and circumstances of the system. Here it is suggested that, as a matter of general principle, a system State does have the right to participate in the negotiation and conclusion of a limited agreement that may affect that State's interests in system water.

15. THE "TO AN APPRECIABLE EXTENT" CRITERION

115. The remaining issue is whether the rule should include qualification of the degree to which the interests of a State must be affected in order to give that State a right to negotiate and become a party to a system agreement. It is necessary to decide whether such a qualification—"to an appreciable extent"—gives rise to more problems than it resolves. If an "effect" could be quantified, it would be far more useful. In so far as the Special Rapporteur has been able to determine, however, at any rate in the absence of technical advice, such quantification is not practicable.

116. While a decision on this issue has legal consequences, the decision itself should be made in the light of scientific, technical and mathematical considerations. The Commission will require assistance

from experts to reach a reasoned judgement on such a matter as this. For this and other reasons, a body of experts should be established to supply specialized knowledge on problems of this character—a question to which the Special Rapporteur will return.

117. In the absence of any mathematical formula for fixing the extent to which use or enjoyment of system water should be affected in order to support participation in a negotiation, effect on a system State to an "appreciable extent" is suggested as the criterion. This extent is one that can be established by objective evidence (provided that the evidence can be secured). There must be a real impairment of use or enjoyment.

118. What is intended to be excluded are situations of the kind involved in the *Lac Lanoux* case, in which Spain insisted upon delivery of water from the lake through the original system. The arbitral tribunal found that, "thanks to the restitution effected by the devices described above, none of the guaranteed users will suffer in his enjoyment of the waters . . . ; at the lowest water level, the volume of the surplus water of the Carol, at the boundary, will at no time suffer a diminution . . .".¹¹¹ The tribunal continued by pointing out that Spain might have claimed that the proposed diversionary works

. . . would bring about an ultimate pollution of the waters of the Carol or that the returned waters would have a chemical composition or a temperature or some other characteristic which could injure Spanish interests . . . Neither in the *dossier* nor in the pleadings in this case is there any trace of such an allegation.¹¹²

In the absence of any assertion that Spanish interests were affected in a tangible way, the tribunal held that Spain could not require maintenance of the original unreturned flowage. It should be noted that the French plan on which the Court relied had been adopted only after a long-drawn-out series of negotiations, beginning in 1917, in the course of which, *inter alia*, a mixed commission of engineers had been established in 1949 and a French proposal made in 1950 that would have appreciably affected the use and enjoyment of the waters by Spain; that proposal had later been superseded by the plan on which the Tribunal ruled.¹¹³

119. At the same time, "appreciable" is not used in the sense of "substantial". A requirement that use or enjoyment must be substantially affected before there can be a right to participate in negotiations would impose too heavy a burden upon the third State. The exact extent to which the use of water may be affected by proposed actions is likely to be far from clear at the outset of negotiations. The *Lake Lanoux* decision illustrates the extent to which plans may be varied as a result of negotiations, and such variance may favour or harm a third State. That State should only be required

¹¹¹ United Nations, *Reports of International Arbitral Awards* vol. XII (*op. cit.*), p. 303.

¹¹² *Ibid.*

¹¹³ *Ibid.*, pp. 292.

to establish that its use or enjoyment of the water may be affected to some appreciable extent.

120. This appears to be the sense in which that qualification is used in article 5 of the Statute annexed to the Convention relating to the development of the Chad Basin (Fort Lamy, 22 May 1964), which reads:

The Member States undertake to abstain from taking, without prior consultation with the Commission, any measure likely to have an appreciable effect either on the extent of the loss of water or on the nature of the yearly hydrogramme and limnigramme and certain other features of the Basin . . . the conditions subject to which other riparian States may utilize the waters in the Basin, the sanitary conditions of the waters or the biological characteristics of its flora and fauna.¹¹⁴

121. Other examples of a use with this meaning are to be found in article 1 of the Convention between Norway and Sweden on certain questions relating to the law on watercourses (Stockholm, 11 May 1929):

1. The present Convention relates to installations or works or other operations on watercourses in one country which are of such a nature as to cause an appreciable change in watercourses in the other country in respect of their depth, position, direction, level or volume of water, or to hinder the movement of fish to the detriment of fishing in the latter country.¹¹⁵

and in article XX of the Convention regarding the determination of the legal status of the frontier between Brazil and Uruguay (Montevideo, 20 December 1933):

When there is a possibility that the installation of plant for the utilization of the water may cause an appreciable and permanent alteration in the rate of flow of a watercourse running along or intersecting the frontier, the contracting State desirous of such utilization shall not carry out the work necessary therefor until it has come to an agreement with the other State.¹¹⁶

122. It should also be noted that, in an article requiring notice and provision of information on proposed construction or installations that would alter the regime of a basin, the Helsinki Rules provide for furnishing such notice to the basin State "the interests of which may be substantially affected".¹¹⁷

123. For the reasons stated above, the Special Rapporteur prefers the criterion of "appreciable". In that regard, the "Draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States"¹¹⁸ are instructive. In these principles it is provided that States should make environmental assessments before engaging in any activity with respect to a shared natural

resource "which may create a risk of significantly affecting the environment of another State or [other] States sharing that resource" (principle 4). Similarly, it is provided that advance notification shall be made of plans to make a change in the utilization of a shared natural resource "which can reasonably be expected to affect significantly the environment in the territory of the other State or States" (principle 6, para. 1(a)). A single definition follows the draft principles: ". . . the expression 'significantly affect' refers to any appreciable effects on a shared natural resource and excludes *de minimis* effects".

16. COLLECTION AND EXCHANGE OF INFORMATION

124. Chapter IV of the Special Rapporteur's first report¹¹⁹ deals with the collection and exchange of data. Draft article 8¹²⁰ provides that each contracting State "shall collect and record data with respect to precipitation and evaporation of water and with respect to the stage of flow, mean velocity and abstraction of the water of an international watercourse in its territory". The modalities of collection and recording were left open for future exploration with the aid of expert advice. Article 9¹²¹ provides for exchange of the data with other watercourse States on a regular basis and for the collection and exchange, on a "best efforts" basis, of additional data. Article 10¹²² lays down rules regarding cost sharing.

125. The commentary in the report emphasizes that there can be no effective application of legal principles to the uses of the water of an international watercourse unless there is accurate and detailed knowledge regarding that water. Chapter I, section A, of the report, in its examination of the hydrologic cycle, refers to the broad variations occurring on a seasonal and annual basis, as well as in longer cycles, in the volume of available water for use in a basin. While the total amount of water in the total hydrologic cycle remains constant, the amount available within a basin or a river or a stream can and does vary within broad limits as the result of climatic and man-made changes.

126. The kind of information called for under draft article 8 would be required for the success of any attempt to deal with use of international fresh water on a co-operative rather than on an adversary basis. As the report of the Commission on its thirty-first session reveals, however, these proposals on data were greeted with a degree of criticism. Concern was expressed by some members that the requirements would be burdensome; it was suggested that the requirements should be cut back to a provision for co-operation of States in studying the problem of data collection and

¹¹⁴ *Nigeria's Treaties in Force for the Period 1st October 1960 to 30th June 1968* (Lagos, Federal Ministry of Information, 1969), p. 220. See also *Yearbook . . . 1974*, vol. II (Part Two), p. 291, document A/CN.4/274, para. 55.

¹¹⁵ League of Nations, *Treaty Series*, vol. CXX, pp. 277-278.

¹¹⁶ *Ibid.*, vol. CLXXXI, p. 87.

¹¹⁷ Article XXIX, para. 2. See *Yearbook . . . 1974*, vol. II (Part Two), p. 359, document A/CN.4/274, para. 405. See also article X, on pollution, where the standard of "substantial injury" and "substantial damage" is advanced (*ibid.*, p. 358).

¹¹⁸ For reference, see para. 90 and footnote 97 above.

¹¹⁹ *Yearbook . . . 1979*, vol. II (Part One), p. 143, document A/CN.4/320.

¹²⁰ *Ibid.*, pp. 144-145, para. 2.

¹²¹ *Ibid.*

¹²² *Ibid.*

exchange and that the formulation of obligations could be left to user agreements.¹²³

127. Articles 8, 9 and 10 were intended to be illustrative of some of the technical difficulties that would have to be dealt with if workable rules in this field were to be developed. In that connection, the need to establish a body of experts to assist the Commission in dealing with issues such as information collection and exchange were emphasized.

128. In the Sixth Committee of the General Assembly, the question of collection and transmission of information was not the subject of much discussion. The representative of Egypt strongly supported recognition of the need for co-operation among States in this respect.¹²⁴ The representative of Thailand stressed that, "without data collection and exchange, little or no progress could be made in the law-making process".¹²⁵ A number of other States supported the need for provisions on data collection and exchange and had specific proposals regarding content. The representative of Niger was concerned that developing States might not have the technical resources to meet the requirements of the articles and proposed changes to make the article more flexible.¹²⁶ The representative of the German Democratic Republic considered that the obligation to collect and exchange data should be incumbent only upon States parties to a treaty, and that any such obligation should be governed by that treaty.¹²⁷ The representative of India proposed that the obligations covering exchange of data provided for in article 9, paragraph 1, "should be regulated by user agreements and not under the fundamental rules".¹²⁸

129. The relative scarcity of comment may possibly reflect a general acceptance of the position that the collection and exchange of necessary information is an essential element of rules on the use of system water. The material collected in chapter IV of the Special Rapporteur's first report strongly confirms the general acceptance by States of the need for information, a need reflected in many treaty provisions.

17. DRAFT ARTICLE 6: "COLLECTION AND EXCHANGE OF INFORMATION"

130. The draft articles proposed in the first report may be unduly specific for use in a framework

¹²³ *Ibid.*, vol. II (Part Two), p. 168, document A/34/10, paras. 142-143.

¹²⁴ *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 51st meeting, para. 27; and *ibid.*, *Sessional fascicle*, corrigendum.

¹²⁵ *Ibid.*, 40th meeting, para. 50; and *ibid.*, *Sessional fascicle*, corrigendum.

¹²⁶ *Ibid.*, 46th meeting, para. 36; and *ibid.*, *Sessional fascicle*, corrigendum.

¹²⁷ *Ibid.*, 43rd meeting, para. 32; and *ibid.*, *Sessional fascicle*, corrigendum.

¹²⁸ *Ibid.*, 51st meeting, para. 65; and *ibid.*, *Sessional fascicle*, corrigendum.

agreement at a stage devoted to the presentation of general principles. However, the need for the collection and exchange of information is so essential that its expression can and should be cast in the form of a basic obligation. The following article is accordingly proposed:

Article 6. Collection and exchange of information

System States shall undertake or make arrangements to accomplish, in the light of the economic development of and the resources available to the individual system States, the systematic collection and exchange, on a regular basis, of hydrographic and other information and data pertinent to existing and planned uses of the system water.

131. Article 6 summarizes a number of the salient requirements regarding the collection and exchange of information regarding fresh water. It leaves to the States of the individual systems the task of working out the procedures for collection and exchange of information that are best suited to the needs of that system. This approach follows the tenor of comment in the Commission and in the Sixth Committee.

132. The article also leaves it to the system States to determine the manner in which provision is to be made regarding data collection and exchange. This would normally be done through a system agreement. However, in those systems where machinery already exists, such as river commissions, there may be administrative procedures in effect that will serve to achieve the necessary results.

133. The collection and exchange of information is to be carried out on a continuing basis. The reference to "systematic" collection and exchange and to existing and planned uses is regarded as making this aspect clear, as is the phrase "on a regular basis".

134. The kind of information to be supplied is expressed in general terms. The reference to existing and planned uses of the water gives some definition to the obligation. It is possible that there are very minor international streams in sparsely settled areas where the level of use is such that no information exchange is required. The reference to the stage of "economic development" is also pertinent.

135. The reference to "uses" of system water also serves to clarify "hydrographic and other information and data" which are "pertinent". It is a rare water course in which domestic consumption is not an important use. Consequently information regarding water quality would be pertinent information on the physical condition of the water in a substantial number of cases. It is for the system States concerned to determine what information regarding water quality should be collected and exchanged in the individual system.

136. The reference to planned as well as existing uses is essential because it is not possible to make plans for

the use of fresh water or to forecast, for example, the effects of the construction of works in the watercourse upon water conditions in system States without a considerable amount of hydrologic data. As a general rule, planning in one system State requires planning in other system States, and this, in turn, may react upon the planning in the first State. Without adequate information from all the States concerned, the planning can become guesswork.

137. The reference to the stage of economic development and available resources has been included in the light of the statement referred to previously that States should not be required to supply information if they do not have the means to do so.¹²⁹ This concern is a

¹²⁹ See paras. 126 and 128 above.

reasonable one. However, the solution to this problem may lie in a proper allocation of the costs of supplying information.

138. Article 6 does not deal with the issue of burden sharing, and this too, perhaps, is a subject best dealt with by system States for the individual systems.

139. The first report of the Special Rapporteur contained a considerable amount of analysis and precedent supporting the need for the collection and exchange of information among system States regarding system water. The Special Rapporteur does not propose to repeat those data or to add to them because the necessity for a general principle regarding the collection and exchange of information has not been challenged.

CHAPTER III

General principles: water as a shared natural resource

A. Introduction

140. In recent years, the concept of shared natural resources, and of co-operation among States with respect to the mutually beneficial use and development of shared natural resources, has become widely accepted. Indeed, the concept of shared resources and co-operative use of them appears to have been the implicit assumption of extensive State practice which is deeply rooted in the history of international law and relations. It is the purpose of this chapter to relate the concept of shared natural resources to the water of international watercourses; to demonstrate the measure of acceptance of the concept of shared natural resources by the international community; to indicate that application of this concept to the law of the navigational uses of international watercourses has ineluctable implications for the law of non-navigational uses; and to illustrate that the concept of fresh water as a shared natural resource has had wide application in the sphere of boundary waters as well. At the outset of the chapter, a pertinent draft article is proposed.

B. Water as the archetype of the shared natural resource

141. If the concept of natural resources shared by two or more States has any core of meaning, it must be derived from the water of international watercourses. It was demonstrated in the first report of the Special Rapporteur that the physical facts of nature governing the behaviour of water that flows from the territory of one State to that of another give rise to inescapable interaction of that water. What happens to water in one part of an international watercourse generally

affects, in large measure or small, sooner or later, what happens to water in other parts of that watercourse.¹³⁰ A mass of scientific proof can be brought to bear to reinforce this incontestable truth. The time of the Commission will be saved if what is the fact is accepted as the fact and if the law is shaped to respond to the fact. The immediate essential fact is that the water of an international watercourse system is the archetype of the shared natural resource.¹³¹

C. Draft article 7: "A shared natural resource"

142. In the light of the foregoing considerations and those that follow in this chapter, the following draft article is proposed for the Commission's consideration

¹³⁰ *Yearbook ... 1979*, vol. II (Part One), pp. 145 *et seq.*, document A/CN.4/320, paras. 4–31. See also *Management of international water resources: institutional and legal aspects—report of the Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development*, Natural Resources/Water Series, No. 1 (United Nations publication, Sales No. E.75.II.A.2), paras. 14–38. Changes in boundary waters, and in waters upstream, necessarily affect other boundary waters and waters downstream. Changes downstream in some cases affect waters upstream.

¹³¹ Stating that there existed no satisfactory generic term for describing natural resources shared by two or more States, the Executive Director of UNEP limited himself to five of "the most obvious examples" of such resources, the first of which was: "(a) an international water system, including both surface and ground waters" (see report of the Executive Director of UNEP, "Co-operation in the field of the environment concerning natural resources shared by two or more States" (UNEP/GC/44 and Add.I), para. 86). The draft principles prepared by UNEP, to which that report relates, are discussed below (paras. 156–185).

as the first of the general principles governing the uses of the water of international watercourses:

Article 7. A shared natural resource

System States shall treat the water of an international watercourse system as a shared natural resource.

D. Acceptance by the international community of the concept of shared natural resources

143. While the concept of shared resources may in some respects be as old as that of international co-operation, its articulation is relatively new and incomplete. It has not been accepted as such, nor in these terms, as a principle of international law, although the fact of shared natural resources has long been treated in State practice as giving rise to obligations to co-operate in the treatment of such resources. It is only during the last decade that the concept of shared natural resources has come to the fore.

1. CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES

144. The Charter of Economic Rights and Duties of States, adopted by the General Assembly on 12 December 1974¹³² by 120 votes to 6, with 10 abstentions, contains the following article:

Article 3

In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve the optimum use of such resources without causing damage to the legitimate interest of others.

145. This article was a source of controversy, being adopted in the Second Committee by 97 votes to 7, with 25 abstentions, and in plenary by 100 votes to 8, with 28 abstentions.¹³³ Neither article 3 nor the Charter of Economic Rights and Duties as a whole can be treated as declaratory or creative of international law, in view of the well-known limitations on the authority of the General Assembly and the fact that this controversial and controverted resolution of the General Assembly was expressly characterized by a number of States, in the course of its negotiation, at the time of its adoption, and thereafter, as not expressing or giving rise to obligations under international law.

146. Nevertheless, article 3 of the Charter of Economic Rights and Duties is of high interest to the Commission's concerns. In the first place, it assumes and expressly states what is the undeniable fact: that

there are natural resources shared by two or more countries. Secondly, it holds that, in the exploitation of such shared resources, "each State must co-operate". Thirdly, the basis of such co-operation is specified in terms resonant of this topic's concern with the collection and exchange of data and with negotiation among riparians: "on the basis of a system of information and prior consultations...". And, fourthly, the objective of such international co-operation is specified to be "the optimum use of such resources without causing damage to the legitimate interest of others". In all these respects, it is submitted, this article of the Charter of Economic Rights and Duties is eminently sound. Moreover, it can and will be shown in succeeding passages of this report that, while this Charter as a whole cannot be viewed as declaratory or creative of international law, its article 3 essentially expresses what are valid principles of existing international law, quite apart from any legal weight that may be attached as such to their rendering in the article.

147. The Charter of Economic Rights and Duties of States calls for a further observation. Article 3 follows and is juxtaposed by article 2, which provides, in paragraph 1, that:

Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.

Article 2 then proceeds to specify what, in the view of a majority of the General Assembly, flows from the right so declared.

148. It is not at all necessary to accept the much disputed provisions of article 2 of the Charter of Economic Rights and Duties, in whole or in part, to perceive that article 3 is placed as, and is designed to be, an exception to article 2. That is to say, the General Assembly has adopted a resolution which asserts, in unqualified terms, the permanent sovereignty of every State over "its" natural resources, while having taken care immediately to specify that, in respect of natural resources "shared by two or more countries", other obligations come into play. This appears to be an important recognition by no fewer than 100 States that the principle of permanent sovereignty over natural resources does *not* apply to shared natural resources, and, hence, does not apply to the water of international watercourses.

2. REPORT OF THE UNITED NATIONS WATER CONFERENCE

149. The United Nations Water Conference convened in 1977, adopted a report¹³⁴ which contains much of relevance to the topic before the Commission.

¹³² Resolution 3281 (XXIX).

¹³³ See *Official Records of the General Assembly, Twenty-ninth Session, Second Committee*, 1648th meeting, and *ibid.*, *Plenary Meetings*, 2319th meeting.

¹³⁴ *Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977* (United Nations publication, Sales No. E.77.11.A.12).

Of particular pertinence to the immediate point are the following recommendations of the Conference, which constitute part of the Mar del Plata Action Plan:

G. REGIONAL CO-OPERATION

Development of shared water resources⁵

84. In the case of shared water resources, co-operative action should be taken to generate appropriate data on which future management can be based and to advise appropriate institutions and understandings for co-ordinated development.

85. Countries sharing water resources, with appropriate assistance from international agencies and other supporting bodies, on the request of the countries concerned, should review existing and available techniques for managing shared water resources and co-operate in the establishment of programmes, machinery and institutions necessary for the co-ordinated development of such resources. Areas of co-operation may with agreement of the parties concerned include planning, development, regulation, management, environmental protection, use and conservation, forecasting, etc. Such co-operation should be a basic element in an effort to overcome major constraints such as the lack of capital and trained manpower as well as the exigencies of natural resources development.

86. To this end it is recommended that countries sharing a water resource should:

(a) Sponsor studies, if necessary with the help of international agencies and other bodies as appropriate, to compare and analyse existing institutions for managing shared water resources and to report on their results;

(b) Establish joint committees, as appropriate with agreement of the parties concerned, so as to provide for co-operation in areas such as the collection, standardization and exchange of data, the management of shared water resources, the prevention and control of water pollution, the prevention of water-associated diseases, mitigation of drought, flood control, river improvement activities and flood warning systems;

(c) Encourage joint education and training schemes that provide economies of scale in the training of professional and subprofessional officers to be employed in the basin;

(d) Encourage exchanges between interested countries and meetings between representatives of existing international or interstate river commissions to share experiences. Representatives from countries which share resources but yet have no developed institutions to manage them could be included in such meetings;

(e) Strengthen if necessary existing governmental and inter-governmental institutions, in consultation with interested Governments, through the provision of equipment, funds and personnel;

(f) Institute action for undertaking surveys of shared water resources and monitoring their quality;

(g) In the absence of an agreement on the manner in which shared water resources should be utilized, countries which share these resources should exchange relevant information on which their future management can be based in order to avoid foreseeable damages;

(h) Assist in the active co-operation of interested countries in controlling water pollution in shared water resources. This co-operation could be established through bilateral, subregional or regional conventions or by other means agreed upon by the interested countries sharing the resources.

87. The regional water organizations, taking into account existing and proposed studies as well as the hydrological, political,

economic and geographical distinctiveness of shared water resources of various drainage basins, should seek ways of increasing their capabilities of promoting co-operation in the field of shared water resources and, for this purpose, draw upon the experience of other regional organizations.

H. INTERNATIONAL CO-OPERATION

Development of shared water resources⁵

90. It is necessary for States to co-operate in the case of shared water resources in recognition of the growing economic, environmental and physical interdependencies across international frontiers. Such co-operation, in accordance with the Charter of the United Nations and principles of international law, must be exercised on the basis of the equality, sovereignty and territorial integrity of all States, and taking due account of the principle expressed, *inter alia*, in principle 21 of the Declaration of the United Nations Conference on the Human Environment.⁶

91. In relation to the use, management and development of shared water resources, national policies should take into consideration the right of each state sharing the resources to equitably utilize such resources as the means to promote bonds of solidarity and co-operation.

92. A concerted and sustained effort is required to strengthen international water law as a means of placing co-operation among States on a firmer basis. The need for progressive development and codification of the rules of international law regulating the development and use of shared water resources has been the growing concern of many Governments.

93. To this end it is recommended that:

(a) The work of the International Law Commission in its contribution to the progressive development of international law and its codification in respect of the law of the non-navigational uses of international watercourses should be given a higher priority in the working programme of the Commission and be co-ordinated with activities of other international bodies dealing with the development of international law of waters with a view to the early conclusion of an international convention;

(b) In the absence of bilateral or multilateral agreements, Member States continue to apply generally accepted principles of international law in the use, development and management of shared water resources;

(c) The Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States of the United Nations Environment Programme be urged to expedite its work on draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious exploitation of natural resources shared by two or more States;

(d) Member States take note of the recommendations of the Panel of Experts on Legal and Institutional Aspects of International Water Resources Development set up under Economic and Social Council resolution 1033 (XXXVII) of 14 August 1964 as well as the recommendations of the United Nations Inter-regional Seminar on River Basin and Inter-basin Development (Budapest, 1975).

(e) Member States also take note of the useful work of non-governmental and other expert bodies on international water law;

(f) Representatives of existing international commissions on shared water resources be urged to meet as soon as possible with a view to sharing and disseminating the results of their experience

⁵ This term has been used only for the uniformity of the text and its use does not prejudice the position of the countries supporting the terms "transboundary waters" or "international waters" in any of the problems involved.

⁶ *Report of the United Nations Conference on the Human Environment* (United Nations publication, Sales No. E.73.II.A.14), chap. 1, sect. 111.

and to encourage institutional and legal approaches to this question;

(g) The United Nations system should be fully utilized in reviewing, collecting, disseminating and facilitating exchange of information and experiences on this question. The system should accordingly be organized to provide concerted and meaningful assistance to States and basin commissions requesting such assistance.

[...]¹³⁵

150. These passages from the report of the United Nations Water Conference are noteworthy in the following respects, among others. They accept and apply the term "shared water resources"—albeit without prejudice to the position of countries supporting the terms "transboundary waters" or "international waters". The need for international co-operation, through international river commissions and otherwise, and generation exchange of data to that end, is stressed. The "right of each State sharing the resources to equitably utilize such resources as the means to promote bonds of solidarity and co-operation" is asserted. That there are "generally accepted principles of international law" which apply, even in the absence of bilateral or multilateral agreements, to the use, development and management of shared water resources is assumed and stated, and these principles Member States are to "continue to apply".

151. Subsequently, the Economic and Social Council¹³⁶ and the General Assembly¹³⁷ adopted resolutions strongly commending the report. By 128 votes to none, with 9 abstentions, the General Assembly adopted the report of the United Nations Water Conference and approved the Mar del Plata Action Plan, of which the recommendations quoted above form a part. The resolution urges Member States to take intensified and sustained action for the implementation of the agreements reached at the Conference, including the Mar del Plata Action Plan.

152. The recommendations of the Mar del Plata Action Plan and the resolutions of the Economic and Social Council and of the General Assembly approving them do not of themselves demonstrate or give rise to obligations under international law. But they are important in their indication that the world community as a whole recognizes both that the water of international watercourses is a shared natural resource and that there are "generally accepted principles of international law" which apply, even in the absence of bilateral or multilateral agreements, to the use, development and management of shared water resources.

3. CO-OPERATION IN THE FIELD OF THE ENVIRONMENT CONCERNING NATURAL RESOURCES SHARED BY TWO OR MORE STATES

153. In 1973, the General Assembly adopted a resolution which led to the preparation of draft principles discussed in the following section. Entitled "Co-operation in the field of the environment concerning natural resources shared by two or more States", resolution 3129 (XXVIII) of 13 December 1973 refers to the Declaration of the United Nations Conference on the Human Environment,¹³⁸ takes note with satisfaction of "the important Economic Declaration adopted by the Fourth Conference of Heads of State or Government of Non-aligned Countries, held at Algiers", declares itself conscious "of the importance and urgency of safeguarding the conservation and exploitation of the natural resources shared by two or more States, by means of an effective system of co-operation, as indicated in the above-mentioned Economic Declaration of Algiers",¹³⁹ considers it necessary "to ensure effective co-operation between countries through the establishment of adequate international standards for the conservation and harmonious exploitation of natural resources common to two or more States", and considers further that co-operation "must be developed on the basis of a system of information and prior consultation".

154. The striking support General Assembly resolution 3129 (XXVIII) gives to the themes of the present report is clear. The concept of shared natural resources is accepted. The need for establishing adequate international standards for their conservation and exploitation is asserted. Co-operation among States sharing natural resources is called for on the basis of (a) a system of information (a call which conjoins with draft article 6 of this report) and (b) prior consultation (a proviso which conjoins with draft article 4 of this report).

155. Equally in point are the principles whose preparation resulted from the foregoing General Assembly resolution.

¹³⁸ See *Report of the United Nations Conference on the Human Environment Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), part 1, chap. 1.

¹³⁹ "The non-aligned countries consider it necessary to ensure effective co-operation between countries through the establishment of adequate international standards for the conservation and harmonious exploitation of natural resources common to two or more States in the context of the normal and habitual relations existing between them.

"They also believe that co-operation between countries interested in the exploitation of such resources should be developed on the basis of a system of information and prior consultations . . ." (Fourth Conference of Heads of State or Government of Non-aligned Countries, Algiers, 5-9 September 1973, Economic Declaration, sect. XII (A/9330, p. 72)).

¹³⁵ *Ibid.*, chap. I.

¹³⁶ Resolutions 2115 (LXIII) and 2121 (LXIII) of 4 August 1977.

¹³⁷ Resolution 32/158 of 19 December 1977.

4. THE DRAFT PRINCIPLES OF CONDUCT IN RESPECT OF SHARED NATURAL RESOURCES

156. An Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States was established by UNEP in 1975 pursuant to the provisions of General Assembly resolution 3129 (XXVIII).¹⁴⁰ The Intergovernmental Working Group held five sessions in the period 1976–1978. Interest in the activities of the Group grew and at the final session, held from 23 January to 27 February 1978, experts from 26 States took part.¹⁴¹

157. At the final session, in 1978, the Working Group adopted 15 draft principles which represented the consensus of the experts. These were accompanied by a variety of declarations and reservations, among which were statements that the experts from India, Poland, Romania and the USSR regarded the principles as having the character of recommendations.¹⁴² The expert from Brazil reserved his position on all the principles.¹⁴³ The expert from Mexico considered that, although the draft principles were written for insertion in a document which was to have the form of a recommendation, that did not have any bearing on the legal force which most of the principles already possessed.¹⁴⁴

158. In this connection, it should be noted that the principles are preceded by the following explanatory note:

The draft principles of conduct . . . have been drawn up for the guidance of States in the field of the environment with respect to the conservation and harmonious utilization of natural resources shared by two or more States. The principles refer to such conduct of individual States as is considered conducive to the attainment of the said objective in a manner which does not adversely affect the environment. Moreover, the principles aim to encourage States sharing a natural resource, to co-operate in the field of the environment.

An attempt has been made to avoid language which might create the impression of intending to refer to, as the case may be, either a specific legal obligation under international law, or to the absence of such obligation.

The language used throughout does not seek to prejudice whether or to what extent the conduct envisaged in the principles is already prescribed by existing rules of general international law. Neither does the formulation intend to express an opinion as to

¹⁴⁰ See para. 90 above. The Intergovernmental Working Group was originally constituted with experts drawn from the following 17 States: Argentina; Brazil; Canada; France; India; Iraq; Kenya; Mexico; Morocco; Netherlands; Philippines; Poland; Romania; Senegal; Sweden; Union of Soviet Socialist Republics; United States of America. An observer for Turkey was also present.

¹⁴¹ Argentina; Bangladesh; Brazil; Canada; France; Germany; Federal Republic of Ghana; Greece; India; Iran; Iraq; Jamaica; Kenya; Mexico; Netherlands; Philippines; Poland; Romania; Senegal; Sweden; Switzerland; Uganda; Union of Soviet Socialist Republics; United Kingdom of Great Britain and Northern Ireland; United States of America; Yugoslavia. Experts from Austria, Japan and Turkey participated as observers. (See UNEP/IG.12/2, para. 11.)

¹⁴² *Ibid.*, para. 15.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

whether or to what extent and in what manner the principles—as far as they do not reflect already existing rules of general international law—should be incorporated in the body of general international law.¹⁴⁵

159. Principles 1 and 2 are of substantial importance to the issues raised by draft article 7 and are therefore reproduced at this juncture:

Principle 1

It is necessary for States to co-operate in the field of the environment concerning the conservation and harmonious utilization of natural resources shared by two or more States. Accordingly, it is necessary that consistent with the concept of equitable utilization of shared natural resources, States co-operate with a view to controlling, preventing, reducing or eliminating adverse environmental effects which may result from the utilization of such resources. Such co-operation is to take place on an equal footing and taking into account the sovereignty, rights and interests of the States concerned.

Principle 2

In order to ensure effective international co-operation in the field of the environment concerning the conservation and harmonious utilization of natural resources shared by two or more States, States sharing such natural resources should endeavour to conclude bilateral or multilateral agreements between or among themselves in order to secure specific regulation of their conduct in this respect, applying as necessary the present principles in a legally binding manner, or should endeavour to enter into other arrangements, as appropriate, for this purpose. In entering into such agreements or arrangements, States should consider the establishment of institutional structures, such as joint international commissions, for consultations on environmental problems relating to the protection and use of shared natural resources.¹⁴⁶

160. The principles do not contain a definition of the term “shared resources”. Attempts were made to draft such a definition. The Working Group, after mentioning a number of proposals made, states in its report: “The Working Group, for want of time, was not in a position to enter into an in-depth discussion of the question of the definition of shared natural resources, and therefore did not reach any conclusion.”¹⁴⁷

161. In May 1978, the Governing Council of UNEP proposed that the General Assembly adopt the principles of conduct.¹⁴⁸ General Assembly resolution 33/87 of 15 December 1978 requested the Secretary-General to submit the principles to Member States for consideration and comment. Thirty-six Governments commented on the report of the Working Group of experts. The report of the Secretary-General on co-operation in the field of the environment concerning natural resources shared by two or more States contains the following summary of replies received:

¹⁴⁵ *Ibid.*, p. 10.

¹⁴⁶ *Ibid.*, p. 11.

¹⁴⁷ *Ibid.*, para. 16. See also the report of the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States on the progress made at its first session, held at Nairobi in January 1976 (UNEP/GC/74).

¹⁴⁸ UNEP Governing Council decision 6/14 of 19 May 1978; see *Official Records of the General Assembly, Thirty-third Session, Supplement No. 25 (A/33/25)*, pp. 154–155.

(a) Thirty of the 36 Governments whose views were received were generally in favour of the adoption of the principles. Without derogating from their favourable views on the principles, some of those Governments, however, expressed reservations on specific principles, or suggested alternative formulation of some of them. Some expressed the view that the adoption of the principles should not preclude the solution of specific problems on shared natural resources through bilateral agreements based on principles other than the 15 principles.

(b) Many Governments expressed views on the legal status of the principles. On this issue most of the Governments that regarded the principles as acceptable also wanted the principles to be regarded as guidelines only and not as an international code of conduct which was necessarily binding on States. Nearly all the Governments in favour of the principles wanted those principles to be used as the negotiating basis for the preparation of bilateral or multilateral treaties among States with regard to their conduct when dealing with natural resources they share in common. Some of them even indicated that similar principles were already being used by States to make treaties relating to shared natural resources.¹⁴⁹

162. Two States, Brazil and Ethiopia, expressed strong opposition to the principles. A number of States were concerned that there was no definition of shared natural resources.¹⁵⁰

163. The Secretary-General's report suggested that the General Assembly might wish to adopt the principles. At the thirty-fourth session of the General Assembly, a draft resolution was introduced in the Second Committee by Argentina, Bangladesh, Canada, Greece, the Netherlands, Norway, Pakistan, Sweden and Upper Volta entitled "Co-operation in the field of the environment covering natural resources shared by two or more States", paragraphs 2 and 3 of which would have had the General Assembly adopt the draft principles for the guidance of States and request States Members "to respect the principles in their inter-State relations".¹⁵¹

164. The draft principles were the subject of scattered comment by a relatively small number of States in the course of consideration of the report of UNEP in the Second Committee. The representative of Italy indicated that his Government had no basic objection to the principles, "particularly since they were guidelines without legally binding force", but expressed puzzlement at "the vagueness of the definition of shared natural resources".¹⁵² The representative of Greece favoured adoption of the draft principles by the General Assembly, noting that, "while the scope and binding legal nature of the principles would be derived in the future from their incorporation in international agreements, it was obvious that they already had an intrinsic value ...".¹⁵³ The representative of Sweden stated that the Swedish Government:

... attached great importance to the adoption at the current session of the General Assembly of the 15 draft principles of conduct for the guidance of States in the use and conservation of shared resources. States should be called upon to respect the principles and to apply them within the framework of their relations. UNEP should be requested to encourage the elaboration and application of the 15 draft principles in the context of formulation of bilateral and multilateral conventions regarding natural resources shared by two or more States. The adoption of the principles would be an important step in the process of developing further the international law related to the protection of the environment.¹⁵⁴

However, the representative of Japan said that "his delegation was not convinced of the need for hastily finalizing the issue of shared natural resources in the form of the principles on that subject, in view of the political, technical and legal difficulties, such as the definition of shared resources and the accommodation of national jurisdiction to the principles".¹⁵⁵

165. The representative of Argentina, stating that the 15 draft principles "could be of useful application," noted that "Argentina had used the provisions contained in those principles in drafting its treaties with neighbouring countries concerning river basins".¹⁵⁶ He continued:

... That showed that the draft principles could contribute to the development of norms to be applied in legally binding form in bilateral and regional relations ... and his delegation was therefore in favour of the adoption of the principles together with a recommendation to States to apply them in their mutual relations.

The legal status of the principles had raised doubts among some delegations. His delegation believed that the explanatory note (UNEP/IG.12/2) was sufficiently clear in that regard; any United Nations resolution was, of course, of a recommendatory nature when addressed to sovereign States. With regard to the future of the draft principles, his delegation believed that it would be desirable for States to facilitate their effective entry into force by transforming them into obligatory norms through their incorporation in bilateral agreements or multilateral conventions. That would give an impetus to the progressive development and codification of international law, in accordance with the principles of the United Nations Charter.¹⁵⁷

166. In contrast, the representative of India

... noted that less than half of the 36 Governments conveying their views on the subject had wholeheartedly supported the adoption of the draft principles by the General Assembly. Her delegation felt that they should merely provide guidelines for States and serve as recommendations. In the absence of any agreed and acceptable definition of shared natural resources, it would be premature to force the adoption of the draft principles.¹⁵⁸

167. The representative of Portugal, however,

... agreed with the recommendations contained in the report of the Secretary-General on natural resources shared by two or

¹⁴⁹ See *Official Records of the General Assembly, Thirty-fourth Session, Annexes*, agenda item 60, document A/34/557, para. 6.

¹⁵⁰ *Ibid.*, annex.

¹⁵¹ *Ibid.*, document A/34/837, para. 18.

¹⁵² *Ibid.*, *Second Committee*, 28th meeting, para. 81; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁵³ *Ibid.*, para. 88; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁵⁴ *Ibid.*, para. 99; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁵⁵ *Ibid.*, 30th meeting, para. 59; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁵⁶ *Ibid.*, 31st meeting, para. 11; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁵⁷ *Ibid.*, paras. 11–12; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁵⁸ *Ibid.*, para. 26; and *ibid.*, *Sessional fascicle*, corrigendum.

more States (A/34/557). The views of the vast majority of States that had replied to the questionnaire clearly showed that the draft principles had been widely accepted as guidelines which should assist the conduct of States in that area. Their legal status as mere recommendations should dispel any doubts or reticence. His delegation wished to emphasize the high priority which should be given to arriving at an agreed definition of shared natural resources, without which the applicability of the principles could obviously be undermined . . . ¹⁵⁹

168. The representative of the Soviet Union expressed his delegation's agreement with the recommendation of the UNEP Governing Council that the General Assembly adopt the 15 draft principles and held that "the proposed principles . . . must take the form of recommendations", and that "work should be continued on the drafting of an acceptable definition of 'shared natural resources' ". ¹⁶⁰

169. The representative of Brazil expressed another position:

. . . His delegation had been unable to associate itself with the results of the work of the Intergovernmental Working Group of Experts, because the document it had produced proposed that States should adopt the same approach to questions of a completely different nature, such as the impact of transfrontier pollution and the economic use of a natural resource. The draft principles attempted to establish guidelines universal in scope, without taking into account the fact that the nature of problems linked to the conservation and utilization of natural resources differed from region to region. The document prepared by the Working Group contained certain provisions that would impose unacceptable limitations on the exercise of sovereignty. His Government believed that it should be stressed, firstly, that each State had full and permanent sovereignty over its natural resources, and, secondly, that each State had the right to use its natural resources according to its national policies, provided that it did not cause significant damage to another State or States. Any formulation which deviated from those two general rules weakened the principle of State responsibility and violated the principle of sovereignty. ¹⁶¹

170. The representative of Venezuela declared that his Government was not able to take a definitive position on the draft principles for a number of reasons, stating:

Generally speaking, Venezuela was not opposed to the idea of establishing principles to guide States in the equitable and harmonious utilization and conservation of resources which, because of their particular characteristics, might require the co-operation of two or more States. It could agree to principles that were purely recommendatory and in the nature of general guidelines for co-operation in pursuance of bilateral or multi-lateral agreements concluded between the States concerned. However, it had some reservations regarding the principles as drafted. While a number of them were quite useful in so far as they related to the use of water resources, there were difficulties in applying those principles to other resources. Venezuela also had reservations regarding the use of international forums to solve problems which fell within the sovereign jurisdiction of States. ¹⁶²

171. The representative of Yugoslavia declared that:

His delegation attached great importance to the draft principles of conduct on the sharing of natural resources by two or more

States. In practice, his Government was already guided by the spirit of those principles. The conservation and harmonious utilization of natural resources shared by two or more countries obviously required broad co-operation and understanding. His delegation was therefore prepared to support any action which would lead to the adoption of the principles, and felt that Governments should be encouraged to apply them whenever they engaged in discussions on shared natural resources. ¹⁶³

The representative of Sudan, while generally supporting the draft principles, considered that, since only 36 States had commented upon them, adoption at the current session might be premature. ¹⁶⁴

172. Efforts were made to find a compromise solution in the Second Committee, but without success. Finally, the representative of Pakistan, on behalf of the sponsors, introduced a revised version of the draft resolution as the highest measure of agreement that could be reached in informal discussions. The operative paragraphs as proposed by Pakistan now read:

[The General Assembly]

. . .

2. *Adopts* the draft principles as guidelines and recommendations in the conservation and harmonious utilization of natural resources shared by two or more States without prejudice to the binding nature of those rules already recognized as such in international law;

3. *Requests* all States to use the principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States, on the basis of the principle of good faith and in the spirit of good neighbourliness and in such a way as to enhance and not to affect adversely development and the interests of all countries and in particular of the developing countries. ¹⁶⁵

Agreement could not be reached on the proposed text, the representative of Pakistan stated, because a few delegations continued to press for the replacement of the word "*Adopts*" by the phrase "*Takes note of*". ¹⁶⁶ The representative of Brazil proposed amending paragraph 2 of the draft resolution so as to substitute "*Takes note of*" for "*Adopts*". ¹⁶⁷

173. The Brazilian amendment was adopted by 59 votes to 25, with 27 abstentions. ¹⁶⁸ As finally adopted by the General Assembly, the resolution provides: ¹⁶⁹

The General Assembly,

Recalling the relevant provisions of its resolutions 3201 (S-VI) and 3202 (S-VI) of 1 May 1974, in which it reaffirmed the principle of full permanent sovereignty of every State over its natural resources and the responsibility of States as set out in the Declaration of the United Nations Conference on the Human Environment to ensure that activities within their jurisdiction or

¹⁵⁹ *Ibid.*, para. 34; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁶⁰ *Ibid.*, para. 47; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁶¹ *Ibid.*, para. 54; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁶² *Ibid.*, para. 59; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁶³ *Ibid.*, para. 67; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁶⁴ *Ibid.*, para. 78; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁶⁵ *Ibid.*, *Annexes*, agenda item 60, document A/34/837, para. 19.

¹⁶⁶ *Ibid.*, *Second Committee*, 57th meeting, para. 19; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁶⁷ *Ibid.*, para. 23; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁶⁸ *Ibid.*, para. 45; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁶⁹ Resolution 34/186 of 18 December 1979.

control do not cause damage to the environment of other States and to co-operate in developing the international law regarding liability and compensation for such damages,

...
Also recalling the Charter of Economic Rights and Duties of States, contained in its resolution 3281 (XXIX) of 12 December 1974,

...
Desiring to promote effective co-operation among States for the development of international law regarding the conservation and harmonious utilization of natural resources shared by two or more States,

Recognizing the right of States to provide specific solutions on a bilateral or regional basis,

Recalling that the principles have been drawn up for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States,

1. *Takes note* of the report as adopted of the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States established under decision 44 (111) of the Governing Council of the United Nations Environment Programme in conformity with General Assembly resolution 3129 (XXVIII);

2. *Takes note* of the draft principles as guidelines and recommendations in the conservation and harmonious utilization of natural resources shared by two or more States without prejudice to the binding nature of those rules already recognized as such in international law;

3. *Requests* all States to use the principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States, on the basis of the principle of good faith and in the spirit of good neighbourliness and in such a way as to enhance and not to affect adversely development and the interests of all countries, in particular the developing countries.

174. What conclusions are to be drawn from the adoption of the foregoing resolution in the light of its surrounding debate? A review of the record indicates that objections to adoption of the draft principles by the General Assembly were made on six grounds:

- (i) There was no definition of a "shared natural resource";
- (ii) There had been insufficient comment by States on the draft principles;
- (iii) Adoption of the principles by the General Assembly would constitute a premature commitment to the principles;
- (iv) The principles did not take into account the differences in regional problems;
- (v) The principles dealt with a field of co-operation among States in which research and actual experience were extremely limited;¹⁷⁰
- (iv) Some of the principles constituted an encroachment upon sovereignty.

¹⁷⁰ To quote the representative of Brazil: "Those principles dealt with a highly controversial subject, namely, co-operation among States in a field in which both research and actual experience were still extremely limited." (*Official Records of the General Assembly, Thirty-fourth Session, Second Committee, 57th meeting, para. 21; and ibid., Sessional fascicle, corrigendum*).

175. These objections were advanced by a very limited number of States, so that it is not possible to tell what part they played in the vote in favour of "noting" and against "adoption" of the principles by the General Assembly. In any event, these objections have little instruction for the Commission's work on international watercourses.

176. The absence of a definition of shared natural resources in the draft principles does not bear upon consideration of the draft articles submitted to the Commission. Draft article 7 defines the water of an international watercourse as a shared natural resource. As noted at the outset of this chapter, while there is room for difference of view over the content of the concept of shared natural resources, if any meaning is to be attached to that concept it must embrace water which flows from the territory of one State to that of another.

177. That there was insufficient written comment by States on the draft principles is a criticism that fails to take account of the restricted number of States that characteristically respond, often belatedly, to requests for comments of this kind. Members of the Commission will, from experience, be aware that the number of State comments received by the Secretary-General in the case of the draft principles of conduct was not unusually low.

178. The objection that adoption of the principles by the General Assembly would constitute a premature commitment to the principles is questionable because, as the representative of Portugal put it, "all resolutions of the General Assembly were only recommendations, and the draft resolution itself clearly stated that the principles were of the nature of recommendations".¹⁷¹ As far as the work of the Commission is concerned, any legal commitment by States to the principle contained in draft article 7 would arise only at such indeterminate future time as a treaty based on the draft articles was concluded, ratified and came into force.

179. As to the objection that the draft principles did not take into account the differences in regional problems, it may be noted that the draft articles submitted to the Commission are framed to be conjoined with system agreements that will deal with the distinctive character of diverse river systems.

180. The fifth objection, namely, that the subject of shared natural resources is one in which research and experience are extremely limited, clearly does not apply to the shared resource constituted by the water of international watercourses, as debate in the Second Committee recognized. There is a very large body of research and experience—and of State practice and treaty-making—in the sphere of international watercourses, especially on aspects such as navigation, irrigation and power.

¹⁷¹ *Ibid.*, 58th meeting, para. 20; and *ibid.*, *Sessional fascicle, corrigendum*.

181. The sixth objection, that of encroachment on sovereignty, recalls the elements of the Commission's work. The first contentious case before the Permanent Court of International Justice gave rise to the classic statement of a governing axiom:

The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.¹⁷²

The task of codifying and progressively developing international law will inevitably produce proposals for treaty articles which, if they are to become provisions of treaties in force, will require States to exercise their sovereign rights in a certain way. That achievement constitutes no encroachment upon sovereignty, but rather its enlightened exercise. Moreover, in so far as draft articles codify existing customary international law—law which equally restricts the ways in which States are entitled to exercise their sovereignty—that too constitutes no encroachment upon sovereignty which is inconsistent either with the fundamentals of statehood or of international law.

182. The foregoing considerations apply to the work of the Commission at large. But there is a singular aspect of work on the topic of the law of the non-navigational uses of international watercourses which bears on invocations of sovereignty and which requires comment as well. To argue in respect of the draft principles of conduct that "some of the principles constituted an encroachment upon sovereignty itself... [and] imposed limitations on the fundamental principle of the full and permanent exercise of sovereignty by States over natural resources in their respective territories"¹⁷³ is to beg the question of what resources are "in" a particular territory. By its very nature, water flowing from the territory of one State to that of another is not "in", in the sense of being within the exclusive jurisdiction and domain of, just one State; it is shared between States, that is to say, in the words of draft article 7, the water of an international watercourse system is a "shared natural resource".

183. Whatever the force of the objections to adoption of the UNEP draft principles of conduct in their context—and some of those objections may well have validity in the context of the entire, undefined field of shared natural resources—it is submitted for the foregoing reasons that those objections do not detract from the value of the draft principles for the topic under the Commission's consideration. Nor do they depreciate the value of the concept of shared natural

resources or its cardinal application to the waters of international watercourse systems.

184. While clearly the substitution of the phrase "Takes note of" for "Adopts" in the circumstances described¹⁷⁴ demonstrates reservations by a plurality of the General Assembly about the draft principles of conduct in certain, apparently diverse, respects, the General Assembly, in paragraph 3 of its resolution 34/186,

Requests all States to use the principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States...¹⁷⁵

Although that request is not expressly directed to the Commission in its formulation of a draft multilateral convention on the primary shared natural resource, namely, the water of international watercourses, it would be difficult to maintain that in so requesting States to act the General Assembly meant to exempt the expert examination of the subject by the Commission.

185. Acceptance of this view does not mean that the commission should necessarily adopt the 15 guidelines as the basis for its work. The Commission should, however, in carrying out its task of codifying the law of the uses of international watercourse systems, take full advantage of the work that has been carried on under the aegis of UNEP, which is a very substantial contribution to the development of legal principles in the field of international environmental law.¹⁷⁶

E. Sharing the natural resource of navigation

186. Use of international watercourses for navigation may be the most widespread and certainly is the best established of the various uses that have given rise to the existing body of international law applicable to shared resources. The Commission is not directly addressing the world-wide custom that riparian States share in the right to free and unimpeded navigation of an international watercourse and share as well in the duty to assist in maintaining the watercourse in navigable condition. Nevertheless, in framing principles for the non-navigational uses of international watercourses, the Commission must take into account the legal rules regarding the navigable uses of those

¹⁷⁴ See paras. 172 and 173 above.

¹⁷⁵ The text as a whole was adopted in draft form in the Second Committee by 94 votes to none, with 23 abstentions (see *Official Records of the General Assembly, Thirty-fourth Session, Second Committee, 57th meeting, para. 55*; and *ibid., Sessional fascicle, corrigendum*), and in plenary meeting, in final form, without a vote (*ibid., Plenary Meetings, 107th meeting*).

¹⁷⁶ For an able summary and analysis of the draft principles, see A.O. Adede, "United Nations efforts toward the development of an environmental code of conduct for States concerning harmonious utilization of shared natural resources", *Albany Law Review*, vol. 43 (1979), pp. 488–512.

¹⁷² S.S. "Wimbledon", Judgments, 1923: *P.C.I.J.*, Series A, No. 1, p. 25.

¹⁷³ As stated by the representative of Brazil in the Second Committee (*Official Records of the General Assembly, Thirty-fourth Session, Second Committee, 57th meeting, para. 21*; and *ibid., Sessional fascicle, corrigendum*).

waters that have developed in the course of the last two hundred years. Those rules, after all, derive from one use of the very resource in question, the international watercourse; it is a use of continuing importance; that use has been the subject of a substantial development of conventional and customary law; and at the very least, the body of law respecting navigation should provide sources and analogies for the law of the non-navigational uses of international watercourses.

1. THE *River Oder* CASE

187. The judgement of the Permanent Court of International Justice in the *River Oder* case¹⁷⁷ provides a lucid statement of the legal position of riparian States in respect of navigation. Pursuant to articles 341 and 343 of the Treaty of Versailles,¹⁷⁸ the Oder River was to be placed under the administration of an International Commission. The Commission considered that two tributaries of the Oder—the Netze and the Warthe—came within its jurisdiction. Both rivers rise in Poland and are navigable in Poland. Both crossed into then German territory where the Netze flows into the Warthe. The combined streams thereafter flow into the Oder. Under article 331 of the Versailles Treaty, the Oder “from its confluence with the Oppa... and all navigable parts of these river systems which naturally provide more than one State with access to the sea” are declared international and thus subject to the jurisdiction of the Commission.¹⁷⁹

188. The Polish Government advanced the position that the parts of the Warthe and the Netze which were in Poland naturally provided only one State—Poland—with access to the sea. Therefore the portions of those two rivers in Poland were not subject to the jurisdiction of the Commission. The opposing position was that the provisions on access to the sea concerned “the waterway as such and not a particular part of its course”. The Court put the question in the following terms:

It remains therefore to be considered whether the words “all navigable parts of the river systems which naturally provide more than one State with access to the sea” refer to tributaries and sub-tributaries as such, in such a way that if a tributary or sub-tributary in its naturally navigable course traverses or separates different States, it falls as a whole within the above definition; or whether they refer rather to that part of such tributary or sub-tributary which provides more than one State with access to the sea, in such a way that the upstream portion of the tributary or sub-tributary is not internationalized above the last frontier crossing its naturally navigable course.¹⁸⁰

189. After considering canons of interpretation and other constructions urged by the parties and deciding that they were not decisive, the Court made the following illuminating statements:

The Court must therefore go back to the principles governing international fluvial law in general and consider what position was adopted by the Treaty of Versailles in regard to these principles.

It may well be admitted, as the Polish Government contend, that the desire to provide the upstream States with the possibility of free access to the sea played a considerable part in the formation of the principle of freedom of navigation on so-called international rivers.

But when consideration is given to the manner in which States have regarded the concrete situations arising out of the fact that a single waterway traverses or separates the territory of more than one State, and the possibility of fulfilling the requirements of justice and the considerations of utility which this fact places in relief, it is at once seen that a solution of the problem has been sought not in the idea of a right of passage in favour of upstream States, but in that of a community of interest of riparian States. This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.

It is on this conception that international river law, as laid down by the Act of the Congress of Vienna of June 9th, 1815, and applied or developed by subsequent conventions, is undoubtedly based.¹⁸¹

190. This holding is notable in placing the weight of the Permanent Court of International Justice behind the principle of “a community of interest of riparian States”. In speaking of a community of interest and of a “common legal right”—which it defines as “the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others”—the Court appears to assume that the international watercourse is a shared natural resource. And, as a former President of the International Court of Justice and member of the Commission has written:

Although this progressive principle was stated by the Court, as *lege lata*, in respect of navigation, its fundamental concepts of equality of rights and community of interests are applicable to all utilizations of international watercourses.¹⁸²

191. Two further aspects of the *River Oder* case should be noted. The first is that by 1929 there was extensive State practice, often reflected in conventional law, in accordance with the Court's finding. Such conventional law includes the prototype provisions of the Final Act of the Congress of Vienna (1815):

Article 108

The Powers whose territories are separated or traversed by the same navigable river undertake to settle by common agreement all

¹⁷⁷ Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929: *P.C.I.J.*, Series A, No. 23.

¹⁷⁸ *British and Foreign State Papers, 1919 (op. cit.)*, p. 177.

¹⁷⁹ *Ibid.*, p. 173 (see para. 53 above).

¹⁸⁰ Territorial Jurisdiction ..., *P.C.I.J.*, Series A, No. 23, pp. 25–26.

¹⁸¹ *Ibid.*, pp. 26–27.

¹⁸² E. Jiménez de Aréchaga, “International law in the past third of a century”, *Collected Courses of The Hague Academy of International Law, 1978–1* (Alphen aan den Rijn, Sijthoff and Noordhoff, 1979), vol. 159, p. 193.

questions affecting navigation thereon. They shall appoint for this purpose commissioners, who shall meet, at the latest, six months after the end of this Congress, and take for the basis of their work the principles laid down in the following articles.

Article 109

Navigation throughout the whole course of the rivers referred to in the preceding article, from the point where they respectively become navigable to their mouths, shall be entirely free, and shall not in the matter of commerce be prohibited to anybody, provided that they conform to the regulations regarding the police of this navigation which shall be drawn up in a manner uniform for all and as favourable as possible to the commerce of all nations.¹⁸³

192. The Court in the *River Oder* case quotes these articles in its decision and then states:

If the common legal right is based on the existence of a navigable waterway separating or traversing several States, it is evident that this common right extends to the whole navigable course of the river and does not stop short at the last frontier; no instance of a treaty in which the upstream limit of internationalization of a river is determined by such frontier rather than by certain conditions of navigability has been brought to the attention of the Court.¹⁸⁴

193. The second feature of interest is that articles 108–116 of the Final Act of the Congress of Vienna may be the earliest precedent for the adoption of a framework agreement within the context of which individual agreements would be negotiated by the system States to govern uses of the water of individual watercourse systems.

2. FRENCH DECREE OF 1792

194. There are, however, other early examples of the assertion of the principle that an international river gives rise to a common interest of all riparian States in the use of its waters. One of the most interesting of these is the Decree of the Executive Council of the French Republic of 16 November 1792, which stated:

That the stream of a river is the common, inalienable property of all the countries which it bounds or traverses; that no nation can without injustice claim the right exclusively to occupy the channel of a river and to prevent the neighbouring upper riparian States from enjoying the same advantages; that such [an exclusive] right is a remnant of feudal servitude, or at any rate, an odious monopoly which must have been imposed by force and yielded by impotence; that it is therefore revocable at any moment and in spite of any convention, because nature does not recognize privileged nations any more than privileged individuals, and the rights of man are for ever imprescriptible.¹⁸⁵

195. The specific cause of this sweeping and strongly stated contention was article XIV of the Treaty of Munster (30 January 1648), in which Spain recognized the independence of the Netherlands United Provinces. Article XIV recognized the sovereignty of the United Provinces over the Scheldt estuary, which was the direct watercourse from Antwerp to the sea, and

authorized the closing of the waters by the Netherlanders.¹⁸⁶ The United Provinces in fact closed the Scheldt to Antwerp commerce. This closure remained in effect, despite efforts of the Emperor Joseph II of Austria to eliminate it in the 1780s, until French troops took control of Belgium and the Decree of 1792 was issued. Whatever the motivation of the French Republic may have been in issuing its decree, it indicates that the sharing of riparian States in the uses of the water of international watercourses is a principle with a genealogy extending back two hundred years.

196. While article 108 of the Final Act of the Congress of Vienna of 1815 clearly applies to all the States bordering on or traversed by a navigable river, article 109 is not equally clear on the question whether or not the ships of non-riparian States have a right to the same treatment as the ships of riparian States. This ambiguity has resulted in differing regimes for different watercourses and has been the source of numerous disputes, negotiations and conferences.¹⁸⁷ However, there has been no dispute that freedom of navigation on international rivers in the context of the Vienna settlement meant in practice "freedom of navigation for the riparian States without discrimination, it being understood that vessels of non-riparian States might also use the waters concerned, be it on less favourable terms or conditions".¹⁸⁸

197. Under both conventional regimes and established practice, riparian States acknowledge duties to facilitate river traffic to and from the other riparian States and in fact carry out those duties routinely. Much more than mere passage is involved in the community of interests which the Permanent Court mentions in the *River Oder* case. Channels change, shoals form and shift, rivers flood, ships sink, streams dry up. These and a hundred other matters must be dealt with on a co-operative and continuing basis by the riparian States.

3. BARCELONA CONVENTION ON NAVIGABLE WATERWAYS

198. The only general treaty in existence dealing with these rights and duties is the Convention and Statute on the regime of navigable waterways of international concern (Barcelona, 20 April 1921).¹⁸⁹ This agreement had its origin in article 338 of the Treaty of Versailles. Articles 332 to 337 of that Treaty established rules governing a number of internationalized rivers, such as the Elbe, the Oder, the Niemen and the

¹⁸⁶ C. Parry, *Consolidated Treaty Series* (Dobbs Ferry, N.Y., Oceana Publications, 1969), vol. I (1648–1649), p. 76.

¹⁸⁷ See Kaeckenbeeck, *op. cit.*

¹⁸⁸ L.J. Bouchez, "The Netherlands and the law of international rivers", *International Law in the Netherlands*, H.F. van Panhuys *et al.*, eds., (Alphen aan den Rijn, Sijthoff and Noordhoff, 1978), vol. I, p. 251.

¹⁸⁹ League of Nations, *Treaty Series*, vol. VII, p. 35.

¹⁸³ Reproduced in *P.C.I.J.*, Series A, No. 23, p. 27.

¹⁸⁴ *Ibid.*, pp. 27–28.

¹⁸⁵ G. Kaeckenbeeck, *International Rivers*, Grotius Society Publications, No. 1 (London, Sweet and Maxwell, 1918), p. 32.

Danube. Under article 338, these rules were to be replaced by a general convention relating to waterways having an international character.¹⁹⁰

199. The Statute (which is made an integral part of the Barcelona Convention by its article 1) contains the operative rules regarding international navigable waterways. The general definition of such waterways is contained in article 1 of the Statute:

In the application of the Statute, the following are declared to be navigable waterways of international concern:

1. All parts which are naturally navigable to and from the sea of a waterway which in its course, naturally navigable to and from the sea, separates or traverses different States, and also any part of any other waterway naturally navigable to and from the sea, which connects with the sea a waterway naturally navigable which separates or traverses different States.¹⁹¹

200. Each State party is required under the Statute to accord free access to flag vessels of all other States party (article 3) upon a footing of perfect equality (article 4), subject to limited exceptions such as sabotage (article 5). Common obligations of the riparian States are highlighted in article 10, which requires each such State to maintain the waterway in a navigable condition. This requirement is coupled with provisions concerning works construction and cost-sharing:

3. In the absence of legitimate grounds for opposition by one of the riparian States, including the State territorially interested, based either on the actual conditions of navigability in its territory, or on other interests such as, *inter alia*, the maintenance of the normal water-conditions, requirements for irrigation, the use of water-power, or the necessity for constructing other and more advantageous ways of communication, a riparian State may not refuse to carry out works necessary for the improvement of the navigability which are asked for by another riparian State, if the latter State offers to pay the cost of the works and a fair share of the additional cost of upkeep. It is understood, however, that such works cannot be undertaken so long as the State of the territory on which they are to be carried out objects on the ground of vital interests.

4. In the absence of any agreement to the contrary, a State which is obliged to carry out works of upkeep is entitled to free itself from the obligation, if, with the consent of all the co-riparian States, one or more of them agree to carry out the works instead of it; as regards work for improvement, a State which is obliged to carry them out shall be freed from the obligation, if it authorizes the State which made the request to carry them out instead of it. The carrying out of works by States other than the State territorially interested, or the sharing by such States in the cost of works, shall be so arranged as not to prejudice the rights of the States territorially interested as regards the supervision and administrative control over the works, or its sovereignty and authority over the navigable waterway.¹⁹²

201. Professor Reuter appraises the Barcelona Convention as follows:

Although the Convention is binding on only some 20 States and has, because of its abstract nature, operated only infrequently, it is at present the only general source of international fluvial law.¹⁹³

202. Professors Šahović and Bishop conclude that "since even the States that took part in the Conference failed to accept the Convention, its decisions have little or no legal significance."¹⁹⁴

203. Nevertheless, even though the Convention was not universally accepted (the 21 States which ratified or acceded to it were Albania, British Empire, Bulgaria, Chile, Colombia, Czechoslovakia, Denmark, Finland, France, Greece, Hungary, India (which later denounced the Convention), Italy, Luxembourg, New Zealand, Norway, Peru, Romania, Sweden, Thailand and Turkey), it reflects substantial agreement, declaratory of existing international law, that navigation of an international watercourse is not controlled by unilateral decision. The language of the provisions regarding responsibility for upkeep of watercourses, for cost-sharing and for assumption of the obligation to construct works in the river may be wanting in a variety of ways. These provisions represent, none the less, agreement on the principle that navigation entails rights and duties exercised in common by riparian States for the benefit of all who navigate the river.

4. SPECIFIC CONVENTIONS ON NAVIGABLE WATERWAYS

204. The numerous conventions which govern navigation on individual international watercourses witness to the existence of—and the recognition of the existence of—this community of interest.

205. The Scheldt, which has been referred to above,¹⁹⁵ constitutes an example of the development of a river region from a situation in which a lower riparian exercised a right to cut off all access of a major port from the sea to a situation in which the lower and upper riparians not only recognize freedom of navigation but are engaged in widespread co-operative action to ensure that vessels, both ocean-going and river-going, may use the watercourse for navigation in a safe and expeditious manner. This transition from conflict over rights of navigation on the Scheldt to co-operation in developing the river for navigational purposes through apportionment of benefits and costs parallels the development of navigational uses on the great majority of international watercourses. A few contemporary arrangements will now be cited which illustrate that, at least for purposes

¹⁹⁰ *British and Foreign State Papers, 1919 (op. cit.)*, vol. 112, p. 175.

¹⁹¹ League of Nations, *Treaty Series*, vol. VII, p. 51. (It should be noted that article 1(c) states that tributaries are to be considered as separate waterways.)

¹⁹² *Ibid.*, p. 57.

¹⁹³ P. Reuter, *Droit international public*, 5th ed. (Paris, Presses universitaires de France, 1976), p. 321.

¹⁹⁴ M. Šahović and W. W. Bishop, "The authority of the State: Its range with respect to persons and places", in *Manual of Public International Law*, ed. M. Sørensen (London, MacMillan, 1968), p. 327.

¹⁹⁵ See para. 195.

of navigation, international watercourse systems are treated as a shared natural resource.

206. A most recent illustration is the Treaty for Amazonian Co-operation (Brasilia, 3 July 1978):

Article III

In accordance with and without prejudice to the rights granted by unilateral acts, to the provisions of bilateral treaties among the Parties and to the principles and rules of international law, the Contracting Parties mutually guarantee on a reciprocal basis that there shall be complete freedom of commercial navigation on the Amazon and other international Amazonian rivers, observing the fiscal and police regulations in force now or in the future within the territory of each. Such regulations should, insofar as possible, be uniform and favour said navigation and trade.

...

Article VI

In order to enable the Amazonian rivers to become an effective communication link among the Contracting Parties and with the Atlantic Ocean, the riparian States interested in any specific problem affecting free and unimpeded navigation shall, as circumstances may warrant, undertake national, bilateral or multilateral measures aimed at improving and making the said rivers navigable.

Paragraph: For this purpose, they shall carry out studies into the means for eliminating physical obstacles to the said navigation as well as the economic and financial implications so as to put into effect the most appropriate operational measures.¹⁹⁶

207. Another instructive recognition of the basic principle is found in the Statute annexed to the Convention relating to the development of the Chad Basin (Fort Lamy, 22 May 1964):

Article 7

The Member States shall establish common rules for the purpose of facilitating navigation on the lake and on the navigable waters in the Basin and to ensure the safety and control of navigation.¹⁹⁷

208. No less instructive is the Convention regulating maritime and inland navigation on the Mekong and inland navigation on the approach to the port of Saigon (Paris, 29 December 1954):

Article I

On the basis of equality of treatment, navigation shall be free throughout the course of the Mekong, its tributaries, effluents, and navigable mouths located in the territories of Cambodia, Laos, and Vietnam, as well as on the waterways giving access to the Port of Saigon and to the sea.

For purposes of the customs laws and regulations of each riparian State, navigation between Phnom Penh and the sea by way of the Mekong and the waterways mentioned in the preceding paragraph shall be considered maritime navigation.

Article II

Such freedom of navigation is automatically granted to the States that have recognized the High Contracting Parties diplomatically. It shall become effective after the adherence of each State to the protocol annexed hereto prescribing the conditions of navigation.

¹⁹⁶ American Society of International Law *International Legal Materials* (Washington, D.C.), vol. XVII, No. 5 (Sept. 1978), pp. 1046-1047. Signatory States: Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname, Venezuela.

¹⁹⁷ *Nigeria's Treaties in Force*. . . (op. cit.), p. 221. Signatory States: Cameroon, Chad, Niger, Nigeria.

As regards States that have not recognized the High Contracting Parties diplomatically, freedom of navigation shall be subject to their consent.

Article III

Each of the High Contracting Parties undertakes in respect of the other two, to refrain from adopting any measure that might directly or indirectly impair navigability or make it permanently more difficult, and to take, as promptly as possible, the necessary measures to remove all obstacles and hazards to navigation.

If such navigation requires regular upkeep, each of the High Contracting Parties shall, to that end, have an obligation towards the other two to take the measures and to carry out the necessary work in its territory as quickly as possible.

...¹⁹⁸

209. One of the more complete, modern arrangements is illustrated by the treaty on the River Plate Basin (Brasilia, 23 April 1969):

Article I

The Contracting Parties agree to combine their efforts for the purpose of promoting the harmonious development and physical integration of the River Plate Basin, and of its areas of influence which are immediate and identifiable.

Sole paragraph. To this end, they shall promote, within the scope of the Basin, the identification of areas of common interest and the undertaking of surveys, programmes and works, as well as the drafting of operating agreements and legal instruments they deem necessary, and which shall tend towards:

(a) Advancement and assistance in navigation matters...¹⁹⁹

210. Still other pertinent, illustrative treaty provisions are the following: the Act regarding navigation and economic co-operation between the States of the Niger Basin (Niamey, 26 October 1963), the Agreement concerning co-operation with regard to navigation in frontier waters between the German Democratic Republic and Poland (Warsaw, 15 May 1969), and the Treaty between Argentina and Uruguay concerning the La Plata River and its maritime limits (Montevideo, 19 November 1973).

Act regarding navigation and economic co-operation between the States of the Niger Basin, 1963:

Article 3

Navigation on the River Niger, its tributaries and sub-tributaries, shall be entirely free for merchant vessels and pleasure craft and for the transportation of goods and passengers. The ships and boats of all nations shall be treated in all respects on a basis of complete equality.²⁰⁰

Agreement concerning co-operation with regard to navigation in frontier waters between the German Democratic Republic and Poland, 1969:

Article 2

1. The Contracting Parties grant each other, on a basis of complete equality, the right to navigation in frontier waters.

¹⁹⁸ France, *La Documentation française* (Paris), 25 January 1955, No. 1973, p. 32. Parties: Cambodia, Laos, Viet Nam.

¹⁹⁹ American Society of International Law (op. cit.), vol. VIII, No. 5 (Sept. 1969), Signatory States: Argentina, Bolivia, Brazil, Paraguay and Uruguay.

²⁰⁰ United Nations, *Treaty Series*, vol. 587, p. 13. Parties: Cameroon, Chad, Dahomey, Guinea, Ivory Coast, Mali, Niger, Nigeria, Upper Volta.

2. Sporting and tourist navigation shall be permitted only on the Oder.

Article 3

Co-operation on the basis of this Agreement for the safe and optimum conduct of navigation in frontier waters shall include, in particular, the following functions:

- (1) The preparation of rules concerning navigation and concerning the marking of frontier waters for navigation;
- (2) Supervision to maintain the order and safety of navigation;
- (3) Determination of the depth and breadth of the fairway;
- (4) Marking of frontier waters for navigation;
- (5) Removal of sunken vessels and other objects in the fairway which may become a danger to navigation;
- (6) Designation of moorings;
- (7) Conduct of aid and rescue operations;
- (8) Investigation of accidents occurring in the course of navigation.

Article 4

1. The Contracting Parties shall jointly prepare uniform rules concerning the regulation of shipping and the marking of frontier waters for navigation and shall put them into force on the same date.

2. Provisions not covered by the rules referred to in paragraph 1 which may affect navigation by the other Contracting Party shall be agreed upon with that Party.²⁰¹

Treaty between Argentina and Uruguay concerning the La Plata River and its maritime limits, 1973:

CHAPTER II. NAVIGATION AND FACILITIES

Article 7

The Parties mutually acknowledge freedom of navigation, permanently and under all circumstances, on the river for vessels flying their flags.

Article 8

The Parties mutually guarantee the maintenance of facilities that have been available up to the present time for access to their respective ports.

Article 9

The Parties mutually pledge themselves to develop adequate navigation aids and buoy services within their respective coastal zones, and to co-ordinate the development of the same within waters of common utilization outside of the channels, in such manner as to facilitate navigation and to guarantee its safety.

Article 10

The Parties have the right to use all of the channels situated in waters of common utilization, under equal conditions and under any circumstances.

Article 11

Navigation shall be permitted in waters of common utilization by public and private vessels of the La Plata Basin countries, and by public and private merchant vessels of third flag States, without precluding rights which may have already been granted by the Parties pursuant to Treaties in force. In addition, one Party shall permit passage of war vessels of a third flag State when authorized by the other party, provided this does not threaten its public order or security.

Article 12

Outside of the coastal zones, the Parties, jointly or individually, may construct channels or undertake other works pursuant to provisions established in articles 17 to 22.

The Party who constructs or has constructed any works shall continue to be responsible for their maintenance and control.

The Party who constructs or has constructed a channel shall, in addition, adopt the relevant regulations, shall exercise surveillance thereover to ensure compliance with adequate means for this purpose, and shall be responsible for the extraction, removal or demolition of craft, naval artifacts, aircraft, sunken remains or cargo, or any other objects that are likely to constitute an obstacle or hazard to navigation, and which are located sunken or aground in said waterway.

Article 13

In those cases not covered in article 12, the Parties shall co-ordinate, through the Administrative Commission, a rational sharing of responsibilities for the maintenance, control and regulation of the various sections of the channels, keeping in mind the special interests of each Party and the works that each has undertaken.

Article 14

All regulations relevant to the channels situated in waters of common utilization, and any substantial or permanent modification thereto, must be effectuated subject to advance consultation with the other Party.

In no case and under no conditions may a regulation be adopted which might cause appreciable detriment to the navigation interests of either Party.²⁰²

211. One further example is the Convention regarding the regime of navigation on the Danube (Belgrade, 18 August 1948):

Article 1

Navigation on the Danube shall be free and open for the nationals, vessels of commerce and goods of all States, on a footing of equality in regard to port and navigation charges and conditions for merchant shipping. The foregoing shall not apply to traffic between ports of the same State.

...

Article 3

The Danubian States undertake to maintain their sections of the Danube in a navigable condition for river-going and, on the appropriate sections, for sea-going vessels, to carry out the works necessary for the maintenance and improvement of navigation conditions and not to obstruct or hinder navigation on the navigable channels of the Danube. The Danubian States shall consult the Danube Commission (article 5) on matters referred to in this article.

The riparian States may within their own jurisdiction undertake works for the maintenance of navigation, the execution of which is necessitated by urgent and unforeseen circumstances. The States shall inform the Commission of the reasons which have necessitated the works, and shall furnish a summary description thereof.²⁰³

5. HELSINKI RULES

212. The Helsinki Rules on the Uses of the Waters of International Rivers²⁰⁴ address "Navigation" in chapter IV. The articles under that heading which are succinct, merit quotation.

²⁰² American Society of International Law (*op. cit.*), vol. XIII, No. 2 (March 1974), pp. 253-254.

²⁰³ United Nations, *Treaty Series*, vol. 33, pp. 197 and 199. Parties: Bulgaria, Czechoslovakia, Hungary, Romania, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Yugoslavia.

²⁰⁴ For reference, see footnote 72 above.

²⁰¹ *Ibid.*, vol. 769, p. 58.

CHAPTER IV. NAVIGATION

Article XIII

1. This Chapter refers to those rivers and lakes portions of which are both navigable and separate or traverse the territories of two or more States.

2. Rivers or lakes are "navigable" if in their natural or canalized state they are currently used for commercial navigation or are capable by reason of their natural condition of being so used.

3. In this chapter the term "riparian State" refers to a State through or along which the navigable portion of a river flows or a lake lies.

Article XIII

Subject to any limitations or qualifications referred to in these chapters, each riparian State is entitled to enjoy rights of free navigation on the entire course of a river or lake.

Article XIV

"Free navigation", as the term is used in this chapter, includes the following freedom for vessels of a riparian State on a basis of equality:

- (a) freedom of movement on the entire navigable courses of the river or lake;
- (b) freedom to enter ports and to make use of plants and docks; and
- (c) freedom to transport goods and passengers, either directly or through trans-shipment, between the territory of one riparian State and the territory of another riparian State and between the territory of a riparian State and the open sea.

Article XV

A riparian State may exercise rights of police, including but not limited to the protection of public safety and health, over that portion of the river or lake subject to its jurisdiction, provided the exercise of such rights does not unreasonably interfere with the enjoyment of the rights of free navigation defined in articles XIII and XIV.

Article XVI

Each riparian State may restrict or prohibit the loading by vessels of a foreign State of goods and passengers in its territory for discharge in such territory.

Article XVII

A riparian State may grant rights of navigation to non-riparian States on rivers or lakes within its territory.

Article XVIII

Each riparian State is, to the extent of the means available or made available to it, required to maintain in good order that portion of the navigable course of a river or lake within its jurisdiction.

*Article XVIII bis*²⁰⁵

1. A riparian State intending to undertake works to improve the navigability of that portion of a river or lake within its jurisdiction is under a duty to give notice to the co-riparian States.

2. If these works are likely to affect adversely the navigational uses of one or more co-riparian States, any such co-riparian State may, within a reasonable time, request consultation. The concerned co-riparian States are then under a duty to negotiate.

3. If a riparian State proposes that such works be undertaken in whole or in part in the territory of one or more other co-riparian States, it must obtain the consent of the other

²⁰⁵ Article XVIII bis was included in the Helsinki Rules subsequently (see ILA, *Report of the Fifty-sixth Conference (New Delhi, 29 December 1974-4 January 1975)* (London, 1976), p. xiii).

co-riparian State or States concerned. The co-riparian State or States from whom this consent is required are under a duty to negotiate.

Article XIX

The rules stated in this chapter are not applicable to the navigation of vessels of war or of vessels performing police or administrative functions, or, in general, exercising any other form of public authority.

Article XX

In time of war, other armed conflict, or public emergency constituting a threat to the life of the State, a riparian State may take measures derogating from its obligations under this chapter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. The riparian State shall in any case facilitate navigation for humanitarian purposes.

213. A commentary to article XIII of the Helsinki Rules quotes the interpretation of international fluvial law set forth by the Permanent Court of International Justice in the *River Oder* case, and says of it:

The Court's statement in respect to the "perfect equality" of the co-riparian States is but a specific application of the principle of equality of rights in equitable utilization.²⁰⁶

214. This interpretation—to which, as noted above,²⁰⁷ Judge Jiménez de Aréchaga subscribes—is also supported in one scholar's acute examination of "equitable utilization", in the following terms:

While this [*River Oder Case*] analysis was directed by the Court to the issue before it—the rights of navigation of co-riparians on an international river—both its language and its reasoning make it equally applicable to non-navigational uses. First, the Court expressly stated that it was applying "international fluvial law in general". If only the law of navigation were intended, it could have been readily so stated. Secondly, "the requirements of justice and the considerations of utility" referred to by the Court apply with equal force to both navigational and non-navigational uses. Thus, there is no utilitarian or logical basis for distinguishing the two. Finally, if navigation on an international river—which involves the physical entry of foreign vessels into the territory of another State—does not violate State sovereignty, it would seem that, *a fortiori*, States would have the right to use the waters of such river within their own territory subject to "the perfect equality of all riparian States" so to do.²⁰⁸

F. Boundary water sharing

215. In fact, there is substantial direct precedent in treaty law and international practice for treating the waters of international watercourses as a shared natural resource, in addition to the body of related precedent found in the sphere of navigation. Some of this precedent will be drawn upon in future reports, which will address such general principles of law governing the use of the water of international

²⁰⁶ ILA, *Report of the Fifty-second Conference, (Helsinki, 1966)* (London, 1967), p. 507.

²⁰⁷ See para. 190.

²⁰⁸ J. Lipper, "Equitable utilization", in *The Law of International Drainage Basins*, eds. A.H. Garretson, R.D. Hayton and C.J. Olmstead (Dobbs Ferry, N.Y., Oceana Publications, 1976), p. 29.

watercourses as equitable utilization and not using what is one's own to the injury of others. At this juncture, material relating to the sharing of boundary waters will be set out, for it so well illustrates that it is an implemented assumption of States that the waters of an international watercourse constitute a shared natural resource.

216. The greater proportion of treaties concerning the sharing of fresh water deal with the use of boundary waters, presumably because the physical nature of water requires co-operation of States on both sides of a boundary river if anything more than the most elementary uses are contemplated. Whatever these treaties show about the content of customary international law, it is submitted that their assumption that boundary waters are a shared natural resource is beyond controversy.

217. A number of treaties regarding hydroelectric use were entered into prior to the First World War between European States. These accepted the necessity for co-operation and recognized that sharing the use of the water was the sensible solution. For example, the Convention between France and Switzerland (Bern, 4th October 1913) regarding the use of the Rhone River laid down the rule that each State was entitled to a share in the power produced, based upon the fall of the water in relation to the extent of river bank in its territory. Switzerland, therefore, was allocated all the power resulting from the fall of water in the area where it occupied both banks of the Rhone, while it would divide equally with France the power derived from the fall of water in the area where each was a riparian.²⁰⁹

218. A forerunner of this sharing of the use of the Rhone water was article 5 of a frontier agreement of 4 November 1824 between the Canton of Neuchâtel (Switzerland) and France:

The liberty of using the watercourse for mills and other works and for irrigation will not be subordinated into the limits of sovereignty. It will appertain to each bank to the extent of half the quantity of flowing water in the lower State.²¹⁰

219. Then equal division of the use of water of boundary rivers has become a commonly used norm of sharing. The Agreement between Argentina and Uruguay concerning the utilization of the rapids of the Uruguay River in the Salto Grande area (Montevideo, 30 December 1946) provides in article 1:

The High Contracting Parties declare that, for the purposes of this agreement, the waters of the Uruguay River shall be utilized jointly and shared equally.²¹¹

220. The Treaty between the United States of America and Canada relating to the uses of the waters

of the Niagara River (Washington D.C., 27 February 1950) provides:

Article V

All water specified in article III of this Treaty in excess of water reserved for scenic purposes in article IV may be diverted for power purposes.

Article VI

The waters made available for power purposes by the provisions of this Treaty shall be divided equally between the United States of America and Canada.²¹²

221. The Treaty between El Salvador and Guatemala for the delimitation of the boundary between the two countries (Guatemala, 9 April 1938) provides:

Article II

...
Each Government reserves the right to utilize half the volume of water in frontier rivers, either for agricultural or industrial purposes...²¹³

222. The Agreement between the Soviet Union and Iran for the joint utilization of the frontier parts of the rivers Aras and Atrak for irrigation and power generation (Teheran, 11 August 1957) contains a precise provision on division of the water:

The Imperial Government of Iran and the Government of Soviet Socialist Republics, signatories to this Agreement, taking cognizance of the friendly relations existing between the two countries and desiring further to strengthen these relations, do hereby agree to utilize their respective equal rights of fifty per cent of all water and power resources of the frontier parts of the rivers Aras and Atrak for irrigation, power generation and domestic use and, to this end, agree to the following joint enterprises:

Article 1

The parties hereto agree that the utilization of their above fifty per cent right on the part of each will require separate and independent division and transmission of water and power in each party's territory, in accordance with the provisions of a general preliminary project prepared for the joint utilization of the rivers and mutually agreed upon. If the activities of one of the parties in utilizing its fifty per cent of all resources are slower than those of the other, this fact shall not deprive that party of its right of utilizing all its share.²¹⁴

223. A Convention between the Soviet Union and Turkey for the use of frontier waters and Protocol concerning the Araxe River (Kars, 8 January 1927), which entered into force on 26 June 1928, provides:

Article 1

The two Contracting Parties shall have the use of one half of the water from the rivers, streams and springs which coincide with the frontier line between the Turkish Republic and the Union of Soviet Socialist Republics.²¹⁵

224. The redrawing of the map of Europe which occurred after the First World War caused a proliferation of boundary water issues resulting from the

²⁰⁹ *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for Other Purposes than Navigation* (United Nations publication, Sales No. 63.V.4), p. 708 (cited hereinafter as *Legislative Texts*).

²¹⁰ *Ibid.*, p. 701.

²¹¹ United Nations, *Treaty Series*, vol. 671, p. 26.

²¹² *Ibid.*, vol. 132, p. 228.

²¹³ League of Nations, *Treaty Series*, vol. CLXXXIX, p. 295.

²¹⁴ *British and Foreign State Papers, 1957-1958* (London, H.M. Stationery Office, 1966), vol. 163, p. 428.

²¹⁵ *Legislative Texts*, p. 384.

coming into being of numerous new boundaries based on rivers. These were, in the main, settled by treaty. One example of a common solution is found in the frontier agreement between Austria and Czechoslovakia (Prague, 12 December 1928), which provides:

Article 28

1. Each of the two States is entitled in principle to dispose of half the water flowing through frontier waterways.²¹⁶

225. The Treaty between Denmark and Germany relating to frontier watercourses (Copenhagen, 10 April 1922) deals, *inter alia*, with the use of water for irrigation purposes:

Article 35: Distribution of water in connection with irrigation works

The proprietors on both banks of any one of the watercourses mentioned in article 1 have equal rights as regards the use of the water, so that, if irrigation works are erected upon one bank, only half the water of the watercourses may be assigned to these works. The Frontier Water Commission shall establish detailed regulations for the apportionment of the water in connection with the erection of irrigation works.

If, however, all the proprietors and usufructuaries of the land on the opposite bank of the watercourse between the point at which the water is diverted and the point at which it re-enters the watercourse give their assent, more than half the water may be applied to irrigation works on one bank.²¹⁷

226. Another relatively recent example of 50–50 percentage sharing is the Agreement between Romania and Yugoslavia concerning the construction and operation of the Iron Gates water power and navigation system on the River Danube (Belgrade, 30 November 1963), which entered into force in 1964.²¹⁸ Under article 6, the Parties contribute equally to the costs of constructing control structures in the Iron Gates sector of the Danube and article 8 provides for equal sharing of the power produced.

227. Although the principle of equal sharing of boundary waters is generally accepted in treaties, the method of dividing either water use or energy on a 50–50 percentage basis is not the only solution employed. The agreement between Switzerland and Italy on the Averserrhein basin (Rome, 18 June 1949) is a somewhat specialized treaty, as the preamble indicates:

The Swiss Federal Council and the Government of the Republic of Italy,

Having considered an application by the Rhätische Werke für Elektrizität Company, Thusis, Switzerland, and the Edison Company, Milan, Italy, for the concession of the hydraulic power of the Reno di Lei and other watercourses situated in the Averserrhein basin,

Hereby recognize that the project submitted for the development in one single generating station of the hydraulic power of sections of Swiss and Italian watercourses will ensure the rational utilization of such power. They nevertheless note that the harnessing and utilization of such power, which can be ensured

only by one single enterprise, should be the subject of an international agreement taking account of the differences in the legislation of the two States.

They accordingly agree that the two Governments should authorize the construction, by a single concessionaire, of the installations necessary for the harnessing and utilization of such power and should share between them the energy produced, each one subsequently being free to use at its discretion and in conformity with the principles of its own legislation, the energy apportioned to it.

For this purpose, they have decided to conclude an agreement...²¹⁹

228. Article 5 provides:

Taking into account the water and gradients to be used on the respective territories, it is agreed that 70 per cent of the hydraulic power produced in the Innerferrera generating station shall be attributed to Switzerland and 30 per cent to Italy...²²⁰

229. An exchange of notes constituting an agreement between Spain and Portugal on the exploitation of border rivers for industrial purposes (Madrid, 29 August and 2 September 1912) contains the provision that each Party is "entitled to half the flow of water existing at the various seasons of the year".²²¹

230. This system of equal sharing was abandoned in the Convention between Spain and Portugal to regulate the hydroelectric development of the international section of the River Douro (Lisbon, 11 August 1927), in favour of sharing based on segmentation of the watercourse. It provides:

Article 2

The power capable of being developed on the international section of the Douro shall be distributed between Portugal and Spain as follows:

(a) Portugal shall have the exclusive right of utilizing the entire fall in level of the river in the zone included between the beginning of the said section and the confluence of the Tormes and the Douro.

(b) Spain shall have the exclusive right of utilizing the entire fall in level of the river in the zone included between the confluence of the Tormes and the Douro and the lower limit of the said international section...²²²

231. A somewhat similar type of sharing is provided for in the Agreement between the Soviet Union and Norway on the utilization of the water power of the Pasvik (Paatso) River (Oslo, 18 December 1957):

[Preamble]

The Government of Norway and the Government of the Union of Soviet Socialist Republics,

Desirous of further developing economic co-operation between Norway and the Soviet Union, and

Desirous, to this end, of utilizing the water-power of the Pasvik (Paatso) river, situated on the frontier between Norway and the Soviet Union, for their mutual benefit on the basis of an equitable apportionment between the two countries of the rights to utilize this water-power,

Have decided to conclude this Agreement [. . .]

²¹⁶ League of Nations, *Treaty Series*, vol. CVIII, p. 69.

²¹⁷ *Ibid.*, vol. X, p. 221.

²¹⁸ United Nations, *Treaty Series*, vol. 512, p. 42.

²¹⁹ *Legislative Texts*, p. 846.

²²⁰ *Ibid.*, p. 847.

²²¹ See *Yearbook . . . 1974*, vol. II (Part II), p. 131, document A/5409, para. 584.

²²² League of Nations, *Treaty Series*, vol. LXXXII, p. 133.

Article 1

This Agreement concerns the apportionment between Norway and the Soviet Union of the rights to utilize the water-power of the Pasvik (Paatso) river from the river mouth up to the point 70.32 m above sea level where the river intersects the Norwegian-Soviet State frontier[...]

Article 2

The Soviet Union shall have the right to utilize the water-power of the Pasvik (Paatso) river:

(a) In the lower section, from the river mouth to altitude 21.0 m above sea level at Svan (Salmi) lake;

(b) In the upper section, from Fjaer (Høyhen) lake 51.87 m above sea level to altitude 70.32 m above sea level, where the river intersects the Norwegian-Soviet State frontier between boundary markers 9 and 10.

Norway shall have the right to utilize water-power in the middle section of the Pasvik (Paatso) river from Svan (Salmi) lake 21.0 m above sea level to altitude 51.87 m above sea level at Fjaer (Høyhen) lake.²²³

232. There are examples of still other types of sharing, as by the allocation of waters for a given time, such as alternate days.²²⁴

233. There are a number of boundary water treaties which recognize the interest of each riparian State in the water by requiring agreement on any change in the water regime. In effect, the decision on the nature and extent of sharing is postponed. Thus the Agreement between Hungary and Czechoslovakia concerning the settlement of technical and economic questions relating to frontier watercourses (Prague, 16 April 1954) provides:

Article 9: Planning

(1) The Contracting Parties shall establish joint directives for the preparation of general plans for all hydraulic works as specified in chapter I which are to be carried out on frontier watercourses. The plans must be prepared by joint agreement in accordance with the said directives. Each Contracting Party shall, at its own expense, prepare the plans for works to be carried out in its territory. The cost of joint plans for works to be carried out in the territory of both States shall be borne by the contracting Parties in accordance with a separate agreement.

(2) The plans and all substantial modifications thereof must be approved by the Contracting Parties. The transfer of flood-protection dikes further inland from the river, or the levelling off of dikes at a lower height than approved by a plan shall not be considered a substantial modification of the plan...²²⁵

234. Similarly, Poland and the Soviet Union agree, in article 9 of their Agreement concerning the use of water resources in frontier waters (Warsaw, 17 July 1964), that neither party may, save by agreement with the other party, carry out any work in frontier waters which may affect the use of those waters by the other party.²²⁶

235. A substantial number of treaties dealing with boundary waters, which treat those waters as a shared natural resource to which the principle of equality of right applies, establish some form of joint board of watercourse commission which is given a measure of authority in the application of that principle.

236. For example, the 1946 Agreement between Argentina and Uruguay concerning the utilization of the rapids of the Uruguay River provides:

Article 1

The High Contracting Parties declare that, for the purpose of this Agreement, the waters of the Uruguay River shall be utilized jointly and shared equally.

Article 2

The High Contracting Parties agree to appoint and maintain a Mixed Technical Commission composed of an equal number of delegates from each country which shall deal with all matters relating to the utilization, damming, and diversion of the waters of the Uruguay River.²²⁷

Other articles of the treaty provide that the Mixed Technical Commission shall establish its rules and plan of work, apply certain specified priorities of water-use, make decisions by majority vote, and, in the absence of a majority or agreement by the High Contracting Parties, further provide for submitting the resultant dispute to arbitration. Article 5 provides:

The High Contracting Parties agree that permission for the use and diversion, whether temporarily or permanently, of the waters of the Uruguay River and its tributaries upstream of the dam shall be granted by the Governments only within their respective jurisdictions and after a report by the Mixed Technical Commission.²²⁸

237. The 1954 Agreement between Czechoslovakia and Hungary concerning the settlement of technical and economic questions relating to frontier watercourses provides for equal sharing but prohibits construction of works that may have an adverse effect upon the watercourse (article 23). Under article 26, a Mixed Technical Commission is established to give advice on the consequences of the establishment of construction of works in the watercourse and on whether a special agreement to authorize such construction is required.²²⁹

238. The International Joint Commission (United States and Canada) is empowered, by the provisions of the 1909 Treaty between the United Kingdom and the United States of America relating the boundary waters and questions arising along the boundary between Canada and the United States (Washington D.C., 11 January 1909), to deal with the uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line... (article III).²³⁰

²²³ United Nations, *Treaty Series*, vol. 312, pp. 274 and 276.

²²⁴ See C. A. Colliard, "Evolution et aspects actuels du régime juridique des fleuves internationaux", *Collected Courses, 1968-III* (Leyden, Sijthoff, 1970), vol. 125, pp. 372-373.

²²⁵ United Nations, *Treaty Series*, vol. 504, p. 258.

²²⁶ *Ibid.*, vol. 552, p. 194.

²²⁷ *Ibid.*, vol. 671, p. 26 (see also para. 219 above).

²²⁸ *Ibid.*, p. 30.

²²⁹ *Ibid.*, vol. 504, pp. 268 and 270 (see also para. 233 above).

²³⁰ *British and Foreign State Papers, 1908-1909* (London, H.M. Stationery Office, 1913), vol. 102, p. 138 (see also *Legislative Texts*, p. 261).

The High Contracting Parties agree that they will not permit

the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission (article IV).²³¹

Article VIII provides:

...The High Contracting Parties shall have, each on its own side of the boundary, equal and similar rights in the use of the waters hereinbefore defined as boundary waters....

The foregoing provisions shall not apply to or disturb any existing uses of boundary waters on either side of the boundary.

The requirement for an equal division may, in the discretion of the Commission, be suspended in the cases of temporary diversions along boundary waters at points where such equal division cannot be made advantageously on account of local conditions, and where such diversion does not diminish elsewhere the amount available for use on the other side...²³²

²³¹ *Ibid.*, p. 139 (and *ibid.*).

²³² *Ibid.*, pp. 140–141 (and *ibid.*, pp. 262–263).

239. In addition, a cardinal provision empowers the International Joint Commission to examine and report upon the facts of particular cases and make recommendations, and thus establishes the Commission as an effective agency of co-ordination:

Article IX. The High Contracting Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

The International Joint Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

Such reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award...²³³

²³³ *Ibid.*, pp. 141–142 (and *ibid.*, p. 263).

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

[Agenda item 5]

DOCUMENT A/CN.4/331 and ADD.1

Second report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur

[Original: English]
[11 April and 30 June 1981]

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ABBREVIATIONS

I.C.J.	International Court of Justice
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
OAS	Organization of American States

Introductory note

1. The present report on the topic of jurisdictional immunities of States and their property is a continuation of a series of studies prepared for the International Law Commission. It follows the first preliminary report on the same topic, submitted by the Special Rapporteur in June 1979,¹ which in turn was

preceded by an exploratory report presented in 1978 by the Working Group on jurisdictional immunities of States and their property.²

2. In that exploratory report the Working Group examined some general aspects of the topic and

¹ See *Yearbook... 1979*, vol. II (Part One), p. 227, document A/CN.4/323.

²A/CN.4/L.279/Rev.1 (partially reproduced in *Yearbook... 1978*, vol. II (Part Two), pp. 153–155, document A/33/10, chap. VIII, sect. D, annex).

explored possible approaches to its study, as well as possible methods of work for such a study.³ The report also contained a brief historical background of the interest in and decisions taken by the Commission in relation to this topic, which appeared in a 1948 memorandum of the Secretary-General⁴ under a separate section entitled "Jurisdiction⁴ over foreign States" covering "the entire field of jurisdictional immunities of States and their property, of their public vessels, of their sovereigns, and of their armed forces".⁵ The topic as it is now entitled was included in the provisional list of 14 topics selected for codification by the Commission at its first session, in 1949.⁶ Although in its work on various topics the Commission had touched upon certain aspects of the question of jurisdictional immunities of States and their property,⁷ it did not have time to give further consideration to the topic until 1977, notwithstanding a second "Survey of international law" submitted by the Secretary-General in 1971⁸ which included a section entitled "Jurisdictional immunities of foreign States and their organs, agencies and property".⁹ At its twenty-ninth session, the Commission recommended selection of the topic for active consideration in the near-future, bearing in mind its day-to-day practical importance as well as its

suitability for codification and progressive development.¹⁰ On 19 December 1977, the General Assembly adopted resolution 32/151, paragraph 7 of which reads as follows:

[*The General Assembly*]

...
Invites the International Law Commission, at an appropriate time and in the light of progress made on the draft articles on State responsibility for internationally wrongful acts and on other topics in its current programme of work, to commence work on* the topics of international liability for injurious consequences arising out of acts not prohibited by international law and jurisdictional immunities of States and their property.*

3. In response to that invitation, the Commission at its thirtieth session established a working group on the topic.¹¹ On the basis of the recommendations contained in paragraph 32 of the exploratory report submitted by the Working Group,¹² the Commission decided to:

(a) include in its current programme of work the topic "Jurisdictional immunities of States and their property";

(b) appoint a Special Rapporteur for that topic;

(c) invite the Special Rapporteur to prepare a preliminary report at an early juncture for consideration by the Commission;

(d) request the Secretary-General to address a circular letter to the Governments of Member States inviting them to submit by 30 June 1979 relevant materials on the topic, including national legislation, decisions of national tribunals and diplomatic and official correspondence;

(e) request the Secretariat to prepare working papers and materials on the topic, as the need arose and as requested by the Commission or the Special Rapporteur for the topic.¹³

4. The report of the Commission relating to the work done on the topic was the object of extensive discussion in the Sixth Committee during the thirty-third session of the General Assembly.¹⁴ By its resolution 33/139, adopted on 19 December 1978, the General Assembly stated:

Taking note of the preliminary work done by the International Law Commission regarding the study of... jurisdictional immunities of States and their property,

...
3. Approves the programme of work planned by the International Law Commission for 1979;

...
6. Further recommends that the International Law Commission should continue its work on the remaining topics in the current programme—

including, notably, jurisdictional immunities of States and their property.

5. On the strength of the recommendation made by the General Assembly, the Special Rapporteur pre-

* Emphasis by the Special Rapporteur.

¹⁰ *Yearbook...* 1977, vol. II (Part Two), document A/32/10, para. 110.

¹¹ *Yearbook...* 1978, vol. II (Part Two), p. 152, document A/33/10, para. 179.

¹² See footnote 2 above.

¹³ *Yearbook...* 1978, vol. II (Part Two), p. 153, para. 188.

¹⁴ *Official Records of the General Assembly, Thirty-third Session, Annexes*, agenda item 114, document A/33/419, paras. 263 and 264.

³ *Ibid.*, paras. 11–31.

⁴ *Survey of International Law in Relation to the Work of Codification of the International Law Commission* (United Nations publication, Sales No. 1948.V.1(I)).

⁵ *Ibid.*, para. 50.

⁶ See *Yearbook...* 1949, p. 281, para. 16.

⁷ The Commission referred to the immunities of State-owned ships and warships in its 1956 draft articles on the law of the sea (*Yearbook...* 1956, vol. II, pp. 256 *et seq.*, document A/3159, chap. II, sect. II). The immunities of State property used in connection with diplomatic missions were considered in the 1958 draft articles on diplomatic intercourse and immunities (*Yearbook...* 1958, vol. II, pp. 89 *et seq.*, document A/3859, chap. III, sect. II), while those of such property used in connection with the consular posts were dealt with in the 1961 draft articles on consular relations (*Yearbook...* 1961, vol. II, pp. 92 *et seq.*, document A/4843, chap. II, sect. IV). The 1967 draft articles on special missions also contained provisions on the immunity of State property (*Yearbook...* 1967, vol. II, pp. 347 *et seq.*, document A/6709/Rev.1, chap. II, sect. D), as did the 1971 draft articles on the representation of States in their relations with international organizations (*Yearbook...* 1971, vol. II (Part One), pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, sect. D). International conventions have been elaborated on the basis of the above-mentioned sets of draft articles (see *Yearbook...* 1978, vol. II (Part Two), p. 152, document A/33/10, chap. VIII, sect. D, annex, footnote 686).

⁸ *Yearbook...* 1971, vol. II (Part Two), p. 1, document A/CN.4/245. In the survey, it was said:

"Differences of view exist on these questions, as indeed they do on the substantive matters referred to above. But it may be suggested that the differences are not in all cases large, although they can nevertheless cause friction and uncertainty; that, as was said in the 1948 Survey, it is doubtful whether considerations of any national interest of decisive importance stand in the way of a codified statement of the law on this topic, commanding general acceptance; and that its day-to-day importance makes it suitable for codification and progressive development." (*Ibid.*, p. 20, para. 75.)

⁹ *Ibid.*, pp. 18–21, chap. I, sect. 5.

pared and submitted the first preliminary report on the topic¹⁵ in the spirit in which the topic had been discussed in the Commission and in the Sixth Committee and in the light of relevant materials made available by Governments of Member States in response to a request circulated by the Legal Counsel on 18 January 1979.¹⁶ The first report identified the types of relevant source materials to be examined, namely, the practice of States, in the form of national legislation, judicial decisions of municipal courts and governmental practice; international conventions; international adjudication; and opinions of writers. It contained a historical sketch of international efforts towards codification, including those of the League of Nations Committee of Experts and of the International Law Commission, as well as of regional legal committees and professional and academic institutions. It gave a rough analytical outline of the possible content of the law of State immunity covering a number of initial questions: the problem of defining certain concepts, the general rule of State immunity including the extent of its application—noting consent as an element of the rule together with some possible exceptions—immunity from attachment and execution, as well as other procedural and related questions. The first report also underlined the possibility and practicability of the eventual preparation of draft articles on the topic.

6. The first report was discussed by the Commission during its thirty-first session, and a consensus emerged to the effect that the Special Rapporteur should clarify, in the first instance, the general principles and the content of the basic rules governing the subject and endeavour with the utmost caution to define the limits of immunities and determine the exceptions to them.¹⁷ As reported by the Chairman of the Commission to the Sixth Committee, emphasis had also been placed on the need for detailed analysis of the practice and legislation of all States, particularly of the socialist countries and the developing countries.¹⁸ Moreover, it had been the Commission's view that consideration of the topic should take the practice of States as its point of departure. The topic was further discussed in the Sixth Committee, which recommended to the General Assembly for adoption a draft resolution,¹⁹ reading in part as follows:

The General Assembly,

...

Noting further with appreciation the progress made by the International Law Commission in the preparation of draft articles

¹⁵ See footnote 1 above.

¹⁶ Pursuant to the Commission's request noted in para. 3(d) above.

¹⁷ *Yearbook... 1979*, vol. II (Part Two), p. 186, document A/34/10, para. 178.

¹⁸ *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 38th meeting, para. 30; and *ibid.*, Sessional fascicle, corrigendum.

¹⁹ A/C.6/34/L.21, adopted by the Sixth Committee by consensus. The General Assembly followed the recommendation of the Sixth Committee and adopted the draft without a vote on 17 December 1979 as resolution 34/141.

on State responsibility and on treaties concluded between States and international organizations or between international organizations, as well as the work done by it regarding the study of the law of the non-navigational uses of international watercourses, jurisdictional immunities of States and their property, the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and the review of the multilateral treaty-making process,

...

4. *Recommends* that the International Law Commission should:

...

(e) Continue its work on jurisdictional immunities of States and their property, taking into account information furnished by Governments and replies to the questionnaire addressed to them, as well as views expressed on the topic in debates in the General Assembly;

...

7. Pursuant to the recommendation made by the General Assembly, the Special Rapporteur continued his study and examination of the source materials on the topic in the light of the debate that had taken place in the Sixth Committee and the views expressed in that Committee by various representatives as well as the direction of emerging trends indicated by the Commission. In the meantime, replies from Governments continued to reach the Special Rapporteur both in the form of information in response to the circular note of 18 January 1979 and of replies to the questionnaire circulated by the Secretariat to Governments of Member States on 2 October 1979.²⁰

8. On the basis of the source materials hitherto made available to the Special Rapporteur, the present (second) report on the topic has been prepared for submission to the Commission in the form of draft articles with an appropriate analysis of source materials leading to the formulation of the provisions of each article. The draft articles are present in two parts: part I, entitled "Introduction", covering initial questions essential to the study of the topic, and part II, entitled "General principles", regulating the question of jurisdictional immunities of States and their property.

9. Further discussion by the Commission on the initial questions and general principles will throw more light on subsequent parts of the draft articles on the topic under consideration. Additional information from Governments of Member States regarding their practice and replies to the questionnaire will provide a welcome source of information and views to be consulted in the preparation of the remaining parts of the study of the topic. Comments and observations of representatives of Governments in the Sixth Committee will afford further help in the search for balanced and practical solutions to specific problems involved in the question of jurisdictional immunities of States and their property.

²⁰ Replies to the questionnaire will serve to indicate the views of Governments on a number of key issues vital to the preparation of draft articles on the topic.

Draft articles on jurisdictional immunities of States and their property

PART I. INTRODUCTION

10. Part I of the draft articles on jurisdictional immunities of States and their property is entitled "Introduction". Appropriately enough, it will serve to introduce the substantive content of norms of international law to be embodied in the ensuing parts of the draft articles by identifying with sufficient clarity and delineating the scope of the articles, by defining the meaning and clarifying the use of certain terms which initially appear indispensable in any serious study and treatment of the issues involved in the jurisdictional immunities of States and their property, and by indicating with precision the prospective intertemporal effect of the articles.

11. It should be made clear at the very outset that provisions of the draft articles in this part deal with initial questions, prior to an analytical examination of the substantive content of the rules to be elaborated. Subsequent treatment of the ensuing operative parts may reveal a need for a closer look at part I to see whether additional provisions might be required to complete a revised version of the articles in that part.

ARTICLE 1: Scope of the present articles

12. One of the questions to be determined in the very first instance is the scope of the draft articles, which may or may not take the form of a general convention. The purpose of the articles is to codify what might be considered as existing customary rules of international law on the topic of jurisdictional immunities of States and their property. Closely linked to the process of identifying or determining existing rules is the possibility or opportunity of progressively developing additional rules to supplement and accelerate the process of crystallization of norms on the subject.

13. The identity of the subject matter may be defined by reference to the ultimate utilization of the draft articles, the scope of which in turn will become clearer. This first provision should therefore indicate without equivocation the questions to which the articles should apply. The simplest and clearest indication would directly bring out the composite ingredients or constituent elements of the topic under examination. In any given situation in which the question of State immunity may arise, a few basic notions or concepts appear to be inevitable. In the first place, the main character or the principal subject of the present study is unequivocally "jurisdictional immunities", whatever the inherent complexities and subtleties of that notional concept. Secondly, the existence of two independent sovereign States is a prerequisite to the question of jurisdictional immunities. For the purpose of the present articles, one will be called the "territorial State" and another the "foreign State". The selection of the two contrasting terms is designed to avoid the

possibility of conceptual overlapping, as the question arises in fact when the activities of the "foreign State" overlap the territorial jurisdiction of the "territorial State". The jurisdictional immunities in question are accorded in normal circumstances to States, and they are sometimes said, and correctly said, to belong to States, namely, foreign States. On the other hand, such immunities, which are indubitably and incontestably the immunities of States, are sometimes said to cover—or, with fairness and accuracy, to "extend to"—property of States, without becoming, as it were, the right of State property or exercisable by the State. It should be added finally that the scope of the present articles should be wide enough not only to cover the question of jurisdictional immunities of States and their property but also to encompass or include provisions for all the questions relating thereto.

TEXT OF ARTICLE 1

14. The first article in the present draft could accordingly read as follows:

Article 1. Scope of the present articles

The present articles apply to questions relating to jurisdictional immunities accorded or extended by territorial States to Foreign States and their property.

ARTICLE 2: Use of terms

15. The use of certain key terms for the purpose of the draft articles requires primary attention, immediately following the identification of the scope of their application in article 1. A number of terms that appear to need clarification by way of precise definition are visible from a glance at the wording of the preceding article. As an initial minimum, the use of the following terms should be clarified:

- (a) "immunity"
- (b) "jurisdictional immunities"
- (c) "territorial State"
- (d) "foreign State"
- (e) "State property"
- (f) "trading or commercial activity"
- (g) "jurisdiction".

16. This initial list is clearly not exhaustive of the terms that may need definition and further clarification. The terms listed are nevertheless indicative of the expressions which, at this stage of the study, appear to constitute vital elements readily discernible in the early parts of the draft articles. The need for inclusion of additional terms may become apparent in

subsequent reports dealing with limitations and exceptions to jurisdictional immunities and other incidental questions. The current list may therefore be regarded as open-ended, until all other parts of the draft articles have been fully considered.

(a) "Immunity"

17. "Immunity" is a legal concept which can be expressed in terms of jural relationship. Just as a "right" is correlated to a corresponding "duty" incumbent on another party, "immunity" to which a person or party or State is entitled is correlated to "no power" on the part of the corresponding authority. It signifies absence or lack of power, or necessity to withhold or suspend the exercise of such power. In other words, the expression "immunity" connotes the non-existence of power or non-amenability to the jurisdiction of the national authorities of a territorial State.

18. Viewed generically, "immunity" is but a species, or another aspect, of privilege. The term "privilege" is more often used, and correctly so, with a more positive connotation. "Privileges" presuppose the availability of positive or substantive advantages, whereas "immunities" imply the absence of power or abstention from its exercise. The term "privilege" is closer to "power", which is correlated to "liability", but the expression is not easily expressible in jural terminology. Privileges, in general usage, are matters of courtesies subject to reciprocity, and are not always enforceable as legal rights unless specifically confirmed in an international convention or by mutual agreement.

19. "Immunity" therefore is a right or a privilege. Hence, the expression "the privilege of immunity" is not uncommon. By way of illustration, the proposition that a foreign State possesses jurisdictional immunity, or is immune from the jurisdiction of competent courts of the territory, can be restated correlatively: "the territorial State has or exercises no power or jurisdiction over the foreign sovereign State". Immunity can as such be regarded as a right that is positive in form, but negative in substance. It is negative in the sense that it denotes "no power" or "non-use of authority" by the correlative partner or otherwise fully competent counterpart.

(b) "Jurisdictional immunities"

20. State immunity, like the immunity accorded to ambassadors and members of a diplomatic mission, is jurisdictional in nature. States are immune from the jurisdiction of another equally sovereign State. "Jurisdictional immunities" do not result in exemption from the application of substantive law. No foreign State can be said to be immune from the laws of the territorial State applicable within that State's territory. Just as diplomatic agents are required to observe the laws of the host country notwithstanding their immuni-

ties from the jurisdiction of the territorial authorities,²¹ States which extend their activities within the territorial confines of other States will find themselves subject to the internal laws of the territorial States. Thus the fiction of extritoriality or extraterritorial rights of ambassadors, which has long been exploded in international practice,²² has never had any consistent application in regard to States. As each State possesses a territory which does not overlap or coincide with that of another State, there is no physical presence, as in the case of an accredited diplomat, in the territorial jurisdiction of another State. Nevertheless, the activities of a State could be conducted within the territory of another State, and its property located in the areas under the territorial jurisdiction of that other State could become a subject of dispute or a target for seizure or attachment or execution of a judgement debt. In this way, the question of State immunity may arise—but it should be noted that the immunity in question is from the jurisdiction of the territorial authorities only, and not from the application of the substantive provisions of the territorial law.

21. In the case of States, the absence of legal or substantive immunity from the territorial laws of other States is clearly manifested upon waiver of jurisdictional immunities or voluntary submission to the territorial jurisdiction or otherwise consenting to be proceeded against before the authorities of the territorial State. Thereafter, the substantive and also procedural rules of the local law, including all aspects of the *lex fori*, that may be or may have been temporarily suspended on account of State immunities, will resume their normal application. The comparison with the purely jurisdictional character of diplomatic immunities is further illustrated by the necessarily provisional nature of the immunities *ratione personae* of a diplomatic agent. Thus, if an action is brought after the end of his mission, the diplomatic agent concerned is amenable to the local jurisdiction in respect of his private and non-official acts, including those performed during the term of his office.²³

22. As will be seen in connection with the use of the term "jurisdiction", State immunities are exemptions from the jurisdiction of the judicial as well as of the administrative authorities of the territorial State. It will

²¹ See art. 41 of the 1961 Vienna Convention on Diplomatic Relations (United Nations, *Treaty Series*, vol. 500, p. 95); hereinafter called "1961 Vienna Convention".

²² See for example the case *The Empire v. Chang and others* (1921) (*Annual Digest of Public International Law Cases, 1919-1922* (London), vol. 1 (1932), case No. 205, p. 288), where the Supreme Court of Japan confirmed the conviction of ex-employees of the Chinese Legation in respect of offences committed during their employment as attendants but unconnected with their official duties.

²³ The Supreme Court of Japan held that:

"...an offence committed by such persons is not purged of its *prima facie* quality as an illegal act. Whilst they may not be tried in the territorial courts during the term of their office or employment, this may naturally be effected when they become divested of it..." (*ibid.*).

also be seen that the application of State immunity presupposes the existence of a situation in which the territorial State would be vested with a valid or competent jurisdiction in accordance with the ordinary rules of private international law. The expression covers immunities from various phases, not only from jurisdiction *par excellence* but also, as will be seen later, from execution.

(c) “Territorial State”

23. To invoke the application of the maxim *par in parem imperium non habet* there must be two equals, i.e. two equal sovereign States. The term “territorial State” is adopted for practical convenience to denote the State before whose authorities proceedings have been brought and jurisdictional immunities invoked. A “territorial State” is therefore the State in whose territorial jurisdiction a dispute has arisen involving another State claiming exemption from the exercise of such jurisdiction over an unwilling or unconsenting State from outside the boundary of the territorial State. The State of the territory is therefore the State the exercise of whose jurisdiction is being questioned, if not challenged, because a party before its authorities enjoys an equally sovereign status and as such is not subject or amenable to its jurisdiction without consent.

24. A dispute which has arisen in any given case may concern a foreign State directly or only indirectly, because its property is involved as a subject of litigation or in a provisional measure of attachment or in satisfaction of a judgement.

(d) “Foreign State”

25. The expression “foreign State” does not require much clarification. The term is practically self-evident if not self-explanatory. It signifies a State foreign to the jurisdiction of the territorial State. It has an identity distinct from the local State whose territorial jurisdiction has been invoked in legal proceedings against the external or foreign State or involving the property of that State. The foreign State is therefore a *sine qua non* in the situation in which the question of immunity of equals arises. It is the other equal in the duality of equality of States.

(e) “State property”

26. The notion of property belonging to a State, or “State property” (“*biens d’Etat*”) has received some clarification from earlier work by the Commission, especially in the context of the draft articles on succession of States in respect of matters other than treaties.²⁴ The use of this term for the purpose of the

²⁴ See arts. 4–14 of the draft articles on succession of States in respect of matters other than treaties, and commentaries thereto, as adopted by the Commission at its thirty-first session (*Yearbook... 1979*, vol. II (Part Two), pp. 15 *et seq.*, document A/34/10, chap. II, sect. B). See also the seventh report on succession of States in respect of matters other than treaties: *Yearbook... 1974*, vol. II (Part One), p. 91, document A/CN.4/282.

draft articles under preparation appears to be essentially similar. There is therefore no need to attempt to redefine the term “State property”; the meaning to be ascribed to it could remain as earlier defined. It should include not only property, but also rights and interests which are owned by the State, in the present context, the foreign State. Ownership for the purpose of this definition is determined in the first instance by the internal law of the State owning the property.²⁵ This does not mean, however, that the territorial authorities would have no say on the question. As a matter of fact, differences in the internal laws on questions of ownership or proprietary rights or interests constitute a rich source of conflict of laws. The use of the term as clarified is serviceable, but it is not determinative of the question whether or not in a given situation a property said to be property of a foreign State is actually immune from the jurisdiction of the territorial State. This could well depend on the classification of the types of State property for purposes of immunities from jurisdiction as well as immunities from execution, which will require a fresh and closer examination in the later parts of the draft articles.

(f) “Trading or commercial activity”

27. Without at this stage indicating, on the basis of State practice, whether or not and to what extent the foreign State will be accorded jurisdictional immunities in regard to its trading or commercial activities by the authorities of the territorial State, it is abundantly clear that it is in the area of trading activities that the question of jurisdictional immunities of States and their property most frequently arises. While the determination of the precise extent of immunities recognized and accorded in the practice of States in the field of trading activities is a matter to which considerable attention will be devoted in the future part III of the present articles, it is clearly desirable to clarify the notion of trading or commercial activity in this initial article on the use of terms.

28. “Trading or commercial activity” in this context can mean more than just a particular commercial transaction or a particular commercial act. It certainly covers the entire series of acts or transactions that constitute a regular course of commercial conduct. Thus a commercial transaction or act or contract, or the combination of several such activities, will be considered as forming part of the course of conduct traditionally associated with trade or commerce.

(g) “Jurisdiction”

29. The term “jurisdiction” when used in connection with immunities from jurisdiction covers not only the tail end of jurisdiction—namely, the power to give satisfaction to the judgement rendered or execution of judgement—but also each and every aspect of the

²⁵ *Yearbook... 1979*, vol. II (Part Two), p. 17, document A/34/10, chap. II, sect. B, art. 5.

judicial and administrative power connected with adjudication. Although the expression "jurisdiction" may have more than one meaning, including that in comparative law terminology which signifies a particular legal system or the territorial limits of the application of a juridical system, for present purposes the term is employed in its more traditional usage as synonymous with "competence", and when applied to a court is referable principally to the judicial competence or the power of a tribunal to adjudicate or to settle disputes by a peaceful means known as judicial settlement or adjudication. The expression *juris-dictio* literally means the announcement (or pronouncement or determination) of the law or the respective rights of the parties in litigation before the sitting or trying authority.

30. Furthermore, the expression "jurisdiction" in this context is used not only in relation to the right of sovereign States to exemption from the exercise of the power to adjudicate, normally assumed by the judiciary or magistrate within a legal system, but also in relation to the non-exercise of all other administrative and executive powers, by whatever measures or procedures and by whatever authorities of the territorial State. The concept therefore covers the entire judicial process, from the initiation or institution of proceedings, service of writs, investigation, examination, trial, orders which can constitute provisional or interim measures, to decisions rendering various instances of judgements and execution of the judgements thus rendered, or their suspension and further exemption.

31. It is clear that while "jurisdiction" covers "execution", the immunities of States from the one are entirely distinguishable and separate from the other. Thus, a waiver of immunity from jurisdiction does not imply consent or submission to measures of execution. Similarly, the court of the territorial State may in a given situation decide to exercise jurisdiction in a suit against a foreign State on different grounds, such as the commercial nature of the activities involved, the consent of the foreign State, voluntary submission, or waiver, but will have to reconsider and re-examine the question of its own competence when it comes to execute the judgement so rendered. It will be seen that at a later stage of execution the immunities attributable to State property will vary with further distinctions to be made of the types of State property which may or may not be susceptible to measures of execution.

A meaning other than that defined in the articles

32. It is important to point out that the use of the terms listed in this article as explained and clarified is not intended to affect the use of those terms or the meanings that may be attributed to them in another context, in a different connection, in the internal law of any State, or even by the rules of any international organization. Reference is made to such rules of

international organizations since they may be relevant in relation to the status of the premises of permanent missions accredited to an international organization within the territory of a host country under a headquarters agreement or an international convention.

TEXT OF ARTICLE 2

33. Article 2 of the present articles may be thus formulated:

Article 2. Use of terms

1. For the purposes of the present articles:

(a) "immunity" means the privilege of exemption from, or suspension of, or non-amenability to, the exercise of jurisdiction by the competent authorities of a territorial State;

(b) "jurisdictional immunities" means immunities from the jurisdiction of the judicial or administrative authorities of a territorial State;

(c) "territorial State" means a State from whose territorial jurisdiction immunities are claimed by a foreign State in respect of itself or its property;

(d) "foreign State" means a State against which legal proceedings have been initiated within the jurisdiction and under the internal law of a territorial State;

(e) "State property" means property, rights and interests which are owned by a State according to its internal law;

(f) "trading or commercial activity" means:

- (i) a regular course of commercial conduct, or**
- (ii) a particular commercial transaction or act;**

(g) "jurisdiction" means the competence or power of a territorial State to entertain legal proceedings, to settle disputes, or to adjudicate litigations, as well as the power to administer justice in all its aspects.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be ascribed to them in the internal law of any State or by the rules of any international organization.

ARTICLE 3: Interpretative provisions

34. It follows from the examination of the list of terms defined and to some extent clarified in the preceding article that at least two or three of the terms listed should be given further illustration by way of interpretation. Another article is called for to serve as interpretative provisions for the expressions "foreign State" and "jurisdiction", as well as an indication of the method of interpreting or determining the trading or commercial activity of a State. The interpretative clauses are not absolute, in the sense that the expressions to which possible interpretations are

outlined may still be open to other, different, meanings if such were expressly indicated or specifically provided in the relevant articles, or otherwise agreed to by the parties concerned.

(a) *The expression "foreign State"*

35. Upon further analysis, the term "foreign State", which may seem to have been given sufficient definition and clarification in article 2, paragraph 1(d), appears to require further explanation, especially in the context of jurisdictional immunities, with reference to the essential components which compose or constitute the "foreign State" for the purpose of receiving the benefits of State immunity. The list of beneficiaries of State immunity merits some attention at this stage, on the clear understanding that the types of beneficiaries listed may or may not, in any or all cases, be accorded jurisdictional immunities. The list of such potential recipients of State immunity is noteworthy as an indication of possible categories of entities which could in actual State practice participate in the enjoyment of jurisdictional immunities in the name and on behalf of the State of which they form an essential or central part. Such a list may include the following categories:

(i) *The sovereign or head of State*

36. That a foreign sovereign enjoys jurisdictional immunity, including immunity from personal arrest and detention within the territory of another State, has been firmly established in State practice.²⁶ The majority of writers have treated the immunities of foreign sovereigns together with those of foreign States. In an early draft convention,²⁷ for instance, the head of State was included in the definition of the term "State".

37. In the practice of some countries, the doctrine of State immunity has grown out of the immunity of foreign sovereigns who are representatives of the nations of which they are the heads.²⁸ Sovereign

²⁶ See for example the case *Mighell v. Sultan of Johore* (1893) (United Kingdom, *The Law Reports of the Incorporated Council of Law Reporting, Queen's Bench Division, 1894* (London), vol. I, p. 149) and the cases *Wadsworth v. Queen of Spain* and *De Haber v. Queen of Portugal* (1851) (*id.*, *Queen's Bench Reports*, new series, vol. XVII (London, Sweet, 1855), p. 171). See remarks of Chief Justice Campbell in the *De Haber* case: footnote 28 below. Compare with *Hullett v. King of Spain* (1828) (R. Bligh, *New Reports of Cases heard in the House of Lords*, vol. II (1828) (London, Saunders and Benning, 1830), p. 31) and *Duke of Brunswick v. King of Hanover* (1844) (C. Clark and W. Finnely, *House of Lords Cases*, vol. II (1848–1850) (London, Spettigue and Farrance, 1851), p. 1).

²⁷ See art. 1, para. (a) of the "Draft convention and comment on competence of courts in regard to foreign States, prepared by the Research in International Law of the Harvard Law School", in *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 26, No. 3 (July 1932), p. 475.

²⁸ See for example the Statement of Chief Justice Campbell in the *De Haber v. the Queen of Portugal* case:

"... To cite a foreign potentate in a municipal court, for any complaint against him in his public capacity, is contrary to the law of nations, and an insult which he is entitled to resent." (United Kingdom, *Queen's Bench Reports* (*op. cit.*), pp. 206–207.)

immunity in Anglo-American practice, for instance, can be said to be a consequence of the personal immunity of the local sovereign.²⁹ It is not clear in State practice how far foreign sovereigns could enjoy jurisdictional immunities from the local courts. Judicial decisions in some jurisdictions are indecisive,³⁰ while the jurisprudence of many countries tends to confine the application of personal immunities of foreign sovereigns and other heads of State within even narrower limits.³¹ Although earlier cases frequently concerned immunities of the sovereign heads of State, more recent cases have been reported concerning immunities of heads of State who are not sovereigns. Presidents of republics³² are as much entitled to State immunities as emperors, kings and other potentates. The expression "sovereign immunity", used interchangeably with the term "State immunity", still lingers in the official texts of common law jurisdictions—in national legislation as well as in judicial decisions.³³

²⁹ See the case of the *Prins Frederik* (1820), the first British case that touched the immunities of foreign States and their property (J. Dodson, *Reports of Cases Argued and Determined in the High Court of Admiralty*, vol. II (1815–1822) (London, Butterworth, 1828), p. 451).

³⁰ See for example the case *The Swift* (1813), where Lord Stowell said:

"The utmost that I can venture to admit is, that, if the King traded, as some sovereigns do, he might fall within the operation of these statutes [Navigation Acts]. Some sovereigns have a monopoly of certain commodities, in which they traffick on the common principles that other traders traffick; and, if the King of England so possessed and so exercised any monopoly, I am *not prepared to say** that he must *not** conform his traffick to the general rules by which all trade is regulated." (*Ibid.*, vol. I (1815), p. 339.)

* Emphasis added by the Special Rapporteur.

³¹ See for example the case *The Schooner Exchange v. McFaddon and others* (1812), where Chief Justice Marshall said:

"... there is a manifest distinction between private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction." (W. Cranch, *Reports of Cases argued and adjudged in the Supreme Court of the United States* (New York, Banks Law Publishing, 1911), vol. VII, 3rd ed., p. 145.)

Compare the decision of the Corte di Cassazione di Roma in *Nobili v. Carlo d'Austria* (1921) (*Annual Digest...*, 1919–1922 (London), vol. 1 (1932), case No. 90, p. 136). Contrast the two French decisions: *Héritiers de l'Empereur du Mexique Maximilien v. Lemaître* (1872) (*Journal du droit international privé* (Clunet, Paris), No. 1 (January–February 1874), p. 32), and *Mellerio v. Isabelle de Bourbon, ex-reine d'Espagne* (1872) (*ibid.*, p. 33).

³² See for example *Venore Transportation Co. v. President of India*, 67 Civ. 2578, 68 Civ. 1134–1139 (District Court for Southern District of New York, 1967 and 1968), and *Psinakis v. Marcos*, Civil Action No. C-75-1725-RHS (District Court for Northern District of California, 1975) (decisions cited in *Digest of United States Practice in International Law*, 1977, ed. J.A. Boyd (Washington, D.C., U.S. Government Printing Office, 1979), pp. 1067 and 1077).

³³ The United States of America's *Foreign Sovereign Immunities Act of 1976* (United States of America, *United States Code*, (Continued on next page.)

(ii) *The central government and its various organs or departments*

38. Apart from sovereigns and other heads of State, the expression "foreign States" of course comprehends all States: all types of States, whatever their political or economic structures and irrespective of the appellation attributed to them, whether State, republic, kingdom, empire, commonwealth or otherwise.³⁴ Each State, whatever its denomination, normally acts through its central government. An action against a foreign Government is therefore an action against the foreign State on whose behalf the Government has acted. Governments as such are direct beneficiaries of State immunity in their own right.³⁵

(Footnote 33 continued)

1976 Edition (Washington, D.C., U.S. Government Printing Office, 1977), vol. 8, title 28, sect. 1330; text of the act reproduced in: *International Legal Materials* (Washington, D.C.), vol. XV, No. 6 (November 1976), p. 1338) as an example of the expression, although in the Act itself, sect. 1330 of title 28 is entitled "Actions against foreign States," and chapter 97 of that title "Jurisdictional immunities of foreign States".

The latest relevant British law is entitled *State Immunity Act 1978* (United Kingdom, *The Public General Acts, 1978* (London, H.M. Stationery Office), part 1, chap. 33, p. 715; text of the act reproduced in: *International Legal Materials, op. cit.*, vol. XVII, No. 5 (September 1978), p. 1123), following perhaps the nomenclature adopted in the European Convention on State Immunity and Additional Protocol of 1972 (Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series, No. 74 (Strasbourg, 1972)).

³⁴ See for example the cases *Dralle v. Republic of Czechoslovakia* (1950) (*International Law Reports* (London), vol. 17 (1956), case No. 41, pp. 155 *et seq.*); *Etat espagnol v. Canal* (1951) (*Journal du droit international* (Clunet) (Paris), 79th year, No. 1 (January–March 1952), p. 220); *Patterson–MacDonald Shipbuilding Co., McLean v. Commonwealth of Australia* (1923) (United States of America, *The Federal Reporter* (St. Paul, Minn., West Publishing, 1924), vol. 293, p. 192; de Froe *v. The Russian State, now styled "The Union of Soviet Socialist Republics"* (1932) (*Annual Digest...*, 1931–1932 (London), vol. 6 (1938), case No. 87, p. 170); *Irish Free State v. Guaranty Safe Deposit Company* (1927) (*Annual Digest...*, 1925–1926 (London), vol. 3 (1929), case No. 77, p. 100); *Kingdom of Norway v. Federal Sugar Refining Co.* (1923), (United States of America, *The Federal Reporter* (*op. cit.*, 1923), vol. 286, p. 188); *Ipitrade International S.A. v. Federal Republic of Nigeria* (1978) (United States of America, *Federal Supplement* (St. Paul, Minn., West Publishing, 1979), vol. 465, p. 824); 40 D 6262 and 40 E 6262 *Realty Corporation v. United Arab Emirates Government* (1978) (*ibid.* (1978), vol. 447, p. 710); *Kahan v. Pakistan Federation* (1951) (United Kingdom, *The Law Reports of the Incorporated Council of Law Reporting, King's Bench Division, 1951* (London), vol. II, p. 1003).

³⁵ Instances of proceedings against foreign Governments which are entitled to State immunity are many. See for example *Morellet v. Governo Danese* (1882) (*Giurisprudenza italiana* (Turin, Unione Tipografico-editrice torinese, 1883), vol. I, p. 125); *Letort v. Gouvernement ottoman* (*Revue juridique internationale de la locomotion aérienne* (Paris), vol. V (1914), p. 142); *Lakhowsky v. Swiss Federal Government and Colonel de Reyner* (1919 and 1921) (*Annual Digest...*, 1919–1922 (London), vol. 1 (1932), case No. 83, p. 122); *U Kyaw Din v. His Britannic Majesty's Government of the United Kingdom and the Union of Burma* (1948) (*Annual Digest...*, 1948 (London), vol. 15 (1953), case No. 42, p. 137); and *Société générale pour favoriser l'industrie nationale v. Syndicat d'amortissement, Gouvernement des Pays-*

39. The government of a country is often composed of subsidiary organs and departments which act on its behalf. Such organs of State and departments of government can be and often are separate legal entities within the internal legal system. Although without international legal personalities of their own, they could represent the State or the central government of the State of which they form an integral part. Instances of State organs and departments of government are the various ministries that compose the central government,³⁶ including the armed forces, the subordinate divisions or departments within each ministry, such as embassies, special missions and consular posts, and offices, commissions or councils,³⁷ which need not form part of any ministry but are State organs answerable to the central government or to one of its departments, or administered by it. Other principal organs such as the legislative and the judiciary of a foreign State could also enjoy State immunity.

(iii) *Political subdivisions of a foreign State in the exercise of its sovereign authority*

40. The practice of States in regard to State immunities recognized and accorded to political subdivisions of a foreign State is far from uniform. In general, most courts have held political subdivisions of State amenable to the local or territorial jurisdiction on the ground that they lack international personality and external sovereignty.³⁸ On the other hand, cases of

Bas et Gouvernement belge (1840) (*Pasicrisie belge—Recueil général de la jurisprudence des cours et tribunaux et du Conseil d'Etat belge* (Brussels, Bruylant, 1841), vol. II, p. 33).

³⁶ See for example *Bainbridge and another v. The Postmaster-General and another* (1905) (United Kingdom, *The Law Reports of the Incorporated Council of Law Reporting, King's Bench Division, 1906* (London), vol. I, p. 178); *Henon v. Egyptian Government and British Admiralty* (1947) (*Annual Digest...*, 1947 (London), vol. 14 (1951), case No. 28, p. 78); *Triandafilou v. Ministère public* (1942) (*The American Journal of International Law* (Washington, D.C.), vol. 39, No. 2 (April 1945), p. 345); *Piascic v. British Ministry of War Transport* (1943) (*Annual Digest...*, 1943–1945, (London), vol. 12 (1949), case No. 22, p. 87); and *Turkish Purchases Commission case* (1920) (*Annual Digest...*, 1919–1922 (London), vol. 1 (1932), case No. 77), p. 114).

³⁷ See for example *Mackenzie–Kennedy v. Air Council* (1927) (United Kingdom, *The Law Reports of the Incorporated Council of Law Reporting, King's Bench Division, 1927* (London), vol. II, p. 517); *Graham and others v. His Majesty's Commissioners of Public Works and Buildings* (1901) (*ibid.*, 1901 (London), vol. II, p. 781); *Société Viajes v. Office national du tourisme espagnol* (1936) (*Annual Digest...*, 1935–1937 (London), vol. 8 (1941), case No. 87, p. 227); *Compañía Mercantil Argentina v. United States Shipping Board* (1924) (*Annual Digest...*, 1923–1924 (London), vol. 2 (1933), case No. 73, p. 138); and *Telkes v. Hungarian National Museum* (No. 11) (1942) (*Annual Digest...*, 1941–1942 (London), vol. 10 (1945), case No. 169, p. 576).

³⁸ See for example the case *Etat de Ceara v. Dorr et autres* (1932) (M. Dalloz, *Recueil périodique et critique de jurisprudence, de législation et de doctrine, année 1933* (Paris), part I, p. 196), in which the court said:

"Whereas this rule [of incompetence] is to be applied only when it is invoked by an entity which shows itself to have a

recognition of immunity by assimilation of the position of a political subdivision of a State, a semi-sovereign State or even a dependency to that of a foreign sovereign State are not rare. National courts have sometimes accorded sovereign immunity to such subdivisions of a foreign State on the ground that the actions in fact impleaded the foreign Government.³⁹

personality of its own in its relations with other countries considered from the point of view of public international law; whereas such is not the case of the State of Ceara, which, according to the provisions of the Brazilian Constitution legitimately relied upon by the lower courts and whatever its internal status in the sovereign confederation of the United States of Brazil of which it is a part, being deprived of diplomatic representation abroad, does not enjoy from the point of view of international political relations a personality of its own..." (*ibid.*, p. 197). [Translation by the Secretariat.]

Compare with *Schneider v. City of Rome* (1948) (*Annual Digest...*, 1948 (London), vol. 15 (1953), case No. 40, p. 131); *Ville de Genève v. Consorts de Civry* (1894) (M. Dalloz, *Jurisprudence générale—Recueil périodique...*, année 1894 (Paris) part 2, p. 513; and *ibid.*, année 1895, part 1, p. 344); *Dumont v. State of Amazonas* (1948) (*Annual Digest...*, 1948 (London), vol. 15 (1953), case No. 44, p. 140); *Somigli v. Etat de São Paulo du Brésil* (1910) (*Revue de droit international privé et de droit pénal international* (Darras) (Paris), vol. VI (1910), p. 527); *Feldman v. Etat de Bahia* (1907) (*Pasicrisie belge—Recueil général...*, année 1907 (Brussels, Bruylant), vol. II, p. 55) (see also *Supplement to The American Journal of International Law* (*op. cit.*), p. 484); *Duff Development Company Ltd. v. Government of Kelantan and other* (1924) (United Kingdom, *The Law Reports of the Incorporated Council of Law Reporting, House of Lords, Judicial Committee of the Privy Council and Peerage Cases*, 1924 (London, 1924), p. 797); *Sayce v. Bahawalpur State (Ameer)* (1952) (United Kingdom, *The All England Law Reports*, 1952 (London, Butterworth, 1953), vol. 2, p. 64).

³⁹ See for example the case *van Heyningen v. Netherlands Indies Government* (1948) (*Annual Digest...*, 1948 (London), vol. 15 (1953), case No. 43, p. 138), in which Judge Philips of the Supreme Court of Queensland, holding the defendant to be an integral part of the Royal Dutch Government, said:

In my view an action cannot be brought in our courts against a part of a foreign sovereign State. Where a foreign sovereign State sets up as an organ of its Government a governmental control of part of its territory which it creates into a legal entity, it seems to me that that legal entity cannot be sued here, because that would mean that the authority and territory of a foreign sovereign would be subjected in the ultimate result to the jurisdiction and execution of this court." (*Ibid.*, p. 140.)

This dictum is significant, as Australian courts do not normally accord immunity to their own political subdivisions. See *Commonwealth of Australia v. New South Wales* (1923), *Annual Digest...*, 1923–1924 (London), vol. 2 (1933), case No. 67, p. 130). See also *Principality of Monaco v. Mississippi* (1934) (*Annual Digest...*, 1933–1934 (London), vol. 7 (1940), case No. 61, p. 166); *Hans v. Louisiana* (1890) (United States of America, *United States Reports*, vol. 134 (New York, Banks Law Publishing, 1910), p. 1); *South Dakota v. North Carolina* (1904) (*ibid.*, vol. 192 (1911), p. 286); *United States v. North Carolina* (1890) (*ibid.*, vol. 136 (1910), p. 211); *Bey de Tunis et consorts v. Ahmed-ben-Aïad* (1893) (M. Dalloz, *Jurisprudence générale—Recueil périodique...*, année 1894 (*op. cit.*), p. 421); *Huttinger v. Compagnie des chemins de fer du Congo supérieur aux Grands Lacs africains et al.* (1934) (*Revue critique de droit international* (Paris), vol. XXXII, No. 1 (January–March 1937), p. 186); *Poortensdijk Ltd. v. Soviet Republic of Latvia* (1941–1942) (*Annual Digest...*, 1919–1942 (Supplementary volume) (London), vol. 11 (1947), case No. 75, p. 142); *Sullivan v. State of São Paulo* (1941) (*Annual Digest...*, 1941–1942 (London), vol. 10 (1945), case No. 50, p. 178).

Doubts have been expressed whether every political subdivision of a foreign State which exercised substantial governmental powers was immune.⁴⁰ The possibility exists, nevertheless, that the courts of a territorial State may decline jurisdiction in proceedings against political subdivisions of a foreign State in regard to acts performed in the exercise of the sovereign authority of the foreign State in question. In such a situation, State immunity appears to extend also to subordinate organs or departments of the political subdivision acting in the exercise of the sovereign authority assigned to it by the federal or central Government.⁴¹

(iv) *Agencies or instrumentalities acting as organs of a foreign State in the exercise of its sovereign authority*

41. In a way comparable to political subdivisions of a State, agencies and instrumentalities of a foreign State or Government could benefit from the principle of State immunity only in regard to acts performed in the exercise of the sovereign authority of the State and only when acting as State organs or agents. Unlike the sovereign or other heads of State and the central Government and its various organs or departments, which can be presumed to be acting for the State and in the exercise of its sovereign authority, agencies and instrumentalities of a State are not always so empowered. Immunity appears to be based on the attribution of activities to the State and on the fact that the act was done in the exercise of the sovereign authority of the State. Once these two qualifications are fulfilled, the agencies or instrumentalities of a foreign Government would in all likelihood be accorded the same immunity as that granted to the foreign State within whatever limits are recognized in prevailing State practice.

⁴⁰ See for example *Sullivan v. State of São Paulo* (cited in note 39 above, *in fine*): in that case, the United States State Department had recognized the claim of immunity. Judge Clark suggested that immunity could be grounded on the analogy with member States within the United States of America, while Judge Hand expressed his doubts as to the general application of that principle. See also *Schneider v. City of Rome* (cited in note 38 above).

⁴¹ See for example *Rousse and Maber v. Banque d'Espagne et autres* (1937) (France, *Recueil général des lois et des arrêts*, année 1938 (Paris, Recueil Sirey) part 2, p. 17), especially the note by Rousseau (*ibid.*, pp. 17–23) referring to provincial authorities which could equally be "an executive organ of a decentralized administrative entity". However, in that case the Court of Poitiers did not think that the Basque Government had acted "par délégation". See also *Gaekwar of Baroda State Railways v. Hafiz Habib-ul-Haq et al.* (1938) (*Annual Digest...*, 1938–1940 (London), vol. 9 (1942), case No. 78, p. 233); *The Superintendent, Government Soap Factory, Bangalore v. Commissioner of Income Tax* (1943) (*Annual Digest...*, 1941–1942 (London), vol. 10 (1945), case No. 10, p. 38); *Kawanakoa v. Polyblank* (1907), (United States of America, *United States Reports*, vol. 205 (New York, Banks Law Publishing, 1921), p. 349).

42. Such agencies or instrumentalities could be granted State immunity in an appropriate situation, regardless of their constitution, whether or not they are clothed with a separate legal personality or existence by virtue of an Act of Parliament, or a process of incorporation or charter, or otherwise.⁴² Recognition of immunity is accorded irrespective of the fact that they form an integral part of the central Government or not.⁴³ The test for participation in the enjoyment of State immunity lies in the nature of the activities involved, which should be conducted in the exercise of sovereign authority, under instruction from or with the authorization of the foreign State or Government in question. In the circumstances, they may be said to be acting as organs of the State, entitled in that connection to State immunity.

(b) *The expression "jurisdiction"*

43. The term "jurisdiction" as defined in article 2, paragraph 1(g), requires further interpretative assistance. To illustrate the types of power envisaged in the expression "jurisdiction" used in the context of the present articles, there is a need for a provision that makes explicit what otherwise would have been understood, or at any rate implied, by the terminology adopted. The term "jurisdiction" as employed in this context includes:

- (i) the power to adjudicate,
- (ii) the power to determine questions of law and of fact,

⁴² See for example *Krajina v. The Tass Agency and another* (1949) (*Annual Digest...*, 1949 (London), vol. 16 (1955), case No. 37, p. 129); and *Baccus S.R.L. v. Servicio Nacional del Trigo* (1956) (United Kingdom, *The Law Reports, Queen's Bench Division, 1957* (London, The Incorporated Council of Law Reporting for England and Wales), p. 438, in which Chief Justice Jenkins observed:

"Whether a particular ministry or department or instrument, call it what you will, is to be a corporate body or an unincorporated body seems to me to be purely a matter of governmental machinery." (*Ibid.*, p. 466.)

See also *Monopole des Tabacs de Turquie and another v. Régie co-intéressé des tabacs de Turquie* (1980) (*Annual Digest...*, 1929-1930 (London), vol. 5 (1935), case No. 79, p. 123).

⁴³ See for example the opinion of Judges Cohen and Tucker in the case *Krajina v. The Tass Agency and another* (cf. footnote 42 above). In *Baccus S.R.L. v. Servicio Nacional del Trigo* (*ibid.*), Lord Justice Parker stated:

"I see no ground for thinking that the mere constitution of a body as a legal personality with the right to make contracts and to sue and be sued is wholly inconsistent with it remaining and being a department of State." (United Kingdom, *The Law Reports* (*op. cit.*), p. 472.)

See also *Emergency Fleet Corporation, United States Shipping Board v. Western Union Telegraph Company* (1928) (United States of America, *United States Reports* (Washington, D.C., U.S. Government Printing Office, 1928), vol. 275, p. 415):

"Instrumentalities like the national banks or the federal reserve banks, in which there are private interests, are not departments of the Government. They are private corporations in which the Government has an interest." (*Ibid.*, pp. 425-426.)

- (iii) the power to administer justice and to take appropriate measures at all stages of legal proceedings, and
- (iv) such other administrative and executive powers as are normally exercised by the judicial or administrative and police authorities of the territorial State.

44. The power to adjudicate (i) does not require further elucidation. It covers the power to settle disputes, to conciliate, to arbitrate, or otherwise to render a decision in response to a request by one party to the dispute. The power to determine questions of law and of fact (ii) is a necessary incidental to the power to adjudicate. The decision of an authority, judicial or administrative or otherwise, is based on facts as presented and determined and on legal principles enunciated (*juris-dictio*).

45. The power to administer justice (iii), including the authority to take appropriate measures at all stages of legal proceedings, is indeed very comprehensive and wide-ranging. It is exercisable in some countries in the name of the king, in others on behalf of the people or of the State. This power is generally part of the functions entrusted to the judicial authorities, but in its actual administration several aspects are performed by other officers, such as the police, the administrative officer of a tribunal or a court or of a local authority, or the department of public prosecution. Thus, the expression covers the issuance and service of summons or a warrant of arrest or search warrant and other types of writ to initiate proceedings, the arrest and detention of a person, investigation and inquiry or inquest, the provision of security for costs, interim measures or injunction, attachment of property or freezing of assets, as well as other procedural steps before and during the hearing and trial by a court of law. It also includes the power of the judicial authority to pronounce judgement and to order measures to satisfy and execute the judgements rendered, as well as award of costs and charge of fees for the administration of justice. This should also cover all other administrative and executive powers (iv) normally exercised by the judicial or administrative and police authorities of the territorial State. The remaining power could be illustrated, by way of example, as the power to prosecute or stay prosecution, to suspend proceeding, to compel a witness to give evidence on oath, to hold the proceedings *in camera* ("*à huis clos*"). This residuary power could be discretionary in nature, such as the incidence of costs, the assessment of damages in accordance with certain scales, the choice of property or assets to be seized or attached in the event of execution of a judgement debt, the challenge of members of a jury, procedural privileges of some parties, such as the Crown or the State, and countless other powers exercisable under heading (iv). Further enumeration of instances of the power included in the expression "jurisdiction" could be excessively long and yet not exhaustive.

(c) *The criterion for determining a trading or commercial activity*

46. To render further assistance in the interpretation of the expression "trading or commercial activity" as defined in article 2, paragraph 1(f), a criterion is proposed to remove uncertainties in identifying an activity as "commercial" or characterizing it as a "trading activity". The activity or course of conduct or particular act attributable to a foreign State should not be determined by reference to its motivation or purpose. An act performed for a State is inevitably designed to accomplish a purpose which is in a domain closely associated with the State itself or the public at large. In the ultimate analysis, reference to the purpose or motive of an activity of a foreign Government is therefore not helpful in distinguishing the types of activity which could be regarded as commercial from those which are non-commercial. The present article proposes a reference to the nature of the activity or the character of the transaction or act. If it is commercial in nature, the activity can be regarded as a trading or commercial activity. Further reference to the purpose which motivated the activity could serve to obscure its true character. The purpose could best be overlooked in determining whether an activity is commercial or not, especially for the purpose of deciding upon the availability or applicability of State immunity.

47. The objective criterion, i.e. the commercial nature of the transaction or the activity, as opposed to the subjective test of purpose, which breeds uncertainties, is preferred in the present articles. Indeed, it has been adopted in increasing measure in the recent practice of States, as evidenced in national legislation,⁴⁴ judicial decisions,⁴⁵ and international conven-

⁴⁴ See for example art. 1603, para. d, of Title 28 of the United States Code, as modified by the *Foreign Sovereign Immunities Act of 1976* (see footnote 33 above), which provides:

"A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."

Compare art. 3, para. 3, of the United Kingdom *State Immunity Act 1978* (*ibid.*), which defines a commercial transaction by giving a description of its nature and enumerating the types of contract envisaged.

⁴⁵ See for example *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria* (American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XVI, No. 3 (May 1977), p. 471), where the Court of Appeal, applying the test of the nature of the transaction, held the purchase of cement for the construction of barracks for the army in Nigeria to be commercial and as such not covered by State immunity, irrespective of its purpose or motivation. See, however, the mixed criterion of "*acte de commerce*" in French case-law. See also the judgement of the Supreme Court of Austria of 10 February 1961 (2 Ob 243/60):

"Thus we must always look at the act itself which is performed by State organs, and not its motive or purpose... Whether the act is of a private sovereign nature must always be deduced from the nature of the legal transaction, *viz.* the

inherent nature of the action taken or of the legal relationship which arises." (*Juristische Blätter* (Vienna), 84th year, No. 1/2 (13 January 1962), pp. 143 *et seq.* [translation by the Secretariat]). (An English translation of the judgement appears in the mimeographed document A/CN.4/343/Add.2, of 1981.)

TEXT OF ARTICLE 3

48. The interpretative provisions of article 3 could be formulated as follows:

Article 3. Interpretative provisions

1. In the context of the present articles, unless otherwise provided,

(a) the expression "foreign State", as defined in article 2, paragraph 1(d), above, includes:

- (i) the sovereign or head of State,
- (ii) the central government and its various organs or departments,
- (iii) political subdivisions of a foreign State in the exercise of its sovereign authority, and
- (iv) agencies or instrumentalities acting as organs of a foreign State in the exercise of its sovereign authority, whether or not endowed with a separate legal personality and whether or not forming part of the operational machinery of the central government;

(b) the expression "jurisdiction", as defined in article 2, paragraph 1(g), above, includes:

- (i) the power to adjudicate,
- (ii) the power to determine questions of law and of fact,
- (iii) the power to administer justice and to take appropriate measures at all stages of legal proceedings, and
- (iv) such other administrative and executive powers as are normally exercised by the judicial, or administrative and police authorities of the territorial State.

2. In determining the commercial character of a trading or commercial activity as defined in article 2, paragraph 1(f), above, reference shall be made to the

inherent nature of the action taken or of the legal relationship which arises." (*Juristische Blätter* (Vienna), 84th year, No. 1/2 (13 January 1962), pp. 143 *et seq.* [translation by the Secretariat]). (An English translation of the judgement appears in the mimeographed document A/CN.4/343/Add.2, of 1981.)

⁴⁶ See for example arts. 4 and 7 of the European Convention on State Immunity of 1972 (for reference, see footnote 33 above), concerning contractual relations and activities conducted in the same manner as a private person *more privatorum*.

nature of the course of conduct or particular transaction or act, rather than to its purpose.

ARTICLE 4: Jurisdictional immunities not within the scope of the present articles

49. In the practice of States, jurisdictional immunities could be accorded in respect of activities attributable ultimately to a foreign State but, in view of the fact that they have been treated in earlier international conventions or instruments or have followed a separate legal development, they should be excluded from the scope of the present articles. This is to define and delineate still further the precise scope of the present articles, taking into consideration the possibility of some overlapping provisions in existing general or regional conventions, or indeed the existing rules of customary international law marginally touching upon certain aspects of State immunities. The present articles are not intended to deal specifically with certain areas or to affect the legal status and the extent of jurisdictional immunities recognized and accorded to missions such as embassies, consulates, delegations and visiting forces, regulated by international or bilateral conventions or prevailing rules of customary international law.

50. The missions which represent States and whose status has been the subject of separate treatment in international conventions include diplomatic missions under the Vienna Convention of 1961,⁴⁷ consular missions under the Vienna Convention on Consular Relations of 1963,⁴⁸ special missions under the Convention on Special Missions of (1969),⁴⁹ missions under the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of (1975)⁵⁰ and other permanent missions or delegations of States to international organizations in general.⁵¹ Such missions or delegations could be regarded as State organs, agencies or instrumentalities of States in the conduct of their international relations, and are entitled to jurisdictional immunities from the receiving States.⁵²

⁴⁷ For reference, see footnote 21 above.

⁴⁸ United Nations, *Treaty Series*, vol. 596, p. 261. Hereinafter called "1963 Vienna Convention".

⁴⁹ General Assembly resolution 2530 (XXIV) of 8 December 1969, annex.

⁵⁰ *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207. Hereinafter called "1975 Vienna Convention".

⁵¹ See, for instance, Article 105 of the Charter of the United Nations; the 1946 Convention on the Privileges and Immunities of the United Nations (United Nations, *Treaty Series*, vol. 1, p. 15); and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (*ibid.*, vol. 33, p. 261).

⁵² There is an inevitable overlapping, but the practice of States shows no trend of incompatible legal developments. Thus the proposition that there is no substantive immunity from the territorial law finds parallel expression in the provisions of art. 41, para. 1, of the 1961 Vienna Convention and in art. 55, para. 1, of the 1963 Vienna Convention (see footnotes 21 and 48 above).

51. The missions mentioned above invariably have premises in the receiving States or the host countries which, for the purpose of the present articles, are included in the term "territorial States". The immunities accorded in respect of such missions, their members, the various categories of their staff, and their premises including archives, means of transport and communications, which are inviolable—form the subject of separate conventions treated earlier, such as those on diplomatic privileges and immunities, consular immunities, and immunities accorded to special missions and other permanent missions and delegations of States members or associate members or otherwise accredited to international organizations of a universal character, or other types of organizations which could be regional in character or an international community of regional dimension.⁵³

52. The fact that the present articles are not designed specifically to apply to jurisdictional immunities accorded to States in respect of the missions referred to above does not affect the application to such missions or representation of States, or indeed, to international organizations, of any of the rules set forth in the articles to which such missions or representations would also be subject under international law independently of the articles. The premises and archives of such missions, for instance, constitute property of foreign States within the meaning and scope of the present articles. Several aspects of their status, including inviolability and immunities from search, requisition, attachment and execution, have been regulated by existing conventions.⁵⁴ Immunities extended to foreign visiting forces are similarly excluded from the present study, and therefore from the present articles.⁵⁵

⁵³ For the European Communities, see, for instance, J.J.A. Salmon, "Les Communautés en tant que personnes de droit interne et leur privilèges et immunités", *Les Nouvelles—Droit des Communautés européennes*, ed. by W.J. Ganshof van der Meersch (Brussels, Larcier, 1969), pp. 121–122, No. 363; P. Pescatore, "Les Communautés en tant que personnes de droit international", *ibid.*, pp. 109–110, No. 333; L. Plouvier, "L'immunité de contrainte des Communautés européennes", *Revue belge de droit international* (Brussels), vol. IX (1973), No. 2, p. 471. Compare with art. 3 of the Agreement on Privileges and Immunities of the OAS (Washington, D.C., Pan American Union, 1961), *Treaty Series*, No. 22). See also *Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations*, vol. II (United Nations publication, Sales No. 61.V.3), p. 377; the Agreement relating to the Legal Status, Facilities, Privileges and Immunities of the United Nations Organization in the Congo (United Nations, *Treaty Series*, vol. 414, p. 229); and various other headquarters agreements.

⁵⁴ See for example art. 22, paras. 1 and 3 of the 1961 Vienna Convention and art. 31, paras. 1 and 4, and art. 33 of the 1963 Vienna Convention (see footnotes 21 and 48 above).

⁵⁵ Foreign visiting forces, army, air force and navy personnel of a foreign State invited to a host country are accorded a certain measure of courtesies, facilities and privileges. There are generally agreements regulating the exercise of concurrent jurisdiction over members of visiting forces, including the question of priorities of such exercise. In this connection, see, for instance, the 1951

53. Nor indeed would the same fact affect the application of the rules set forth in the present articles to States and international organizations non-parties to the articles, in so far as such rules may have the force of customary international law independently of the articles. There appears to be a need to reconfirm that the rules of customary international law continue to apply generally, on this as well as on other matters, to parties and non-parties to the articles alike, irrespective and independently of the articles. The provisions of the articles will be binding on the parties and States which have otherwise declared themselves bound by them in respect of matters expressly regulated by the rules formulated and incorporated in the present articles.⁵⁶ Rules embodied in other conventions may also continue to apply on matters directly covered by this study in so far as they form part of international customs not modified by the articles.⁵⁷

TEXT OF ARTICLE 4

54. Article 4, on the delineation of the scope of the articles, could be formulated as follows:

Article 4. Jurisdictional immunities not within the scope of the present articles

The fact that the present articles do not apply to jurisdictional immunities accorded or extended to

- (i) diplomatic missions under the Vienna Convention on Diplomatic Relations of 1961,
- (ii) consular missions under the Vienna Convention on Consular Relations of 1963,
- (iii) special missions under the Convention on Special Missions of 1969,
- (iv) the representation of States under the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 1975,
- (v) permanent missions or delegations of States to international organizations in general,

Agreement between the Parties to the North Atlantic Treaty regarding the status of their forces (United Nations, *Treaty Series*, vol. 199, p. 67), the status of forces of parties to the Warsaw Treaty, under art. 5 of the treaty (*ibid.*, vol. 219, p. 29), and various bilateral arrangements or agreements on status of forces, such as the 1966 Republic of Korea–United States of America Agreement (*ibid.*, vol. 674, p. 163). See also national legislation on the subject.

⁵⁶ For an interesting study on recent developments of customary international law by the process of international codification conferences and multilateral general conventions, see E. Jiménez de Aréchaga, "International law in the past third of a century", *Recueil des cours de l'Académie de droit international de La Haye, 1978-I* (Alphen aan den Rijn, Sijthoff, 1979), vol. 159, pp. 9 *et seq.*, chap. I "Custom as a source of international law".

⁵⁷ See for example the 1972 European Convention on State Immunity (see footnote 33 above), the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone (United Nations, *Treaty Series*, vol. 516, p. 205), and the 1958 Geneva Convention on the High Sea (*ibid.*, vol. 450, p. 11).

shall not affect

(a) the legal status and the extent of jurisdictional immunities recognized and accorded to such missions and representation of States under the above-mentioned conventions;

(b) the application to such missions or representation of States or international organizations of any of the rules set forth in the present articles to which they would also be subject under international law independently of the articles;

(c) the application of any of the rules set forth in the present articles to States and international organizations, non-parties to the articles, in so far as such rules may have the legal force of customary international law independently of the articles.

ARTICLE 5: Non-retroactivity of the present articles

55. The provisions of the present articles will embody rules that could be regarded as codification as well as progressive development of international law. Since international law is not static but continues to develop, it is not unnatural to include in part I of the draft articles an initial provision confirming the principle of non-retroactivity. The rules enunciated in the articles should become binding on signatory States which have ratified or States which have acceded to the articles only upon their entry into force, and not before. The articles will therefore not be given retrospective or retroactive effect and will govern the relations among States only from the date of their entry into force, unless, of course, the parties agree otherwise, or unless the rules so embodied have the force of existing customary international law already receiving general application independently of the present articles.

56. The provisions of the present articles, which are merely declaratory of prevailing State practice or evidentiary of emerging rules *in statu nascendi* with their crystallizing effect, will clearly afford evidence of existing rules of international law. They are only evidence of the established practice of States, and have no binding force as treaty provisions. The provisions which are prophetic of future legal developments may be considered as entailing a generating effect for progressive developments of practice to rally behind new rules about to emerge.⁵⁸ It should be further observed in this connection that the general principles of State immunity are rules of international law only in so far as they oblige the territorial State in a given set of circumstances to accord certain measures of jurisdictional immunity to foreign States. The territorial State is not obliged to refuse or deny jurisdictional immunities when no international obligation exists to grant or accord such immunities in the first place. The over-generosity of States falls into the realm of courtesies and outside the ambit of the rules of international law. There is nothing to prevent States from showing more kindness than is required in State practice.

⁵⁸ See Jiménez de Aréchaga, *loc. cit.*, pp. 14–27.

TEXT OF ARTICLE 5

57. The non-retroactive provision could run thus:

Article 5. *Non-retroactivity of the present articles*

Without prejudice to the application of any rules set forth in the present articles to which the relations

between States would be subject under international law independently of the articles, the present articles apply only to the granting or refusal of jurisdictional immunities to foreign States and their property after the entry into force of the said articles as regards States parties thereto or States having declared themselves bound thereby.

PART II. GENERAL PRINCIPLES

58. It is proposed in this part of the report to examine State practice—judicial, administrative and governmental—relating to the fundamental principles of international law of State immunities. In the process of this examination, references will be made primarily to the case-law and jurisprudence of various States having a direct bearing on the principles to be declared, confirmed and restated. National legislation, official communications and diplomatic correspondence will be consulted together with the opinions of writers, so as to help detect and verify the existing or emerging trends in the practice of States, as evidence of the current state in which international law finds itself.

59. The first draft article of this part, article 6, seeks to reflect prevailing State practice in support of the principles of State immunity as one of the fundamental principles of international law. Efforts will be made to bring out more clearly the true nature of State immunity as progressively developed in the practice of the judicial and administrative authorities of territorial States, as well as the views and practice of Governments on the subject. Relevant national legislation and international conventions will also be examined as evidence of existing customary rules of international law on the doctrine of State immunity. Historical developments in the principle of State immunity in the practice of States will serve to indicate some of the closest resemblances and affinities which the principles of State immunity or sovereign immunity bears in comparison to the jurisdictional immunities accorded to foreign sovereigns and accredited diplomats or other representatives of foreign Governments in the practice of States. Article 6 will restate the principle of State immunity as a general rule substantiated by a rational legal basis.

60. As part of an effort to outline general principles, article 7 will draw a line of distinction between cases where the question of State immunity arises with the fulfilment of all conditions necessary for the judicial or administrative authorities to assume and exercise territorial jurisdiction were it not for the application of the doctrine of State immunity, and another type of case where there is no question of State immunity since the territorial State lacks jurisdiction or competence under its own internal law regarding the competence of the judicial or administrative authorities in the first place.

61. Article 8 will deal with the relevance of consent as an important element of the doctrine of State immunity. With the consent of the foreign State, the judicial or administrative authorities of the territorial State will not be constrained from exercising their otherwise competent jurisdiction. The question of State immunity therefore arises in circumstances where the foreign State declines to give consent or is otherwise not disposed to consent to the exercise of territorial jurisdiction.

62. Article 9 will concern itself with another aspect of consent, namely voluntary submission to the territorial jurisdiction and the methods whereby a foreign State may be said to have invoked territorial jurisdiction or voluntarily submitted to the exercise of local jurisdiction by the territorial State.

63. Article 10 will relate to the effect of counter-claims against a foreign State and the extent to which the foreign State will not be accorded jurisdictional immunity where it has itself raised a counter-claim in a suit against it.

64. Article 11, the last provision of part II, will deal with waiver of State immunity, how it is effected, and when it could be considered that the foreign State has in fact waived its sovereign immunity, as well as the effect and extent of a waiver.

ARTICLE 6: The principle of state immunity

I. *Historical and legal developments of the principle of State immunity*

65. The principle of international law regarding State immunity has developed principally from the judicial practice of States. Municipal courts have been primarily responsible for the growth and progressive development of a body of customary rules governing the relations of nations in this particular connection. The opinions of writers and international conventions relating to State immunity are practically all of subsequent growth, although there is markedly a growing interest appreciable in the writings of contemporary publicists and in relatively recent provisions of treaties and international conventions, as well as national legislation. The scantiness of pre-nineteenth century judicial decisions bearing upon the question of jurisdictional immunities of States serves as eloquent

explanation for the total absence of reference to the topic in the classics of international law and the complete silence in earlier treaties and internal laws. To give but a few illustrations, neither Gentili⁵⁹ nor Grotius,⁶⁰ Bynkershoek⁶¹ nor Vattel⁶² revealed any trace of the doctrine of State immunity, although the problems of diplomatic immunities and the immunities of the person of sovereigns received extensive discussion in their monumental treatises. Legislative provisions in Europe or elsewhere and international conventions of the same period made no mention of any principle of State immunity, while references to the immunities of ambassadors and the person of sovereigns were to be found in European statutes of the corresponding period⁶³ as well as in the case-law of

several nations from the eighteenth century onwards.⁶⁴

66. It was mainly in the nineteenth century that national courts began to formulate the doctrine of State immunity in their practice. Since then, judicial deliberations of this doctrine have generated a greater and possibly more divergent volume of municipal jurisprudence hitherto unknown in any other branch of international law.⁶⁵ The diversity and complexity of the problems involved in the application by national authorities of this comparatively recent doctrine of State immunity have increasingly enriched the archives of modern international legal literature.⁶⁶

A. State immunity in the judicial practice of States

1. COMMON LAW JURISDICTIONS

(a) *A sequence of personal immunity*

67. It was in the nineteenth century that the doctrine of State immunity came to be established in the practice of a large number of States. In common-law jurisdictions, especially in the United Kingdom, the principle that foreign States are immune from the jurisdiction of the territorial States has, to a large extent, been influenced by the traditional immunity of the local sovereign, apart altogether from the application of international comity or *comitas gentium*. In the United Kingdom, at any rate, the doctrine of sovereign immunity has been a direct result of English constitutional usage expressed in the maxim "The King cannot be sued in his own courts". To implead the national sovereign was therefore a constitutional impossibility.

A decree of the Constituent Assembly of 11 December 1789 also confirmed this principle ("Arrêté sur une demande faite par les ambassadeurs relativement à leurs immunités", *ibid.* (1824), vol. 1, p. 73).

⁶⁴ See for example the British cases *Buvot v. Barbut* ["Barbut's case"] (1773) (*British International Law Cases*, British Institute Studies in International and Comparative Law (London, Stevens, 1967), vol. 6, No. 1, p. 261) and *Triquet and others v. Bath* (1764) (*ibid.*, p. 211); a Dutch case reported in 1720 concerning the Envoy Extraordinary of the Duke of Holstein (see van Bynkershoek, *De foro legatorum...* (*op. cit.*), chap. XIV); and the French case of *Bruc v. Bernard* (1883), in which the Court of Appeals of Lyon stated:

"it must be recognized that full immunity from jurisdiction in civil matters is enjoyed by anyone invested with an official character as representing a foreign Government in any way..." (M. Dalloz, *Recueil périodique et critique de Jurisprudence, de Législation et de Doctrine année 1885* (Paris, Bureau de la Jurisprudence générale), part 2, pp. 194–195). [Translation by the Secretariat.]

⁶⁵ See especially the case law that will be examined in part III and the parts which follow.

⁶⁶ See the selected bibliography annexed to S. Sucharitkul, *State Immunities and Trading Activities in International Law* (London, Stevens, 1959), pp. 361–380, and more recently in *Recueil des cours...*, 1976-I (Leyden, Sijthoff, 1977), vol. 149, pp. 212–215.

⁵⁹ On the contracts of ambassadors, see A. Gentili, *De legationibus, libri tres* (1594), reproduced and trans. in *The Classics of International Law*, Carnegie Endowment for International Peace (New York, Oxford University Press, 1924), vol. II, chap. XIV.

⁶⁰ On the personal inviolability of ambassadors, see H. Grotius, *De jure Belli ac pacis, libri tres* (1646), *The Classics of International Law, idem.* (Oxford, Clarendon Press, 1925), vol. II, chap. XVIII, sect. IV.

⁶¹ On the immunities of ambassadors from civil jurisdiction, see C. van Bynkershoek, *De foro legatorum tam in causa civili, quam criminali, liber singularis* (1721), *The Classics of International Law* (Oxford, Clarendon Press, 1946), chaps. XIII–XVI, and regarding the immunities of foreign sovereigns and their property, *ibid.*, chaps III and IV. See also E. A. Gmür, *Gerichtsbareit über fremde Staaten* (Zurich, Polygraphischer Verlag, 1948), pp. 38–43 (thesis); and J. Barbeyrac's translation of and notes on Bynkershoek's work: "*Traité du juge compétent des ambassadeurs, tant pour le civil que pour le criminel* (The Hague, Johnson, 1723), pp. 43 and 46.

⁶² On the immunities of personal sovereigns, see E. de Vattel, *Le droit des gens, ou Principes de la loi naturelle* (1758), *The Classics of International Law* (Washington, D.C., Carnegie Institution of Washington, 1916), vol. III, book IV, chap. VII, para. 108. De Vattel, however, recognized the principle of independence, sovereignty and equality of States (*ibid.*, vol. I, book II, chap. III, para. 36, and chap. VII, paras. 79 and 81), and the immunity of the local State or sovereign from the jurisdiction of its or his own courts (*ibid.*, chap. XIV, para. 214).

⁶³ See for example the British law *Statute of 7 Anne* (1708), chap. XII (sects. I–III, "An Act for preserving the privileges of ambassadors and other public ministers of foreign princes and States" (United Kingdom, *The Statutes at Large of England and of Great Britain*, vol. IV (London, Eyre and Strahan, 1811), p. 17; a statute of the United States of America of 1790, which contains a clause providing that:

"Whenever a writ or process is sued out or prosecuted... whereby a person of any ambassador... is arrested or imprisoned, or his goods or chattels are distrained, seized or attacked, such writ or process shall be deemed void." (United States of America, *United States Code, 1964 Edition*, Title 22, "Foreign relations and intercourse" (Washington, D.C., U.S. Government Printing Office, 1965), vol. 5, p. 4416);

and a French decree concerning envoys of foreign Governments, dated 13 Ventôse year 2 (3 March 1794); which provided:

"The National Convention prohibits any constituted authority from proceeding in any manner against the person of envoys of foreign governments; claims which may be raised against them shall be brought to the Committee of Public Safety, which alone is competent to satisfy them." (J. B. Duvergier, *Collection complète des lois, décrets, ordonnances, règlements et avis du Conseil-d'Etat* (Paris, Guyot et Scribe, 1825), vol. 7, p. 108). [Translation by the Secretariat.]

As the King personified the State, constitutionally speaking, the courts forming part of the machinery of justice of the central government of that State could not logically exercise jurisdiction over the sovereign, in whose name and in whose name only they could act. The immunity of the local sovereign is thus a legacy of legal history. Within the confines of a territory, the domestic sovereign was the fountain of law and justice. The sovereign did justice not as a matter of duty but of grace. The immunity of the Crown, although a historical accident, was later extended to cover also the sovereign heads of other nations, or foreign sovereigns with whom at the subsequent stage of legal development foreign States have been identified. The survival of this ancient constitutional practice in the international domain is illustrated by the fact that it is still common usage for courts in the United Kingdom to refer to foreign States as foreign sovereigns, particularly in the present context of State or sovereign immunity.

68. The basis of immunity has been the sovereignty of the foreign sovereign in a way analogous to or comparable with that of the local sovereign. In the "*Prins Frederick*" case (1820),⁶⁷ the first English case that contained a pronouncement on the principle of international law relating to jurisdictional immunities of foreign States and their property, as well as in subsequent cases in which jurisdictional immunity was accorded to foreign States,⁶⁸ the court declined jurisdiction on the grounds that the foreign State as personified by the foreign sovereign was equally sovereign and independent and that to implead him would insult his "regal dignity".⁶⁹ In *De Haber v. the Queen of Portugal* (1851), Chief Justice Campbell, basing sovereign immunity on international law, said:

In the first place, it is quite certain, upon general principles... that an action cannot be maintained in any English court against a foreign potentate, for anything done or omitted to be done by him in his public capacity as representative of the nation of which he is the head; and that no English court has jurisdiction to entertain any complaints against him in that capacity... To cite a foreign potentate in a municipal court, for any complaint against him in his public capacity, is contrary to the law of nations, and an insult which he is entitled to resent.⁷⁰

(b) *Transition from the attributes of a personal sovereign*

69. A further rationalization of the doctrine of sovereign immunity was given by Lord Justice Brett in

⁶⁷ See footnote 29 above.

⁶⁸ See for example the case *Vavasseur v. Krupp* (1878) (United Kingdom, *The Law Reports, Chancery Division*, vol. IX (London, Incorporated Council of Law Reporting for England and Wales, 1878), p. 351) and that of the *Parlement belge* (1880) (*idem*, *The Law Reports, Probate Division*, vol. V (London, Incorporated Council of Law Reporting for England and Wales, 1880), p. 197).

⁶⁹ Lord Justice Esher in the *Parlement belge* case (United Kingdom, *The Law Reports, Probate Division* (*op. cit.*), p. 207).

⁷⁰ United Kingdom, *Queen's Bench Reports* (*op. cit.*), p. 207.

his classic dictum in the "*Parlement belge*" case (1880):

The principle... is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and everyone declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction.⁷¹

70. The rationale of sovereign immunity as propounded by Brett, appears to rest on a number of basic principles—such as the common agreement or usage, international comity or courtesy, the independence, sovereignty and dignity of every sovereign authority—representing a progressive development from the attributes of personal sovereigns to the theory of equality and sovereignty of States and the principle of consent. Immunities accorded to personal sovereigns and ambassadors as well as to their property appear to be traceable to the more fundamental immunities of States.

71. A clearer judicial confirmation of the view that these immunities are regulated by rules of international law can be found in the oft-cited dictum of Lord Atkin in the "*Cristina*" case (1938):

The foundation for the application to set aside the writ and arrest of a ship is to be found in two propositions of international law engrafted into our domestic law, which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.

The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.⁷²

72. State immunity is thus translatable in terms of absence of the power on the part of the territorial authorities to implead a foreign sovereign. The concept of impleading relates to the possibility of compelling the foreign sovereign, against his will, to become a party to legal proceedings, or otherwise to an attempt to seize or detain property which is his or in his possession or control.

(c) *Impact of the Constitution of the United States of America*

73. In a way not dissimilar from developments in the United Kingdom, State immunity in the practice of the United States of America appears to have taken firm

⁷¹ *Idem*, *The Law Reports, Probate Division*, vol. V (*op. cit.*), pp. 214–215.

⁷² *Idem*, *The Law Reports, House of Lords, Judicial Committee of the Privy Council and Peerage Cases, 1938* (London), p. 490; *Annual Digest and Reports of Public International Law Cases, 1938–1940* (London, 1942), case No. 86, p. 252.

root in common ground, where the original doctrine of the common law regarding the prerogative of immunity from suit of the local sovereign had earlier flourished. In a case concerning the Territory of Hawaii,⁷³ Justice Holmes expressed the view that an entity which is the fountain of rights is above the rule of law, by basing immunity "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends".⁷⁴ But it may, with some weight of authority, be contended that the legal basis for the immunity from suit accorded to foreign Governments in United States practice lies in a principle which is much more peculiar to the United States Constitution than the common law doctrine of immunity of the Crown; its strength lies in the impact of the federal Constitution of the United States of America and the influence it has on the necessity to resolve questions to ensure harmony in the reciprocal relations between the federal Union and its member States.

74. In *Principality of Monaco v. Mississippi* (1934),⁷⁵ the court endorsed the insistence made by Hamilton in *The Federalist*, No. 81, saying:

There is... the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been "a surrender of this immunity in the plan of the convention."

This insistence on the need to safeguard the sovereignty of the member States of the Union finds occasional reinforcement in certain cases in which United States courts have gone to the length of recognizing the same need with regard to member-States of a foreign federal union,⁷⁶ while denying immunity in other cases to other similar entities.⁷⁷

⁷³ *Kawananakoa v. Polyblank* (1907): "...the doctrine [of sovereign immunity] is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that in actual administration originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights. A suit presupposes that the defendants are subject to the law invoked. Of course, it cannot be maintained unless they are so. But that is not the case with a territory of the United States, because the Territory itself is the fountain from which rights ordinarily flow. (United States of America, *United States Reports*, vol. 205 (*op. cit.*), p. 353.)

⁷⁴ *Ibid.* Cf. J.F. Lalive, "L'immunité de juridiction des Etats et des organisations internationales", *Recueil des cours...*, 1953-III (Leyden, Sijthoff, 1955), vol. 84, p. 218.

⁷⁵ See G.H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1941), vol. II, p. 402.

⁷⁶ See for example *Sullivan v. State of São Paulo* (footnote 39 above). Judge Clark suggested that immunity could be grounded on the analogy with member States within the United States of America. The State Department of the United States had recognized the claim of immunity.

⁷⁷ See the case of *Schneider v. City of Rome*, where the court said: "That the City of Rome is a 'political subdivision' of the Italian Government which exercises 'substantial governmental powers' is not alone sufficient to render it immune." (*Annual Digest... 1948* (London), vol. 15 (1953), case No. 40, p. 132.) Judge Learned Hand expressed doubt whether every political subdivision of a foreign State which exercised substantial governmental powers was immune (*ibid.*).

(d) *Classic statement of the principle of State immunity*

75. The judicial authorities of the United States were among the first to formulate the doctrine of State immunity, not uninfluenced by the common law concept of the immunity of the domestic sovereign nor unaffected by the impact of the United States Constitution. The principle of State immunity, which was later to become widely accepted in the practice of States, was clearly stated by Chief Justice Marshall in *The schooner "Exchange" v. McFaddon and others* (1812):

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation, within its own territory is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in the power which could impose such restriction. All exceptions, therefore, to the *full and complete power** of a nation *within its own territories,** must be traced up to the *consent of** the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory. The world being composed of distinct sovereignties, possessing *equal rights** and *equal independence,** whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation, in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. This consent may, in some instances, be tested by *common usage,** and by *common opinion,** growing out of that usage. A nation would justly be considered as violating its faith, although that faith might not be expressly pledged, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilised world.

This *full and absolute territorial jurisdiction** being alike the *attribute of every sovereign,** and being capable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights, as its objects. One sovereign being in no respect *amenable* to another; and being bound by obligations of the highest character not to degrade the *dignity** of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the *immunities* belonging to his *independent sovereign station,** though not expressly stipulated, are reserved by implication and will be extended to him.

This *perfect equality** and *absolute independence of sovereigns,** and this common interest impelling them to mutual intercourse and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to *waive** the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.⁷⁸

* Emphasis is added by the Special Rapporteur.

⁷⁸ Cranch, *op. cit.*, vol. VII, 3rd ed., pp. 135-136. See J. Hostie, "Contribution de la Cour Suprême des Etats-Unis au Développement du droit des gens," *Recueil des cours...*, 1939-III (Paris, Sirey, 1939), vol. 69, pp. 241 *et seq.*

76. In this classic statement of the principle of State immunity, the immunity accorded to a foreign State by the territorial State was founded on the attributes of sovereign States, including especially independence, sovereignty, equality and dignity of States. The granting of jurisdictional immunity was based on the consent of the territorial State as tested by common usage and confirmed by the *opinio juris* underlying that usage.

2. CIVIL LAW COUNTRIES: PRIMARILY A QUESTION OF COMPETENCE

77. Civil law countries have taken a different route from that followed by common law jurisdictions in the history of legal developments of the principle of State immunity. Primarily, jurisdictional immunity is closely related to the question of "*compétence*" which literally means "jurisdiction" or jurisdictional authority or power. A brief review of nineteenth-century practice of a number of European countries could illustrate this point.

78. In France, for instance, the principle of State immunity received broad application in the nineteenth century, in regard both to foreign States and also to their property. The acceptance of the principle of State immunity was worthy of notice in view of the French legal system, under which proceedings could be instituted against its own Government before the various Tribunaux administratifs. A distinction has been drawn between "*actes d'autorité*" subject to the competence of the Tribunaux administratifs and "*actes de gouvernement*" which are not subject to review by any French authority, judicial or administrative. As foreign affairs form a significant part of "*actes de gouvernement*", acts attributable to foreign States, emanating from the sovereign authority of the Government, could generally be regarded as "*actes de gouvernement*". Thus, in 1827, the Tribunal civil du Havre decided in *Blanchet v. République d'Haïti*⁷⁹ that article 14 of the Code Civil permitting suits in French courts against foreigners did not apply to a foreign State. This principle was reaffirmed by the Tribunal civil de la Seine in 1847 in a case concerning the Government of Egypt,⁸⁰ and by the Cour de Cassation, for the first time, in *Gouvernement espagnol v. Casaux*

(1849).⁸¹ The Cour de Cassation stated the principle of State immunity in the following terms:

The reciprocal independence of States is one of the most universally recognized principles of the Law of Nations;—it results from this principle that a government may not be subjected, in regard to its undertakings, to the jurisdiction of a foreign State;—the right of jurisdiction possessed by each government to judge disputes arising out of acts emanating from it is a right inherent in its sovereign authority, to which another government may not lay claim without risking a worsening of their respective relations;...⁸²

79. This court appears to have found State immunity on reciprocal independence and sovereign authority of the foreign States. This formulation led commentators of that time to suggest that State immunity be limited to cases where the foreign State was acting in its "sovereign capacity".⁸³ This distinction was recognized in regard to ex-sovereigns, but was generally rejected by French courts in the nineteenth century. Sovereignty, in its unqualified form, continues to be asserted as the foundation of State immunity from French jurisdiction.

80. In Belgium, articles 52 and 54 of the civil code adopted the principles of article 14 of the French Code Civil, permitting suits against foreigners before the local courts. Following the reasoning advanced by French courts, jurisdictional immunities were accorded to foreign States whenever the exercise of territorial jurisdiction would violate the principles of sovereignty and independence of States. Thus, in a case decided in 1840, the Appellate Court of Brussels disclaimed jurisdiction in regard to the Netherlands Government and a Dutch public corporation, holding both defendants to represent the Dutch State. Immunity was based on "the sovereignty of Nations" and "the reciprocal independence of States".⁸⁴ In its reasoning, the Court

⁸¹ *Recueil périodique et critique... (op. cit.)*, p. 9, and *Recueil général des lois... (op. cit.)*, pp. 81 and 94. See also an interesting footnote by L. M. Devilleneuve:

"This is the first ruling by the Cour de Cassation on these important questions of international law and extraterritoriality, although they had already been raised in the courts several times." (*Ibid.*, p. 81.)

⁸² *Recueil général des lois... (op. cit.)*, p. 93; *Recueil périodique et critique... (op. cit.)*, p. 9. See also C. J. Hamson, "Immunity of foreign States: The practice of the French courts", *The British Year Book of International Law, 1950* (London), vol. 27, p. 301. Cf. a decision by the French Conseil d'Etat of 2 May 1828 to the effect that art. 14 of the Civil Code did not apply to foreign ambassadors resident in France (*Recueil périodique et critique... (op. cit.)*, p. 6, *Recueil général des lois... (op. cit.)*, p. 89, and *Gazette des tribunaux* (Paris), 3 May 1828).

⁸³ See for example C. Demangeat, "Les tribunaux français peuvent-ils valider la saisie-arrest formée, en France, par un Français, sur des fonds appartenant à un gouvernement étranger?", *Revue pratique de droit français* (Paris), vol. I (1856), pp. 385 *et seq.*, and "Conférence des avocats de Paris, 27 décembre 1858" (*ibid.*, vol. VII (1859), pp. 182–186).

⁸⁴ Société générale pour favoriser l'industrie nationale v. Syndicat d'amortissement, Gouvernement des Pays-Bas et Gouvernement belge (see footnote 35 above). The decision was not altogether uninfluenced by the Treaty of Peace between Belgium and Holland. See E. W. Allen, *The Position of Foreign States before Belgian Courts* (New York, Macmillan, 1929), pp. 4–7.

⁷⁹ *Recueil périodique et critique... 1849 (op. cit.)*, part I, p. 6; *Recueil général des lois et des arrêts* (Paris, Sirey, 1849), part I, p. 83. See also the cases *Balguerie v. Gouvernement espagnol* (1825) (*Recueil périodique et critique... (op. cit.)*, p. 5); *République d'Haïti v. la maison Ternaux-Gandolphe* (1828); and *Gouvernement d'Espagne v. la maison Balguerie de Bordeaux* (1828), Tribunal civil de la Seine, 2 May 1828 (*Recueil général des lois... (op. cit.)*, p. 85, and *Recueil périodique et critique... (op. cit.)*, p. 7).

⁸⁰ *Solon v. Gouvernement égyptien* (1847) (*Recueil périodique et critique... (op. cit.)*, p. 7, and *Journal du Palais* (Paris, 1849), vol. I, pp. 172 *et seq.*)

appears to have rationalized State immunity by analogy with the basis of diplomatic immunities. The Court said:

It must therefore be held with the weightiest authorities that the immunities of ambassadors are the consequence of the representative character with which they are invested and stem from the independence of nations which are deemed to act through them; the principles of the Law of Nations applicable to Ambassadors are applicable *a fortiori* to the nations which they represent.⁸⁵

81. In Italy, the principle of State immunity was recognized and applied by Italian courts in the nineteenth century. Immunity was viewed as a logical result of independence and sovereignty of States. But even at the very outset, in *Morellet v. Governo Danese* (1882), the Corte di Cassazione of Turin distinguished between the State as “*ente politico*” and as “*corpo morale*”, and confined immunity to the former. The Court stated that:

it being incumbent upon the State to provide for the administration of the public body and for the material interests of the individual citizens, it must acquire and own property, it must contract, it must sue and be sued, and in a word, it must exercise civil rights in like manner as any other juristic person or private individual.⁸⁶

A similar distinction was made between the State as “*potere politico*” and as “*persona civile*” by the Corte di Cassazione of Florence in *Guttieres v. Elmilik* (1886).⁸⁷ Jurisdiction was exercised in respect of service rendered to the Bey of Tunis. A further distinction was recognized by the Corte di Appello di Lucca in 1887, between “*atti d'impero*” and “*atti di gestione*”, in another case connected with the same Bey of Tunis.⁸⁸

82. In Germany, the Minister of Justice was empowered by legislation to authorize certain measures ordered by the judiciary.⁸⁹ In 1819, the Minister of Justice refused an order of attachment made by the

⁸⁵ *Pasicrisie belge* (*op. cit.*), pp. 52–53. [Translation by the Secretariat.]

⁸⁶ *Giurisprudenza Italiana* (*op. cit.*), pp. 125, 130 *et seq.*

⁸⁷ *Il Foro Italiano* (Rome, 1886), vol. I, pp. 920–922, and Corte di Appello, Lucca, *ibid.*, p. 490, decision quoted (trans.) in *Supplement to the American Journal of International Law* (Washington, D.C.), vol. 26, No. 3 (July 1932), part III, “Competence of courts in regard to foreign States”, pp. 622–623.

⁸⁸ *Hampohn v. Bey de Tunisi*, Corte di Appello, Lucca (1887) (*Il Foro Italiano* (Rome, 1887), vol. I, pp. 485–486; trans. in *Supplement to the American Journal of International Law* (*op. cit.*), pp. 480 *et seq.*). Cf. the decision of the same court in the case *Elmilik v. Mandataire de Tunis* (*La Legge* (Rome, 1887), part II, p. 569; cited in *Journal du droit, international privé* (Clunet) (Paris, 1888) vol. 15, p. 289). The court stated:

“Treasury bonds issued by a foreign Government... result from an act of mere administration by the Government and not from the exercise of the right of sovereignty.” [Translation by the Secretariat.]

⁸⁹ The doctrine of State immunity was traceable back to the Prussian General Statute of 6 July 1793, sect. 76, which obliged the courts to notify the Foreign Office whenever the personal arrest of a foreigner of rank was contemplated. A Prussian Order in Council of 14 April 1795 provided for exemption from arrest for German princes as well as foreign princes unless otherwise ordered by a Cabinet Minister. This rule was limited to German princes by the Declaration of 24 September 1798, but was revived

Court of Saarbrücken against the Government of Nassau on the ground that the general principles of sovereign immunity formed part of international law. In a letter to the Advocate-General, the Minister based immunity on the grounds that “The exercise of jurisdiction against [a] foreign government was not consonant with international law maxims as they had developed,” and that “the Prussian Government would not brook such an action against itself, thereby recognizing it as in contradiction with the law of nations.”⁹⁰ This view of the law was adopted by German courts in later nineteenth-century cases.⁹¹

3. OTHER LEGAL SYSTEMS

83. Apart from the common law jurisdictions and the civil law systems already examined, the judicial practice of other countries prevailing in the nineteenth century was not so firmly established on the question of jurisdictional immunities of foreign States and their property. Countries belonging to the developing continents such as Africa, Asia and Latin America were preoccupied with other problems. Africa was not composed of many independent sovereign States; peoples were struggling to assert their self-determination and to regain complete political independence. The process of decolonization was not started until much later, after the advent of the United Nations and the adoption by the General Assembly of resolution 1514 (XV) of 14 December 1960.⁹² Asia was also partially colonized. The Asian countries that maintained their sovereign independence throughout the nineteenth century and all through their national history did not escape subjection to a so-called “capitulation regime”, whereby some measures of extraterritorial rights and powers were recognized in favour of foreign States and their subjects. The question of State immunity was relatively insignificant, since even foreigners were outside the competence of the territorial authorities, administrative or judicial. It was not until well into the present century that extraterritoriality was gradually and ultimately abolished, leaving behind certain trails of misery and injustices in the memories of territorial States which had to endure the regime as long as it lasted.⁹³ The Latin American continent was com-

by the General Statute of 1815 in respect of foreign princes. See E. W. Allen, *The Position of Foreign States before German Courts* (New York, MacMillan, 1928), pp. 1–3.

⁹⁰ *Ibid.*, p. 3.

⁹¹ See for example a decision of the Prussian Superior Court in 1832 and Prussian Order in Council of 1835 (*ibid.*, pp. 4–5).

⁹² This resolution is in part an answer to the call made in the final communiqué of the Asian-African Conference in Bandung, 24 April 1955, sect. D, “Problems of Dependent People”; see Indonesia, Ministry of Foreign Affairs, *Asian-African Conference Bulletin*, No. 9 (Jakarta, 1955), p. 2.

⁹³ See for example A. de Heyking, *L'Exterritorialité* (Berlin, Puttkammer and Mühlbrecht, 1889) and “L'exterritorialité et ses applications en Extrême-Orient”, *Recueil des cours...*, 1925-11 (Paris, Hachette, 1926), vol. 7, p. 241, as well as V. K. W. Koo, *The Status of Aliens in China* (New York, Columbia University, 1912).

paratively more recent in its emergence as a new continent of thriving independent sovereign nations. Socialist legality was not yet established in Eastern Europe at that time. There were scarcely any reported cases from these countries in the nineteenth century on this particular question of State immunity.

4. CURRENT STATE PRACTICE

84. It should be observed at this point that the principle of State immunity which was formulated in the early nineteenth century and was widely accepted in common law countries as well as in a large number of civil law countries in Europe in that century, has later been adopted as a principle of customary international law on a solid and uncontested basis in the general practice of States. Thus the principle of State immunity continues to be applied, to a lesser or greater extent, in the practice of the countries already examined in connection with its case-law in the nineteenth century, both in common law jurisdictions⁹⁴ and in civil law systems in Europe.⁹⁵ Its application is consistently followed in other countries. To give an example, the District Court of Dordrecht in the Netherlands, in *F. Advokaat v. I. Schuddinck & den Belgischen Staat* (1923), upheld the principle of State immunity in respect of the public service of tugboats. The Court said:

The principle [of immunity], which at first was recognized in respect of acts *jure imperii* only—has gradually been applied also to cases where a State, in consequence of the continuous extensions of its functions, and in order to meet public needs, has embarked upon activities of a private-law nature;... this extension of immunity from jurisdiction must be deemed to have been incorporated into the law of nations...⁹⁶

⁹⁴ See for example the following cases: the *Porto Alexandre* (1920) (United Kingdom, *The Law Reports, Probate Division* (*op. cit.*, 1920), p. 30); the *Christina* (1938) (*idem*, *The Law Reports, The House of Lords* (*op. cit.*, 1938), p. 485); *Compañía Mercantil Argentina v. U.S. Shipping Board* (1924) (*idem*, *The Law Journal Reports, King's Bench*, new series, vol. 93, p. 816); *Baccus S.R.L. v. Servicio Nacional del Trigo* (1956) (see footnote 42 above); *Berizzi Bros. Co. v. S.S. Pesaro* (1925) (United States of America, *United States Reports: Cases Adjudged in the Supreme Court* (Washington, D.C., U.S. Government Printing Office 1927), vol. 271, p. 562); the United States of Mexico *et al. v. Schmuck et al.* (1943) (*Annual Digest...*, 1943-1945 (London, 1949), case No. 21, p. 75); *Isbrandtsen Tankers v. President of India* (1970) (American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. X, No. 5 (September 1971), pp. 1046-1050).

⁹⁵ See for example the following cases: *Epoux Martin v. Banque d'Espagne* (1952) (*Journal du droit international* (Clunet) (Paris), No. 3 (July-September 1953), p. 654); *Governo francese v. Serra et al.* (1925) (*Rivista di diritto internazionale* (Rome), vol. IV, series III (1925), p. 540); *de Ritis v. Governo degli Stati Uniti d'America* (1971) (*ibid.* (Milan), vol. LV, No. 3 (1972), p. 483); *Luna v. Republica Socialista di Romania* (1974) (*ibid.*, vol. LVIII, No. 3 (1975), p. 597); *Dhelles et Masurel v. Banque centrale de la République de Turquie* (1963) (*Journal des tribunaux belges*, 19 January 1964, p. 44).

⁹⁶ *Weekblad van het Recht* (The Hague), No. 11088 (5 October 1923); *Nederlandse jurisprudentie* (Zwollen, 1924), p. 344; *Annual Digest...*, 1923-1924 (London, 1933), case No. 69, p. 133. For a critical note by G. van Slooten, see *Bulletin de l'Institut intermédiaire international* (The Hague, Nijhoff, 1924), vol. X, p. 2.

85. Another interesting illustration of the current State practice is the recent decision of the Supreme Court of Austria in *Dralle v. Republic of Czechoslovakia* (1950), which confirmed the principle of State immunity in respect of *acte jure imperii*. After reviewing judicial decisions of various national courts and other leading authorities on international law, the Court stated that:

The Supreme Court therefore reaches the conclusions that it can no longer be said that, under recognized international law, so-called *acta gestionis* are exempt from municipal jurisdiction.... Accordingly, the classic doctrine of immunity has lost its meaning and, *ratione cessante*, can no longer be recognized as a rule of international law.⁹⁷

Without, at this stage, attempting to verify the measure or extent of application of the principle of State immunity to various types of activities attributable to foreign States, suffice it to restate that there is clear authority in the established practice of States confirming the general acceptance of the principle of State immunity in respect of foreign States and their property.

86. Further illustrations of the current practice of States reconfirming the general acceptance of the principle of State immunity have been furnished by replies received from Governments.⁹⁸ Thus, in its ruling of 14 December 1948, Poland's Supreme Court stated:

The question of jurisdiction by Polish courts over other States cannot be based on provisions of articles 4 and 5 of the Code of Civil Procedure of 1932; a foreign State cannot be considered an alien in the meaning of article 4 of the Code of Civil Procedure nor of the provisions of article 6 of the Code which applies to diplomatic representatives of such a State... In deciding upon the questions of *court immunities* with regard to foreign States, one should base directly on the generally recognized principles accepted in international jurisprudence, outstanding among which is that of reciprocity among States. The principle consists in one State rejecting or granting court immunity to another State to the very same extent as the latter would grant or reject the immunity of the foreigner.⁹⁹

The ruling of the Supreme Court of Poland of 26 March 1958 stipulates that due to customary international practice, whereby bringing summons against one State in the national courts of another State is inadmissible, Polish courts, in principle are not competent to deal with cases against foreign States.¹⁰⁰

87. Similarly, courts in the Latin American continents have reaffirmed the principle of State immunity.

⁹⁷ *Österreichische Juristen Zeitung* (Vienna), No. 14/15 (29 July 1950), case No. 356, p. 341 (included in material submitted by the Austrian Government). See also *International Law Reports 1950* (London), vol. 17 (1956), case No. 41, p. 163, and *Journal du droit international* (Clunet) (Paris), No. 1 (January-March 1950), p. 747.

⁹⁸ See *Yearbook...* 1979, vol. II (Part Two), p. 186, document A/34/10, para. 183.

⁹⁹ Decision C.635/48: see *Państwo i Prawo* (Warsaw), vol. IV, No. 4 (April 1949), p. 119.

¹⁰⁰ Decision 2 CR.172/56: see *Orzecznictwo Sądów Polskich i Komisji Arbitrazowych* (Warsaw), No. 6 (June 1959), p. 60.

Thus, the Supreme Court of Justice of Chile, by a decision of 3 September 1969, upheld the principle of State immunity, stating that

it is a universally recognized principle of international law that neither sovereign nations nor their Governments are subject to the jurisdiction of the courts of other countries. There are other extrajudicial means of claiming from those nations and their Governments performance of the obligations incumbent on them.¹⁰¹

By a more recent decision of 2 June 1975, in *A. Senerman v. República de Cuba*, the Court declined jurisdiction on the ground that:

foremost among the fundamental rights of States is that of their equality, and from the equality derives the need to consider each State exempt from the jurisdiction of any other State. It is by reason of this characteristic, erected into a principle of international law, that in regulating the jurisdictional activity of different States the limit imposed on this activity, in regard to the subjects, is that which determines that a sovereign State must not be subjected to the jurisdictional power of the courts of another State.¹⁰²

88. The courts of Argentina also accepted the principle of State immunity. In *Baima & Bessolino v. el Gobierno de Paraguay* (1915),¹⁰³ the court held that a foreign Government cannot be sued in the courts of another country without its consent. In another case, involving the vessel *Cabo Quilates*, requisitioned by the Spanish Government during the Civil War and assigned to the auxiliary naval forces for Government Service, the court, recognizing the sovereign immunity of the Spanish government, observed that it was a fundamental principle of public international law and constitutional law that there could be no compulsion of a State to submit to territorial jurisdiction. The court stated:

The wisdom and foresight of this rule of public law are unquestionable. If the acts of a sovereign State could be examined by the Courts of another State and could perhaps contrary to the former's wishes be declared null and void, friendly relations between Governments would undoubtedly be jeopardized and international peace disturbed.¹⁰⁴

89. While recent African decisions have not been widely known or published for the simple reason that the occasion has not arisen for such a decision, Asian courts have had opportunities to express their views on the principle of State immunity. Reported decisions have recently become available from English-speaking Asian countries, following a pattern closely associated with developments in the Anglo-American practice. While there is a certain harmony in the case-law of Commonwealth countries, owing to the possibility, in some cases, of appeal to the Privy Council, a recent collection of the decisions of the Philippine Supreme Court on jurisdictional immunities of the State and its

properties¹⁰⁵ is most revealing in the emergence of trends and confirmation of practice closely resembling developments in the United States of America, admitting different circumstances and variations in the judicial reasoning. Thus, in *Larry J. Johnson v. Howard M. Turner* (1954),¹⁰⁶ the Court held the action to be really a suit against the Government of the United States acting through its agents and that, because the said Government had not given consent thereto, the trial courts had no jurisdiction to entertain the case. In *Donald Baer v. Hon. Tito V. Tizon et al.* (1974),¹⁰⁷ the Court held that a foreign Government acting through its naval commanding officer is immune from suit relative to the performance of an important public function of any government—the defence and security of its naval base in the Philippines under a treaty.

5. GENERAL PRACTICE OF STATES AS EVIDENCE OF CUSTOMARY LAW

90. The preceding survey of the judicial practice of common law jurisdictions and civil law systems in the nineteenth century and of other countries in that contemporary period indicates a uniformity in the unchallenged acceptance of the principle of State immunity. While it would be neither possible nor desirable to review the current case-law of all countries which might uncover some discrepancies in historical developments and actual application of the principle,¹⁰⁸ it should be observed that for the countries which know of no reported judicial decisions on the subject, there is no indication that the principle of State immunity as a principle of international law has been or will be rejected. The conclusion is therefore warranted that, in the general practice of States as evidence of customary law, there is not a single doubt that the principle of State immunity has been firmly established as a norm of customary international law. There has been no evidence to the contrary, nor of any modification of the content of such a norm, insofar as the basic principle of immunity is concerned.

¹⁰⁵ Information submitted by the Government of the Philippines.

¹⁰⁶ Decision of the Philippines Supreme Court No. L-6118 of 26 April 1954: see *Philippine Reports* (Manila, Bureau of Printing), vol. 94, p. 807.

¹⁰⁷ Decision of the Philippines Supreme Court of 3 May 1974, No. L-24294: see Republic of the Philippines, *Official Gazette* (Manila), vol. 70, No. 35 (2 September 1974), pp. 7361 *et seq.*

¹⁰⁸ For instance, in the case *Secretary of the United States of America v. Gammon-Layton* (1970), an appeal for immunity of a foreign State was dismissed by the Appellate Court of Karachi, which held that sect. 86 of the Code of Civil Procedure, 1908 (Pakistan, Ministry of Law and Parliamentary Affairs, *The Pakistan Code* (Karachi), vol. V (1908–1910) (1966), p. 53) was applicable to foreign rulers and not to foreign States as such, and that it was wrong to hold that the principles of English law had to be followed in the construction of that section (*All-Pakistan Legal Decisions* (Karachi), vol. XXIII (1971), p. 314).

¹⁰¹ Included in material submitted by the Government of Chile.

¹⁰² *Idem.*

¹⁰³ See R. T. Méndez, E. Imaz and R. E. Rey, *Fallos de la Corte Suprema de Justicia de la Nación* (Buenos Aires, Imprenta López), vol. 123, p. 58.

¹⁰⁴ *Ibid.*, vol. 178, p. 173. See also *Annual Digest... 1938–1940* (*op. cit.*), pp. 293–294.

B. Governmental practice

1. THE PART PLAYED BY THE EXECUTIVE IN STATE PRACTICE

91. The practice of States in regard to jurisdictional immunities of foreign States and their property has been gathered mainly from judicial decisions constituting the jurisprudence or case-law of individual nations. As the immunities or exemptions from jurisdiction are accorded to foreign States by the territorial authorities, judicial or administrative, which in so doing have decided not to exercise the power normally vested in them, such decisions are to be found in the records of the courts or the official reports of decided cases more often than in the files or public records of the police or other administrative authorities. On the other hand, in the practice of several countries, the executive branch of the government has undertaken a task or assumed an active part in the process of decision-making by the courts of law. Thus it is not unnatural to enquire further into the governmental practice of States in order to appreciate the overall practice attributed to States as evidence of general custom. This enquiry may reveal an interesting phenomenon. It is not uncommon that, in litigation involving foreign States or Governments, the executive branch of the government of certain States may have a more or less active role to play or may intervene or participate, at one stage or another, in legal proceedings before the Court. The governmental agencies involved in the process could be the Ministry of Foreign Affairs, the Ministry of Justice, the Attorney General's Office, the office of the Director of Public Prosecution, or other like offices of equivalent designation or comparable functions.

92. In some countries, a legal proceeding against a foreign prince is not legally permissible without prior authorization by a Cabinet Minister or by the Government.¹⁰⁹ This requirement of prior governmental authorization is probably attributable to one of the rational bases for State immunity, namely, the fact that the conduct of foreign relations could be jeopardized by uncontrolled or unauthorized proceedings against foreign sovereigns or foreign States. Exercise or assumption of jurisdiction by the territorial court might also, in certain cases, cause political embarrassment for the political branch of the home government.¹¹⁰ Therefore, the decision which, on the face of it

¹⁰⁹ See for example the Prussian practice noted in para. 82 above. The practice of Netherlands courts has also been influenced by intermittent interpositions of the executive, either directly or through the legislature. Compare with the Pakistani case *Secretary of State of the United States of America v. Gammon-Layton* (1970) (see footnote 108 above).

¹¹⁰ For example, the Philippines case *Baer v. Tizon* (1974) noted in para. 89 above. For United States of America cases, see *United States of Mexico et al. v. Schmuck et al.* (1943) (see footnote 94 above); *Ex parte Republic of Peru* (United States of America, *United States Reports* (Washington, D.C., U.S. Government Printing Office, 1943), vol. 318, p. 578); the *Beaton Park* (1946) (*Annual Digest...*, 1946 (London, 1951), case No. 35, p. 83); the *Martin Behrman* (1947) (*ibid.*, 1947 (London, 1951), case No. 26, p. 75); and *Isbrandtsen Tankers v. President of India* (1970) (see footnote 94 above).

is purely judicial, may have been tainted or influenced by political considerations emanating from the territorial government or its political branch, because the matter may have the potential tendency to affect adversely the conduct of foreign affairs or the Government may run the risk of political embarrassment in international relations as well as in the internal political arena.

2. THE FORMS OF PARTICIPATION BY THE POLITICAL BRANCH OF THE GOVERNMENT

93. The executive could participate or intervene in legal proceedings before the territorial court in several ways and at various stages. First, it could do so as regards questions of fact or status, such as the existence of a state of war or peace, the recognition of a foreign State or Government, the official acceptance of the representative character of a delegation or mission, the legal status of an agency or instrumentality of a foreign State or Government, the official text of legal provisions or statutes of a foreign country establishing an entity or incorporating a legal body. Verifications and confirmations of such facts could have a direct bearing on the question of State immunity, whether or not in a given case, a claim of immunity will be upheld or rejected. In the practice of some countries, where the acceptance of a statement of fact by a foreign Government¹¹¹ or the determination of the question of status¹¹² by the executive has been regarded as binding on the courts and decisive as to those facts and status, the courts nevertheless retain jurisdiction to decide other questions left open for determination. Thus, where the executive has sustained the claim of immunity, the courts could decide whether there had been a waiver of immunity, or submission to the jurisdiction on the part of the foreign government.¹¹³

94. Apart from the determination of the question of fact or of status, the executive could also intervene *amicus curiae*, through a responsible governmental

¹¹¹ See for example the *American Tobacco Co. v. the Ioannis P. Goulandris* (1941) (United States of America, *Federal Supplement, District Court of New York* (St. Paul, Minn., West Publishing, 1942), vol. 40).

¹¹² See for example the case of *E. W. Stone Engineering Co. v. Petróleos Mexicanos* (1954), in which the court declared:

"A determination by the Secretary of State with respect to the status of such instrumentalities is as binding on the courts as is his determination with respect to the foreign government itself." (*Annual Digest...*, 1946 (*op. cit.*), case No. 31, p. 78.)

See also the case *United States v. Pink et al.* (United States of America, *United States Reports* (Washington, D.C., U.S. Government Printing Office, 1942), vol. 315, p. 203). For British cases, see for example *Krajina v. The Tass Agency and Another* (footnote 42 above); *Compañía Mercantil Argentina v. U.S.S.B.* (footnote 94 above); and *Baccus S.R.L. v. Servicio Nacional del Trigo* (1957) (footnote 42 above).

¹¹³ See for example the case *United States of Mexico et al. v. Schmuck et al.* (see footnote 94 above) and *Ulen's Co. v. Bank Gospodarstwa Krajowego* (1940) (*Annual Digest...*, 1938-1940 (*op. cit.*), case No. 74, pp. 214-215).

agency such as the legal adviser or the attorney-general, by making a suggestion to the effect that in a given case immunity should be accorded or denied. It is a matter of considerable controversy whether the judicial authority would necessarily follow a positive or negative suggestion from the executive. The weight of persuasiveness of such a suggestion very much depends on the prevailing attitude of the court at the material time.¹¹⁴

95. Since the judiciary is normally, in principle as well as in practice, independent of the executive in matters of adjudication, due to the doctrine of separation of powers,¹¹⁵ it appears that the courts are not always bound to follow the lead of the executive in every case. If the executive suggests that immunity should be accorded, the courts are likely to follow suit,¹¹⁶ although not in every conceivable instance.¹¹⁷ If, however, the political branch of the government chooses to suggest that no immunity was justifiable, the courts could still grant jurisdictional immunity, not out of wilful disregard, but in principle, to assert their constitutional independence from other branches of the government, if indeed not their supremacy.¹¹⁸

96. The hesitations entertained by the courts in regard to "suggestions" made by the executive through the Attorney-General or other officials acting under the direction of an analogous agency, have led the executive to assume a more prominent part in the process of decision-making. It is true that the executive branch of the government may recognize or allow a claim of immunity which the courts are bound to follow, and all questions connected with the claim of immunity cease to be judicial when the executive has

authoritatively recognized the claim of immunity.¹¹⁹ The courts are not always enthusiastic about following the lead of the political branch of the government.¹²⁰ Thus, whenever the necessity arises, the executive could always resort to a more radical means to ensure its leading role in this particular connection. It could make a declaration of a general policy regarding the application of the principle of State immunity, for instance, by imposing some restrictions or limitations.¹²¹ It could also advise the State to become party to an international or regional convention on State immunities that would oblige the judicial authorities to observe the new trends.¹²² It could also introduce or cause to be adopted a legislation more in line with the general direction in which it considers international law to be progressively developing.¹²³

97. The political branch of the government may indeed have a more or less significant part to play in the formation of the practice of a given State in regard to the granting of jurisdictional immunities to foreign States. On the other hand, it is the executive branch of the government that makes a decision whether, in a given case involving its own State or government or agency or instrumentality or property, it will assert a claim of immunity, including the time at which and the form in which such assertion will take place. The claim of State immunity is often made through diplomatic or

¹¹⁹ See for example the cases *United States of Mexico et al. v. Schmuck et al.* (see footnote 94 above) and *ex parte Republic of Peru* (see footnote 110 above).

¹²⁰ See for example the case *Republic of Mexico et al. v. Hoffman* (footnote 116 above); see also Lyons, *loc. cit.* Cf. the role played by the various Secretaries of State of the United Kingdom in regard to questions of status of foreign sovereigns, as, for example, in the cases *Duff Development Co. Ltd. v. Government of Kelantan* and another (see footnote 38 above, *in fine*) and *Kahan v. Pakistan Federation* (see footnote 34, *in fine*).

¹²¹ See for example a letter of 19 May 1952 in which J. B. Tate, Acting Legal Adviser to the United States of America Department of State, wrote:

"It will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity." (United States of America, *Department of State Bulletin* (Washington, D.C.), vol. XXVI, No. 678 (23 June 1952), p. 985.)

See also W. W. Bishop, Jr., "New United States policy limiting sovereign immunity", *The American Journal of International Law* (Washington, D.C.), vol. 47, No. 1 (January 1953), pp. 93 *et seq.*

¹²² For example, the 1972 European Convention on State Immunity; see Council of Europe, *Explanatory Reports on the European Convention on State Immunity and the Additional Protocol* (Strasbourg, 1972). See also I.M. Sinclair, "The European Convention on State Immunity", *International and Comparative Law Quarterly* (London), vol. 22 (April 1973), part 2, pp. 254 *et seq.*

¹²³ For example, the United States *Foreign Sovereign Immunities Act of 1976* (see footnote 33 above). See also T. Atkeson, S. Perkins and M. Wyatt, "H.R. 11315—The revised State-Justice bill on foreign sovereignty immunity: Time for action", *The American Journal of International Law* (Washington, D.C.), vol. 70, No. 2 (April 1976), pp. 298 *et seq.*, and the British *State Immunity Act 1978* (see footnote 33 above), which came into force on 22 November 1978, preceding the ratification by the United Kingdom of the European Convention of 1972.

¹¹⁴ See for example the cases *Miller et al. v. Ferrocarril del Pacifico de Nicaragua* (1941) (*Annual Digest... 1941-1942 (op. cit.)*, case No. 51, p. 191); *United States of Mexico et al. v. Schmuck et al.* (see footnote 94 above); *E. W. Stone Engineering Co. v. Petróleos Mexicanos* (see footnote 112 above). See also A.B. Lyons, "The conclusiveness of the 'suggestion' and certificate of the American State Department", *The British Year Book of International Law, 1947* (London), vol. 24, p. 116.

¹¹⁵ See Montesquieu, *De l'Esprit des lois*.

¹¹⁶ See for example Chief Justice Stone's statement in the case *Republic of Mexico et al. v. Hoffman* (1945):

"It is therefore not for the courts to deny an immunity which our Government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." (United States of America, *United States Reports*, vol. 324 (Washington, D.C., U.S. Government Printing Office, 1946), p. 35.)

Cf. *Ex parte Republic of Peru* (see footnote 110 above).

¹¹⁷ See for example Secretary Lansing's letter of 8 November 1918 (file 195/229a); the refusal of the Attorney General to adopt the Secretary's suggestion (file 195/230); and Mr. Nielson's letter to Mr. Justice Mack of 2 August 1921 (file 800).

¹¹⁸ The United States Supreme Court deliberately refused to adopt the suggestion of the executive that immunity should not be accorded to vessels employed by a foreign government in commercial operations. Compare the attitude of the Department of Justice as reflected in Mr. McGregor's letter of 25 November 1918 (Attorney General File 190/230).

consular agents accredited to the territorial State in which legal proceedings have been instituted involving the foreign State.¹²⁴ It is also possible in certain jurisdictions to assert such claims through diplomatic channels and, ultimately, via the Ministry of Foreign Affairs of the territorial State.¹²⁵

3. THE INFLUENCE OF GOVERNMENTAL PRACTICE

98. There are many different forms that participation by the political branch of the government can take in assuring communication or compliance of its views and, occasionally, in ensuring its lead in matters affecting the conduct of foreign relations, including, inevitably, legal proceedings against foreign States which could entail political embarrassments. The views of the government expressed through its political branch are highly relevant and indicative of general trends in the practice of States. While legal developments in the field of judge-made law may be slow, and not receptive to radical changes, the lead taken by the government could be decisive in bringing about desirable legal developments through forceful assertion of its positions or through the intermediary of the legislature, or by way of governmental acceptance of principles contained in an international convention. Conversely, the government is clearly responsible for its decision to assert a claim of State immunity in respect of itself and its property, or to consent to the exercise of jurisdiction by the court of another State, or to waive its sovereign immunity in a given case. That the government can exert a considerable influence over legal developments in this field, both as grantor and as recipient of immunity in State practice, therefore cannot be gainsaid. As will be seen in the ensuing paragraphs concerning national legislation and international conventions, the role of the executive in introducing bills or draft laws on State immunity,¹²⁶ in securing passage of such bills through parliament,¹²⁷

¹²⁴ See for example the cases *Krajina v. The Tass Agency* and another (footnote 42 above); *Compañía Mercantil Argentina v. U.S.S.B.* (footnote 94 above); and *Baccus S.R.L. v. Servicio Nacional del Trigo* (footnote 42 above), and also *Civil Air Transport Inc. v. Central Air Transport Corp.* (1953) (United Kingdom, *The Law Reports, House of Lords...* (op. cit., 1953), p. 70), and *Juan Ysmael and Co. v. Government of the Republic of Indonesia* (1954), (*idem.*, *The Weekly Law Reports, House of Lords...* (London, 1954), vol. 3, p. 531).

¹²⁵ See for example *Isbrandtsen Tankers v. President of India* (see footnote 94 above), where the United States of America Department of State had presented a written suggestion of immunity. Contrast the case *Comisaria General de Abastecimientos y Transportes v. Victory Transport Inc.* (1965) (United States of America, *Federal Reporter*, St. Paul, Minn., West Publishing, 1965), 2nd series, vol. 336, p. 354).

¹²⁶ See for example *Atkeson, Perkins and Wyatt, loc. cit.*, and United States of America, *94th Congress, 2nd Session, Senate Reports*, vol. 1-11 (Washington D.C., U.S. Government Printing Office, 1976), Report No. 94-1310. This bill (H.R.11315) came into effect in the United States on 19 January 1977.

¹²⁷ See for example the British State Immunity Act 1978 mentioned in footnote 33 above.

and its decision in engaging governmental responsibility by signing and ratification of an international convention on the subject¹²⁸ will clearly reflect its substantial contribution to the progressive development of State practice and, ultimately, of principles of international law governing State immunity.

C. National legislation

99. As has been seen, the principle of State immunity was first recognized in judicial decisions of municipal courts. The practice of States has been more preponderantly established and followed by the courts, although its subsequent growth has received some impetus from the executive branch of the Government. Direct contribution from the legislature to legal department in this field has been a relatively recent occurrence. It is nevertheless not without significance to note that national legislation constitutes an important element in the overall concept of State practice. It is clearly a convenient measure, a decisive indication as to the substantive content of the law and also of the actual practice of States.

1. SPECIAL LEGISLATION ON STATE IMMUNITY

100. An instance of legislation that deals directly with the topic under consideration is the United States of America's *Foreign Sovereign Immunities Act* of 1976. Section 1604 reconfirms the principle of sovereign immunity or immunity of a foreign State from jurisdiction, as it is entitled. It provides:

Subject to existing international agreements, to which the United States is a party at the time of enactment of this Act a foreign State shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.¹²⁹

101. A still more recent legislation on the subject is the United Kingdom *State Immunity Act, 1978*. Article 1, entitled "Immunity from Jurisdiction", provides:

1. (1) A State is immune from jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this part of this Act.

(2) A court shall give effect to the immunity conferred by this Section even though the State does not appear in the proceedings in question.¹³⁰

102. The United Kingdom, having adopted the State Immunity Act 1978, proceeded to ratify the European Convention on State Immunity (1972), which it had

¹²⁸ See for example the European Convention on State Immunity which is in force between Austria, Belgium, Cyprus and the United Kingdom (see footnote 33 above). The Federal Republic of Germany, Luxembourg, the Netherlands and Switzerland have signed the Convention. The Additional Protocol is not yet in force.

¹²⁹ United States of America, *United States Statutes at Large, 1976* (Washington, D.C., U.S. Government Printing Office, 1978), vol. 90, part 2, Public Law 94-583, pp. 2891-2892; *idem.*, *United States Code, 1976 Edition* (op. cit.) chap. 97, sect. 1604.

¹³⁰ For reference, see footnote 33 above.

earlier signed. Other countries which have ratified the Convention have likewise made appropriate declarations or passed legislation giving effect to the provisions of the Convention. For instance, Austria, a signatory to the Convention, has adopted the following legislative measures:

(a) Austrian declaration in accordance with article 28, paragraph 2, of the European Convention;¹³¹

(b) Federal law of 3 May 1974 concerning the exercise of jurisdiction in accordance with article 21 of the Convention;¹³²

(c) Declaration of the Republic of Austria in accordance with article 21, paragraph 4, of the Convention.¹³³

103. Belgium is another country that has adopted similar legislation to facilitate the implementation of the provisions of the European Convention.¹³⁴

2. GENERAL LAWS ON JURISDICTION OF COURTS

104. Apart from special legislation on State immunity, there are legislative provisions in various statutes and basic laws generally dealing with questions of jurisdiction or competence of the courts, or general regulations concerning suits against foreign States. A typical example is the provision of article 61 of a Soviet Act entitled "Fundamentals of Civil Procedure in the Soviet Union and the Union Republics, 1961", which reads (para. 1):

Actions against foreign States: Diplomatic immunity

The filing of a suit against a foreign State, the collection of a claim against it and the attachment of its property located in the USSR may be permitted only with the consent of the competent organs of the State concerned...¹³⁵

105. This act, confirming the principles of State immunity, of diplomatic immunity and of consent, introduces in the third paragraph of the same article an important condition based on reciprocity in practice

¹³¹ "The Republic of Austria declares, according to Article 28, paragraph 2 of the European Convention on State Immunity that its constituent States Burgenland, Carinthia, Lower Austria, Upper Austria, Salzburg, Styria, Tyrol, Vorarlberg and Vienna may invoke the provisions of the European Convention on State Immunity applicable to Contracting States, and have the same obligations." (Austria, *Bundesgesetzblatt für die Republik Österreich* (Vienna), No. 128 (18 August 1976), document No. 432, p. 1840.)

¹³² *Ibid.*, document No. 433, p. 1840.

¹³³ *Ibid.*, No. 47 (5 May 1977), document No. 173, p. 711.

¹³⁴ See for example the Belgian declaration: "In accordance with Article 21, the Belgian Government designates the court of first instance as competent to determine whether the Belgian State must give effect to a foreign judgement."

¹³⁵ Law of 8 December 1961 of the USSR (*Sbornik zakonov SSSR i ukazov Prezidiuma Verkhovnogo Soveta SSSR 1938-1975* [Compendium of laws of the USSR and of decrees of the Presidium of the Supreme Soviet of the USSR, 1938-1975] (Moscow, *Izvestia Sovetov Deputatov Trudiashchikhsia SSR*, 1976), vol. 4, p. 53).

with the possibility of recourse to countermeasures of a retaliatory character.¹³⁶

106. As earlier noted, the principle of State immunity has been established in several countries as a result of judicial interpretation or application of legal provisions, such as the restrictive application of article 14 of the French Code Civil¹³⁷ or articles 52 and 54 of the Belgian Civil Code,¹³⁸ resulting in non-exercise of territorial jurisdiction.

107. On the other hand, the appropriate laws of many countries may contain provisions exempting some categories of privileged persons such as foreign sovereigns,¹³⁹ foreigners of rank,¹⁴⁰ or rulers of foreign States.¹⁴¹

3. LAWS ON SPECIFIC ASPECTS OF STATE IMMUNITY

108. Without at this stage going into details of specific aspects of State immunity or the immunity accorded to certain types of property owned, possessed or controlled or in the employment of a foreign State, such as aircraft and vessels, it is interesting to note that, in some countries, laws have been passed dealing specifically with certain specialized aspects of State immunities. The United States Public Vessels Act of 1925,¹⁴² with its provisions on vessels

¹³⁶ That paragraph reads:

"Where a foreign State does not accord to the Soviet State, its representatives or its property the same judicial immunity which, in accordance with the present article, is accorded to foreign States, their representatives or their property in the USSR, the Council of Ministers of the USSR or other authorized organ may impose retaliatory measures in respect of that State, its representatives or the property of that State" (*ibid.*, pp. 53-54).

¹³⁷ See for example *Blanchet v. République d'Haiti*, mentioned in para. 78 above.

¹³⁸ See for example *Société générale pour favoriser l'industrie nationale v. Syndicat d'amortissement*, mentioned in para. 80 above.

¹³⁹ See for example the requirement of prior governmental authorization for legal proceedings against foreign princes, under Prussian legislation (see para. 82 above).

¹⁴⁰ For example, the Royal Decree of the Netherlands of 29 May 1917 (Government of the Netherlands, *Staatsblad van het Koninkrijk der Nederlanden*, (The Hague), No. 446 (6 June 1917)), and Netherlands practice as noted in para. 84 above.

¹⁴¹ For example, sect. 86 of the Code of Civil Procedure of Pakistan upholding the immunity of foreign rulers as distinguished from foreign States (see footnote 108 above).

¹⁴² See United States of America, *The Statutes at Large of the United States of America from December, 1923, to March, 1925* (Washington D.C., U.S. Government Printing Office, 1925), vol. 43, part 1, chap. 428, sects. 1, 3 and 5, pp. 1112-1113; *idem*, *United States Code Annotated, Title 46, Shipping, Sections 721 to 1100* (St. Paul, Minn., West Publishing, 1975), sects. 781-799; see also sect. 9 of the *United States Shipping Act, 1916* (*idem*, *The Statutes at Large... from December 1915 to March 1917* (*op. cit.*, 1917), vol. 39, part 1, chap. 451, pp. 728, 730 and 731), noted in Hackworth *op. cit.*, vol. II, p. 431), which provides that vessels purchased, chartered or leased from the United States Shipping Board, while employed solely as merchant vessels, "shall be subject to all laws, regulations and liabilities

employed solely as merchant vessels, may be cited as an example of such legislation. It should also be noted that by 1938 thirteen States had deposited their instruments of ratification of the International Convention for the Unification of certain Rules relating to the Immunity of State-owned vessels (Brussels, 1926) and its Additional Protocol (1934),¹⁴³ and that many countries have since adopted national legislation to implement the provisions of the Convention.¹⁴⁴ The United Kingdom is among the latest that have just introduced legislation on the subject.¹⁴⁵

109. Other laws have been adopted by various countries following ratifications or acceptance or adhesion to a number of international conventions on diplomatic and consular relations which, as will be seen, have enabled States to fulfil their obligations under the conventions they have signed and ratified or otherwise accepted.¹⁴⁶

D. International conventions

110. As has been noted in the preliminary report on the topic,¹⁴⁷ international conventions have a decisive role to play in the final stages of international legal developments in the field of jurisdictional immunities of States as well as in other fields of international law. Without analysing the substantive contents of each convention that may have a more or less direct bearing on the principle of State immunity, suffice it to note the conclusion and general direction of such conventions, and whenever specific provisions are

(Footnote 142 continued.)

governing merchant vessels". This must in turn be read subject to sect. 7 of the *Suits in Admiralty Act, 1920* (United States of America, *The Statutes at Large... from May, 1919, to March, 1921*, vol. 41, chap. 95, pp. 525 and 527; *idem*, *United States Code Annotated... (op. cit.)*, sects. 741-752) and *Special Instruction, Consular No. 722, 21 May 1920, U.S. Department of State* file 195/283; and the enquiry made by the United Kingdom Ambassador as to the interpretation of sect. 7 (file 195/482) and the reply thereto (file 195/503): Hackworth, *op. cit.*, vol. II, pp. 434 and 441. See also Gregory's letter of 25 November 1918 (file 195/230 of the Attorney General) refusing to accept the suggestion of Secretary of State Lansing (file 195/229a) (*ibid.*, p. 430).

¹⁴³ League of Nations, *Treaty Series*, vol. CLXXVI, pp. 199 and 214. See Hackworth, *op. cit.*, vol. II, p. 465.

¹⁴⁴ For example, the Swedish law implementing the International Convention of 1926 (see footnote 143 above), as applied in the *Rigmore* case (1942) (*The American Journal of International Law* (Washington, D.C.), vol. 37, No. 1 (January 1943), p. 141, and *Annual Digest... 1941-1942 (op. cit.)*, Case No. 63, p. 240). Compare the Norwegian cases such as the *Frederikstad (Norsk Retstidende 1949)* (Oslo), 114th year, p. 881, and *International Law Reports* (London, 1956), Case No. 42, p. 167).

¹⁴⁵ United Kingdom, *International Convention for the Unification of certain Rules concerning the Immunity of State-owned Ships (Brussels, 10 April 1926, with Supplementary Protocol, Brussels, 24 May 1934)*, Cmnd. 7800 (London, H.M. Stationery Office, 1980). The legislation entered into force on 3 January 1980.

¹⁴⁶ See sect. D below.

¹⁴⁷ *Yearbook... 1979*, vol. II (Part One), pp. 236-237, document A/CN.4/323, paras. 39-43.

appropriately relevant to cite them *in extenso* without additional comments.

1. CONVENTIONS ON STATE IMMUNITY

111. As there are at present no general conventions of a universal character directly on State immunities and the present study is designed to contribute towards the adoption of such an international instrument, conventions of narrower scope in geographical application and in membership may deserve particular attention. In this connection, the European Convention on State Immunity (1972) has a direct bearing on the point under current consideration. The last article of chapter I, "Immunity from jurisdiction", contains the following provision:

Article 15

A Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within Articles 1 to 14; the court shall decline to entertain such proceedings even if the State does not appear.¹⁴⁸

2. INTERNATIONAL CONVENTIONS RELEVANT TO SOME ASPECTS OF STATE IMMUNITY

112. The current treaty practice of States indicates the application of provisions of several conventions of universal character dealing with some special aspects of State immunity. The following instruments have been noted:

(a) The Geneva Conventions on the Law of the Sea of 1958, notably the Convention on the Territorial Sea and Contiguous Zone¹⁴⁹ and the Convention on the High Seas,¹⁵⁰ which contain provisions confirming the principle of State immunity in respect of warships and State-owned ships employed in governmental and non-commercial service in certain circumstances.

(b) The 1961 Vienna Convention,¹⁵¹ which contains an endorsement of the principle of State immunity in respect of State property used in connection with diplomatic missions.

(c) The 1963 Vienna Convention,¹⁵² which contains corresponding provisions partially covering the immunities of State property used in connection with consular missions.

(d) The Convention on Special Missions (1969),¹⁵³ which also treats in part some aspects of State

¹⁴⁸ See Council of Europe, *Explanatory Reports... (op. cit.)*, p. 53 (article) and p. 22 (commentary). See also footnotes 122 and 128 above.

¹⁴⁹ See footnote 57 above (art. 22).

¹⁵⁰ See footnote 57 above.

¹⁵¹ See footnote 21 above (art. 22, on the inviolability of premises; art. 24, on archives and documents; art. 27, on communications).

¹⁵² See footnote 48 above.

¹⁵³ See footnote 49 above.

immunity in respect of property used in connection with special missions.

(e) The 1975 Vienna Convention,¹⁵⁴ which contains appropriate provisions maintaining the immunities of State property used in connection with the premises, offices or missions of the representatives of States in their relations with international organizations with headquarters in the territory of a host country.

3. REGIONAL CONVENTIONS

113. Apart from bilateral arrangements which have played an important part in the development of treaty practice of some States in some specialized fields, there are now currently in force, mainly in Europe, the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels and its Additional Protocol of 1934.¹⁵⁵ The Convention is significant as living testimony of treaty endorsement of the principle of State immunity as applied to State-owned or State-operated vessels employed exclusively in governmental and non-commercial service.¹⁵⁶

E. International adjudication

114. While municipal jurisprudence abounds with decisions indicating general acceptance of the principle of State immunity in the practice of States, there appears to be complete silence on the part of international adjudication, either arbitration or judicial settlement. This singular absence of international judicial pronouncement is no evidence of the principle not being subject to regulation by international law, any more than diplomatic and consular immunities as enshrined in the Vienna Conventions of 1961 and 1963,¹⁵⁷ which received little or no international judicial endorsement until this year in the case between the United States of America and Iran.¹⁵⁸

¹⁵⁴ See footnote 50 above (arts. 54, 56 and 58).

¹⁵⁵ See footnote 143 above. See also J. W. Garner, "Legal status of Government ships employed in commerce", *The American Journal of International Law* (Washington, D.C.) vol. 20, No. 4 (October 1926), p. 759.

¹⁵⁶ See art. 3, para. 1 of the Convention:

"The provisions of the two preceding Articles shall not be applicable to ships of war, Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by a State, and used at the time a cause of action arises exclusively on governmental and non-commercial service, and such vessels shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings *in rem*." (League of Nations, *Treaty Series*, vol. CLXXVI, p. 207.)

¹⁵⁷ See footnotes 21 and 48 above.

¹⁵⁸ See United States Diplomatic and Consular Staff in Tehran, Judgment: *I.C.J. Reports*, p. 3.

F. Opinions of writers

115. The principle of State immunity has been widely upheld in the writings of publicists of the nineteenth century, almost without reservation or qualification of any description. Among earlier writers who have propounded a doctrine of State immunity could be mentioned Gabba,¹⁵⁹ Lawrence,¹⁶⁰ Bluntschli,¹⁶¹ Chrétien¹⁶² and the authorities referred to by de Paepé.¹⁶³ Later publicists advancing an equally strict theory of State immunity include Nys,¹⁶⁴ de Louter,¹⁶⁵ Kohler,¹⁶⁶ Westlake,¹⁶⁷ Cobbett,¹⁶⁸ van Praag,¹⁶⁹ Anzilotti,¹⁷⁰ Provinciali,¹⁷¹ Fitzmaurice¹⁷² and Beckett.¹⁷³

¹⁵⁹ C. F. Gabba, "De la compétence des tribunaux à l'égard des souverains et des Etats étrangers", *Journal du droit international privé* (Clunet) (Paris), vol. XV, No. III-IV (1888), p. 180; *ibid.*, vol. XVII, No. I-II (1890), p. 27.

¹⁶⁰ W. B. Lawrence, *Commentaire sur les éléments du droit international et sur l'histoire des progrès du droit des gens, de Henry Wheaton* (Leipzig, Brockhaus, 1873), vol. 3, p. 420.

¹⁶¹ J. G. Bluntschli, *Le droit international codifié* (Paris, Alcan, 1895), art. 139, p. 124.

¹⁶² A. Chrétien, *Principes de droit international public* (Paris, Chevalier-Marescq, 1893), p. 247.

¹⁶³ P. de Paepé, "De la compétence civile à l'égard des Etats étrangers et de leurs agents politiques, diplomatiques ou consulaires", *Journal du droit international privé* (Clunet) (Paris), vol. 22, No. I-II (1895), p. 31.

¹⁶⁴ E. Nys, *Le droit international* (Brussels, Weissenbruch, 1912), t. I, vol. II, pp. 340 *et seq.*

¹⁶⁵ J. de Louter, *Het stellig volkenrecht* (The Hague, Nijhoff, 1910), part I, pp. 246-247.

¹⁶⁶ J. Kohler, "Klage und Vollstreckung gegen einen fremden Staat", *Zeitschrift für Völkerrecht* (Breslau, 1910), vol. IV, pp. 309 *et seq.*; see also P. Laband, "Rechtsgutachten im Hellfeldfall", *ibid.*, pp. 334 *et seq.*

¹⁶⁷ J. Westlake, *A Treatise on Private International Law*, 6th ed. (London, Sweet and Maxwell, 1922), sects. 190-192, pp. 256 *et seq.*

¹⁶⁸ P. Cobbett, *Cases on International Law*, 6th ed. (London, Sweet and Maxwell, 1947), vol. I, pp. 102-104.

¹⁶⁹ L. van Praag, *Jurisdiction et droit international public* (The Hague, Belinfante, 1915); "La question de l'immunité de juridiction des Etats étrangers et celle de la possibilité de l'exécution des jugements qui les condamnent", *Revue de droit international et de législation comparée* (Brussels), vol. XV, No. 4 (1934), p. 652; *ibid.*, vol. XVI, No. 1 (1935), pp. 100 *et seq.* (see especially pp. 116 *et seq.*)

¹⁷⁰ D. Anzilotti, "L'esonzione degli stranieri dalla giurisdizione", *Rivista di diritto internazionale* (Rome), vol. V (1910), pp. 477 *et seq.*

¹⁷¹ R. Provinciali, *L'immunità giurisdizionale degli stati stranieri* (Padua, Milani, 1933), pp. 81 *et seq.*

¹⁷² G. Fitzmaurice, "State immunity from proceedings in foreign courts", *The British Year Book of International Law*, 1933 (London), pp. 101 *et seq.*

¹⁷³ See the observation by Beckett in *Annuaire de l'Institut de droit international*, 1952-I (Basel), vol. 44, p. 54, that:

"the amount of State immunity accorded by the English courts at present is somewhat wider than is required by the principles of public international law and is perhaps wider than is desirable".

For a review of authorities before 1928, see C. Fairman, "Some disputed applications of the principle of State immunity", *The American Journal of International Law* (Washington D.C.), vol. 22, No. 3 (July 1928), pp. 566 *et seq.*

116. On the other hand, even at the outset, another theory of State immunity has received some adherence in the writings of early publicists such as Heffter,¹⁷⁴ Gianzana,¹⁷⁵ Rolin,¹⁷⁶ Laurent,¹⁷⁷ Dalloz,¹⁷⁸ Spée,¹⁷⁹ von Bar,¹⁸⁰ Fauchille,¹⁸¹ Pradier-Fodéré,¹⁸² Weiss,¹⁸³ de Lapradelle,¹⁸⁴ Audinet¹⁸⁵ and Fiore.¹⁸⁶ This view of State immunity was reflected in the resolution of the Institut de droit international in 1891.¹⁸⁷

117. Contemporary writers are favourably inclined towards a less unqualified principle of State immunity.¹⁸⁸ A few publicists have gone to the length of denying the sound foundation of State immunity in international law but view it as emanating from the notion of "dignity", which cannot continue as a rational basis of immunity.¹⁸⁹

¹⁷⁴ A. W. Heffter, *Das europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen*, 7th ed. (Berlin, Schroeder, 1881), p. 118.

¹⁷⁵ S. Gianzana, *Lo straniero nel diritto civile italiano* (Turin, Unione tipografico-editrice torinese, 1884), vol. I, p. 81.

¹⁷⁶ A. Rolin, *Principes de droit international privé* (Paris, Chevalier-Marescq, 1897), vol. I, pp. 212–213.

¹⁷⁷ F. Laurent, *Le droit civil international* (Brussels, Bruylant-Christophe, 1881), vol. III, p. 44.

¹⁷⁸ De Paepe, *loc. cit.*

¹⁷⁹ G. Spée, "De la compétence des tribunaux nationaux à l'égard des gouvernements et des souverains étrangers", *Journal du droit international privé* (Clunet) (Paris), vol. 3, No. IX–X (September–October 1876), pp. 329 *et seq.*

¹⁸⁰ L. von Bar, "De la compétence des tribunaux allemands pour connaître des actions intentées contre les gouvernements et les souverains étrangers", *ibid.*, vol. XII, No. XI–XII (November–December 1885), p. 645; *Das internationale Privatrecht und Strafrecht* (Hannover, Hahn, 1862), vol. II, pp. 412 and 502; *Theorie und Praxis des internationalen Privatrechts* (Hannover, Hahn, 1889), vol. II, pp. 660 *et seq.*

¹⁸¹ H. Bonfils, *Manuel de droit international public*, 7th ed., rev. by P. Fauchille (Paris, Rousseau, 1914), p. 169, No. 270.

¹⁸² P. Pradier-Fodéré, *Traité de droit international public* (Paris, Durand et Pedone-Lauriel, 1887), vol. III, Case No. 1589, p. 514.

¹⁸³ A. Weiss, *Traité théorique et pratique de droit international privé* (Paris, Sirey, 1913), vol. V, pp. 94 *et seq.*

¹⁸⁴ A. de Lapradelle, "La saisie des fonds russes à Berlin", *Revue de droit international privé et de droit pénal international* (Paris), vol. 6 (1910), pp. 75 *et seq.* and 779 *et seq.*

¹⁸⁵ E. Audinet, "L'incompétence des tribunaux français à l'égard des Etats étrangers et la succession du Duc de Brunswick", *Revue générale de droit international public* (Paris), vol. II (1895), p. 385.

¹⁸⁶ P. Fiore, *Nouveau droit international public* (Paris, Durand et Pedone-Lauriel, 1885), vol. I, Case No. 514, pp. 449 *et seq.*

¹⁸⁷ *Annuaire de l'Institut de droit international, 1891–1892* (Brussels), vol. 11 (1892), pp. 436 *et seq.*

¹⁸⁸ See for example P. B. Carter, "Immunity of foreign sovereigns from jurisdiction: Two recent decisions", *International Law Quarterly* (London), vol. 3, No. 1 (January 1950), pp. 78 *et seq.*, and *ibid.*, No. 3 (July 1950), pp. 410 *et seq.* See also, in footnote 173 above, the observation by Beckett; and W. H. Reeves, "Good fences and good neighbours: Restraints on immunity of sovereigns", *American Bar Association Journal* (Chicago), vol. 44, No. 6 (June 1958), pp. 521–524 and 591–593.

¹⁸⁹ See for example H. Lauterpacht, "The problem of jurisdictional immunities of foreign States", *The British Year Book of International Law, 1951* (London), vol. 28, pp. 220 *et seq.* (in particular, pp. 226–236).

118. An opinion which may be said to give an accurate and lucid description of the principle of State immunity is probably that given by Judge Hackworth, as follows:

The principle that, generally speaking, each sovereign state is supreme within its own territory and that its jurisdiction extends to all persons and things within that territory is, under certain circumstances, subject to exceptions in favour particularly of foreign friendly sovereigns, their accredited diplomatic representatives... and their public vessels and public property in the possession of and devoted to the service of the state. These exemptions from the local jurisdiction are theoretically based upon the *consent*,* express or implied, of the local state, upon the principle of *equality of states** in the eyes of international law, and upon the necessity of yielding the local jurisdiction in these respects as an indispensable factor in the conduct of friendly intercourse between members of the family of nations. While it is sometimes stated that they are based upon international comity or courtesy, and while they doubtless find their origin therein, they may now be said to be based upon generally accepted custom and usage, i.e., international law.¹⁹⁰

II. Rational bases of State immunity

119. The preceding review of historical and legal developments of the principle of State immunity appears to furnish ample proof of the solid foundations of the principle as a general norm of international law. The rational bases of State immunity could be stated in many different ways, some of which are more cogent than others.

A. The principles of the sovereignty, independence, equality and dignity of States

120. The most convincing arguments in support of the principle of State immunity can be found in international law as evidenced in the usages and practice of States, expressed in terms of the sovereignty, independence, equality and dignity of States. All these notions seem to coalesce, together constituting a firm international legal basis for sovereign immunity. State immunity is derived from sovereignty. Between two co-equals, one cannot exercise sovereign will or authority over the other: *par in parem imperium non habet*.¹⁹¹

B. Historical explanation: analogy with the local sovereigns

121. Another rational explanation is based on historical development of the analogy with the immuni-

* Emphasis added by the Special Rapporteur.

¹⁹⁰ Hackworth, *op. cit.*, vol. II, chap. VII, p. 393, para. 169. Compare with the statement of Chief Justice Marshall in the case *The Schooner Exchange v. McFaddon* and others (see para. 75 above).

¹⁹¹ See above (para. 75) the language used by Chief Justice Marshall in the case *The Schooner Exchange v. McFaddon* and others; compare Hackworth (para. 118 above). See also *The Parlement belge* and Brett's analysis in para. 69 above; also the case *Gouvernement espagnol v. Casaux* (see footnote 81 above).

ties of the local sovereign.¹⁹² This is peculiar to common law countries and is sometimes expressed in the proposition that member States of a federal union, while still possessing attributes of sovereignty, are immune from suits. An entity which is the fountain of right cannot be impleaded in its own courts.¹⁹³ This principle is also designed to ensure harmonious relations between the federal union and its member States.

C. Relevance of diplomatic immunities

122. If ambassadors and diplomatic agents are accorded immunities under international law in their capacity as representatives of foreign States or foreign sovereigns, *a fortiori* the States or the sovereigns they represent should be entitled to no lesser a degree of favoured treatment. Immunities belong to a category of favourable treatment. Diplomatic immunities may be said to have given an added reason for State immunities. It is true that in the practice of States the immunities of ambassadors had been well-established before those of States, and that diplomatic immunities are functional in foundation; yet the two concepts are not totally unrelated. Diplomatic immunity is accorded not for the benefit of the individual, but for the benefit of the State in whose service he is. There is no immunity if the diplomat ceases to represent a sovereign State.¹⁹⁴

D. Reciprocity, comity of nations, international courtesy or political embarrassment in international relations

123. Political expediency or consideration of good international relations has sometimes been advanced as a subsidiary or additional reason for recognition of State immunity. Reciprocity of treatment, *comitas gentium* and *courtoisie internationale* are very closely allied notions, which contribute in some measure to further enhance the basis of State immunity. Thus Chief Justice Marshall, in *The Schooner "Exchange" v. McFaddon and others*, invoked the concept of "mutual benefit in the promotion of intercourse and an

¹⁹² See Chief Justice Campbell's statement in the case *De Haber v. the Queen of Portugal* (para. 68 above):

"To cite a foreign potentate in a municipal court, for any complaint against him in his public capacity, is contrary to the law of the nations, and an insult which he is entitled to resent."

¹⁹³ See the cases *Principality of Monaco v. Mississippi* (footnote 39 above) and *Kawananakoa v. Polyblank* (footnote 41 above).

¹⁹⁴ See for example *Dessus v. Ricoy* (1907), in which the court declared:

"The immunity of diplomatic agents is not personal to them but an attribute and a guarantee of the State which they represent; the renunciation of the agent is invalid, particularly if he produces no authorization from his government in support of it." [Translation by the Secretariat.] (*Journal du droit international privé* (Clunet) (Paris), 34th year (1907), pp. 1087 and 1086.)

exchange of good offices dictated by humanity",¹⁹⁵ while Brett, in the "*Parlement belge*" case, referred to State immunity as a "consequence of the absolute independence of every sovereign authority, and of the *international comity* which induces every sovereign State to respect the independence and dignity of every other sovereign State".¹⁹⁶

124. Closely related to the notion of comity of nations is its ancillary rule that in the conduct of international relations the courts of law should refrain from passing judgement or exercising jurisdiction which would embarrass the political arm of the Government, especially in areas that are better reserved for political negotiations.¹⁹⁷ Avoidance of political embarrassment in international relations or disturbance of international peace provides a clear additional basis for the courts not to exercise jurisdiction in certain circumstances, especially where there has been a suggestion or submission from another department of government.¹⁹⁸

E. Other considerations

125. Functional necessities have provided a sound foundation for the immunities of ambassadors and personal sovereigns. They are self-restrictive in the sense that the functional criterion operates to limit the extent of immunity to sovereign or diplomatic immunities in their representative capacity, rather than serving as a rational justification for State immunity. Functional necessities as such afford no legal basis for State immunity.

126. Difficulties or impossibility of execution of judgement against foreign States have sometimes been put forward as an argument for the territorial State to abstain from exercising jurisdiction.¹⁹⁹ A better view

¹⁹⁵ See para. 75 above.

¹⁹⁶ United Kingdom, *The Law Reports, Probate Division* (*op. cit.*, 1880), vol. V, p. 217. In *De Decker v. United States of America*, the Appellate Court of Leopoldville referred to the enjoyment of immunity by foreign States in accordance with international tradition, "founded on a notion of courtesy towards foreign sovereignty which is indispensable to good understanding between countries and unanimously accepted". (*Pasicrisie belge* (*op. cit.*), 144th year, No. 2 (February 1957), part II, p. 56.) See also *International Law Reports 1956* (London, 1960), p. 209.

¹⁹⁷ See for example *Republic of Mexico et al. v. Hoffman* (see footnote 116 above) and the statements of Justices Frankfurter, Black and Stone (*Annual Digest... 1943-1945* (*op. cit.*), case No. 39, p. 143). See also *United States v. Lee* (*United States Reports*, vol. 106 (New York, Banks Law Publishing, 1911), p. 196) and *Ex parte Republic of Peru* (see footnote 110 above).

¹⁹⁸ See for example *Baima y Bessolino v. el Gobierno del Paraguay* (see para. 88 above), and another Argentine case, involving the vessel "*Cabo Quilates*" (*ibid.*), in which the Court said: "If the acts of a foreign State could be examined by the Courts of another State... friendly relations between Governments would undoubtedly be jeopardized and international peace disturbed."

¹⁹⁹ For example, in the *Tilkens* case (1903), the Court said: "A jurisdiction reflected in unenforceable judgements, in commands having no sanction or in injunctions lacking the force of constraint would not be in keeping with the dignity of the Judiciary." (*Pasicrisie belge* (*op. cit.*) (1903), part II, p. 180.)

appears to be that the validity of a judgement does not depend on the possibility or likelihood of its execution.

reference to its historical and legal developments could be stated as follows:

TEXT OF ARTICLE 6

127. Without mention of immunity in respect of State property of various types and descriptions, and without stating the manner in which the question of State immunity should be or may be raised, the principle of State immunity as discussed above with

Article 6. The principle of State immunity

1. A foreign State shall be immune from the jurisdiction of a territorial State in accordance with the provisions of the present articles.

2. The judicial and administrative authorities of the territorial State shall give effect to State immunity recognized in the present articles.

STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER

[Agenda item 6]

DOCUMENT A/CN.4/335

Preliminary report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur

[Original: English]
[1 July 1980]

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ABBREVIATIONS

ICAO International Civil Aviation Organization
ILO International Labour Organisation
WHO World Health Organization

NOTE

For the text of the treaties listed below, which are referred to in this document, see the following sources:

- | | |
|---|---|
| Convention on Special Missions (New York, 8 December 1969) | General Assembly resolution 2530 (XXIV), annex |
| Vienna Convention on Consular Relations (Vienna, 24 April 1963)
(Hereinafter called "1963 Vienna Convention") | United Nations, <i>Treaty Series</i> , vol. 596, p. 261 |
| Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)
(Hereinafter called "1961 Vienna Convention") | <i>Ibid.</i> , vol. 500, p. 95 |
| Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character
(Hereinafter called "1975 Vienna Convention") | <i>Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations</i> , vol. II, <i>Documents of the Conference</i> (United Nations publication, Sales No. E.75.V.12), p. 207. |

I. Introduction

1. The present preliminary report is submitted to the Commission at its thirty-second session pursuant to the recommendation made by the General Assembly in paragraph 4(f) of its resolution 34/141 of 17 December 1979, adopted by consensus on the recommendation of the Sixth Committee. In that paragraph, the General Assembly recommended that the International Law Commission should:

Continue its work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, taking into account the written comments of Governments and views expressed on the topic in debates in the General Assembly, with a view to the possible elaboration of an appropriate legal instrument.

2. The Special Rapporteur has deemed it necessary to include at the outset of this preliminary report a consolidated account of the history of the consideration of the topic by the Commission as well as of the relevant action taken by the General Assembly beginning at its twenty-ninth session, in 1974. The decisions and recommendations adopted since then by the Assembly, together with the Commission's own decisions following the results of the work undertaken by three successive Working Groups established on this topic on the basis of comments submitted in writing or made orally in the General Assembly by Governments of Member States, have laid down the foundations on which the Special Rapporteur and the Commission should endeavour to build, in progressively developing and codifying the law relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

3. After describing the various stages of the work accomplished thus far on the topic, this preliminary report presents, in summary fashion, some of the salient aspects of the further work to be undertaken thereon. Emphasis is placed, in particular, on the method and form of the work and on the scope, contents and structure of the draft articles to be elaborated by the Commission. This is done with a view to facilitating the discussion of the important issues on which the Special Rapporteur seeks the guidance of the Commission before proceeding to the submission of draft articles, so as to contribute more effectively to the timely fulfilment by the Commission of its mandate regarding the progressive development and codification on this particular aspect of diplomatic intercourse.

4. The present report being preliminary in character, the Special Rapporteur has not included a detailed review of the relevant sources of material on the topic as evidenced by State practice and legal doctrine. Those will be dealt with as appropriate, at a subsequent stage, in the commentaries to the draft articles that the Special Rapporteur intends to submit to the Commission in his next report on the topic. Nevertheless, the Special Rapporteur has felt that it might be

appropriate to indicate in this report what are the available source materials on the topic under consideration which could be used in his future work.

5. From a general review of sources it can already be pointed out that, as has emerged from the work carried out by the Working Groups and the study undertaken so far by the Special Rapporteur, most of the items are not covered by existing conventions nor have been the subject of specific legal regulations. This does not mean in any way that the topic is not ripe for codification and progressive development. The existing lacunae in the rules of international law with regard to the status of the diplomatic courier and the diplomatic bag provide reasonable justification for the timely need to elaborate specific rules on the topic. At the same time, the fact that in respect of those items existing international law has not yet been sufficiently developed in the practice of States calls for caution and flexibility in the work of progressive development and codification in this field.

6. Keeping the foregoing in mind, it has to be stressed that the general principles of international law underlying the future draft articles are well established. They are, in particular, freedom of communication for all official purposes, non-discrimination, and respect for the laws and regulations of the receiving State. On the basis of those principles, it might be useful at this stage of the work to identify some of the main issues in substance before proceeding to the elaboration of draft articles. To that effect, attention will be given to the degree of distinction among existing conventions and the extent of the analogy with existing rules in the field of diplomatic law, in order to determine clearly which are the newly emerging rules susceptible of being incorporated in an international legal instrument "which would constitute development concretization of the Vienna Convention on Diplomatic Relations of 1961", as requested by the General Assembly in resolution 31/76 of 13 December 1976.

II. Historical background of the consideration of the topic

7. The Commission started its consideration of the topic concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier at its twenty-ninth session (1977), pursuant to General Assembly resolution 31/76 of 13 December 1976. The Assembly, having considered at its thirty-first session (1976) the item "Implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961", adopted, on the recommendation of its Sixth Committee,¹ resolution 31/76 on ways and means to ensure the implementation of that convention. That resolution recognized in its preamble "the advisability of studying the question of the status of the diplomatic courier and the

¹ *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 112, document A/31/403, para. 4.*

diplomatic bag not accompanied by diplomatic courier” and provided, in paragraphs 3 to 6, the following:

Invites Member States to submit or to supplement their comments and observations on ways and means to ensure the implementation of the provisions of the Vienna Convention on Diplomatic Relations of 1961 and on the desirability of elaborating provisions concerning the status of the diplomatic courier in accordance with paragraph 4 of the General Assembly resolution 3501 (XXX), with due regard also to the question of the status of the diplomatic bag not accompanied by diplomatic courier;

Requests the International Law Commission at the appropriate time to study, in the light of the information contained in the report of the Secretary-General on the implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961 and other information on this question to be received from Member States through the Secretary-General, the proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, which would constitute development and concretization of the Vienna Convention on Diplomatic Relations of 1961;

Requests the Secretary-General to submit to the General Assembly at its thirty-third session an analytical report on ways and means to ensure the implementation of the Vienna Convention on Diplomatic Relations of 1961 on the basis of comments and observations on this question received from Member States and also taking into account the results, if available and ready, of the study by the International Law Commission of the proposals on the elaboration of the above-mentioned protocol;

Decides to include in the provisional agenda of its thirty-third session the item entitled “Implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961: report of the Secretary-General”;

8. The consideration by the General Assembly of the question of the implementation by States of the provisions of the 1961 Vienna Convention originated in a letter dated 11 November 1974 from the Permanent Representative of the Union of Soviet Socialist Republics addressed to the Secretary-General, whereby the Government of the USSR requested the inclusion on the agenda of the twenty-ninth session of the Assembly of an item entitled “Implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961 and measures to increase the number of parties to the Convention”. The item was included in the agenda of that session of the General Assembly and allocated to the Sixth Committee, but its consideration was postponed to the thirtieth session of the Assembly because of the lack of time.²

9. In 1975, the General Assembly included the item in the agenda of its thirtieth session and allocated it again to the Sixth Committee. The Sixth Committee considered the item and adopted a draft resolution which was approved by the Assembly on 15 December 1975 as resolution 3501 (XXX). By paragraph 4 of

that resolution, the General Assembly invited Member States;

to submit to the Secretary-General their comments and observations on ways and means to ensure the implementation of the provisions of the Vienna Convention of 1961 as well as on the desirability of elaborating provisions concerning the status of the diplomatic courier.

Furthermore, by paragraph 5 of the same resolution the Secretary-General was requested to submit a report to the General Assembly at its thirty-first session containing the comments and observations received from Member States.³

10. Pursuant to the request contained in paragraph 4 of General Assembly resolution 31/76,⁴ the Commission inscribed on the agenda of its twenty-ninth session, in 1977, an item entitled “Proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier”, and established a Working Group chaired by Mr. Abdullah El-Erian in order to ascertain the more suitable ways and means of dealing with the topic. The Working Group reached a series of conclusions, which the Commission subsequently approved.⁵ In those conclusions, the Working Group recommended, *inter alia*, that the Commission should undertake the study of the topic during its 1978 session in order to allow the Secretary-General to take into account the results of such a study in the report he had been requested to submit to the General Assembly at its thirty-third session, and that such study should be done without curtailing the time allocated to the consideration of the topics to which priority had been given.

11. At its thirtieth session (1978), the Commission again established a Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, composed of the same members as at the twenty-ninth session and chaired also by Mr. El-Erian. The Working Group had before it three working papers,⁶ on the basis of which, together with other relevant material, it studied the proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The Working Group adopted as its basic position that there had been considerable developments in various aspects of the question in recent years, as reflected in the three multilateral conventions adopted subsequent to the 1961 Vienna Convention—namely, the 1963 Vienna

³ The report was distributed under the symbol A/31/145 and Add.1.

⁴ See para. 7 above.

⁵ *Yearbook . . . 1977*, vol. II (Part Two), p. 125, document A/32/10, paras. 83–84.

⁶ The first contained, in an annex, the comments received from Member States since 1977 on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. For a description of the contents of the working papers, see *Yearbook . . . 1978*, vol. II (Part Two), p. 138, document A/33/10, para. 141.

² *Ibid.*, *Twenty-ninth Session, Annexes*, agenda item 112, document A/9951.

Convention, the Convention on Special Missions and the 1975 Vienna Convention—and that therefore the relevant provisions of those “existing conventions”, if any, should form the bases for any further study of the question. The Working Group established a first list tentatively identifying a number of issues, and examined each of them in order to ascertain whether any of the four conventions adequately covered the issue concerned and what further elements could be considered as appropriately falling within each of those issues. The Working Group submitted a report to the Commission, including the tentative list of issues.⁷ The Commission approved the result of the study undertaken by the Working Group and submitted it to the General Assembly at its thirty-third session, in 1978.⁸ The Commission brought the relevant paragraphs of its report to the attention of the Secretary-General, so that they might be taken into account in the analytical report which he had been requested to prepare by the General Assembly in paragraph 5 of resolution 31/76.⁹

12. The General Assembly, at its thirty-third session, discussed the results of the Commission’s work under two separate agenda items: “Implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961: Report of the Secretary-General”¹⁰ (item 116), and “Report of the International Law Commission on the work of its thirtieth session”, (item 114), both of which were allocated to the Sixth Committee. On the recommendation of that Committee, the Assembly adopted resolutions 33/139 and 33/140 of 19 December 1978, concerning respectively items 114 and 116. By paragraph 5 of section I of resolution 33/139, the Assembly recommended that the Commission should continue the study, including those issues it had already identified, concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, in the light of comments made during the debate on the item in the Sixth Committee at the thirty-third session of the General Assembly and comments to be submitted by Member States, with a view to the possible elaboration of an appropriate legal instrument. It also invited all States to submit written comments on the preliminary study carried out by the Commission on the topic for their inclusion in the report of the Commission on the work of its thirty-first session. The Assembly also, in paragraph 3 of resolution 33/140, noted the invitation to Member States in its resolution 33/139 and observed that, in replying to such a request, States might also include comments and observations on the implementation of the provisions of the Vienna Convention on Diplomatic Relations to be submitted to the Assembly at a future session.

⁷ See para. 47 below.

⁸ See *Yearbook ... 1978*, vol. II (Part Two), pp. 138–139, document A/33/10, paras. 136–144.

⁹ See para. 7 above.

¹⁰ A/33/24.

13. In a preambular paragraph to resolution 33/140, the General Assembly noted

with appreciation the study by the International Law Commission of the proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, which could constitute a further development of international diplomatic law, and, in paragraph 5, decided:

that the General Assembly will give further consideration to this question and expresses the view that, unless Member States indicate the desirability of an earlier consideration, it would be appropriate to do so when the International Law Commission submits to the Assembly the results of its work on the possible elaboration of an appropriate legal instrument on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

14. At its thirty-first session (1979), the Commission again established a Working Group on the topic, which was chaired by the present Special Rapporteur. The Working Group had before it comments submitted by States pursuant to paragraph 5 of section I of General Assembly resolution 33/139 and paragraph 3 of resolution 33/140¹¹ and a working paper prepared by the Secretariat containing an analytical summary of the general views of Governments on the elaboration of a protocol on the topic and comments and observations of Governments, as well as the Commission’s own observations, on specific issues relating to “possible elements of a protocol.”¹²

On the basis of those documents and other relevant material, the Working Group studied issues concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and reported to the Commission the results of its work. That report included, *inter alia*, summaries of comments and proposals on specific issues made by Governments since 1976, grouped together with the Commission’s own observations under each of the headings of the Commission tentatively identified in 1978. It also reproduced certain additional issues which the Working Group examined at the 1979 session of the Commission and considered it necessary to be studied.¹³ The results of the Working Group’s study of the topic were included in the Commission’s report to the General Assembly at its thirty-fourth session.¹⁴ The Commission indicated that a brief review of those results proved that there were many issues on which no provision was contained in the four existing conventions and several issues on which, although there are some relevant provisions in the existing conventions, because of the general nature of such

¹¹ A/CN.4/321 and Add.1–5. Comments received subsequently were reproduced in documents A/CN.4/321/Add.6 and 7. Document A/CN.4/321 and Add.1–7 is reproduced in *Yearbook ... 1979*, vol. II (Part One), p. 213.

¹² *Yearbook ... 1979*, vol. II (Part Two), p. 170, document A/34/10, footnote 789, and *ibid.*, pp. 171 *et seq.* document A/34/10, chap. VI, sects. B and C.

¹³ See para. 47 below.

¹⁴ *Yearbook ... 1979*, vol. II (Part Two), pp. 171 *et seq.*, document A/34/10, chap. VI, sects. B–D.

provisions further elaboration was desirable. In the light of these considerations, the Commission reached the following conclusions regarding the future work to be undertaken on the subject:

(1) The Secretariat should continue with the preparation of a comprehensive follow-up report, on the pattern of the latest working paper,¹⁵ analysing the written comments which may be forthcoming as well as the views which may be expressed by Governments during the thirty-fourth session of the General Assembly.

(2) The Commission should appoint a Special Rapporteur on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, who will be entrusted with the preparation of a set of draft articles for an appropriate legal instrument.¹⁶

15. At its 1580th meeting, held on 31 July 1979, the Commission appointed the present Special Rapporteur for the topic and entrusted him with the preparation of a set of draft articles for an appropriate legal instrument.¹⁷

16. At the thirty-fourth session of the General Assembly (1979), representatives commented on the work carried out by the Commission on the topic in the course of the consideration of the Commission's report in the Sixth Committee.¹⁸ The governmental views expressed have been analysed in a systematic manner in the "Topical summary, prepared by the Secretariat, of the discussion on the report of the International Law Commission, held in the Sixth Committee during the thirty-fourth session of the General Assembly"¹⁹ and have been included, as appropriate, in the working paper²⁰ prepared likewise by the Secretariat pursuant to the decision of the Commission quoted above.²¹ On the recommendation of the Sixth Committee, the General Assembly adopted resolution 34/141 of 17 December 1979, paragraph 4(f) of which has been quoted above.²²

III. Sources of international law on the topic under consideration

17. The process of codification of existing rules of international law on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and the search for the evolving more specific rules on the matter must be based on an evaluation of the relevant practice of States as evidenced in treaty provisions (whether multilateral or bilateral), national laws and regulations, diplomatic

correspondence and official communications or statements, and national judicial decisions. Attention must also be paid to the legal doctrine available on this topic, in particular the writings of publicists and private codification drafts.

18. Although the detailed examination of the relevant materials will be made in the commentaries to the draft articles that the Special Rapporteur proposes to submit in the future, it seems advisable, at the present stage, to identify the different sources and their possible utilization in the further work to be accomplished. Such a description of sources may also give an opportunity for supplementary suggestions that would widen the scope of the research undertaken.

19. An initial general survey of relevant sources shows that the concretization of the basic principles of international law which underlie the efforts at progressively developing and codifying the status of the diplomatic courier and the unaccompanied diplomatic bag are mainly conventional in character. The fundamental principle of the freedom of communication for all official purposes, central to any such effort, has been explicitly recognized in all four existing codification conventions relevant to the topic,²³ although other forms of State practice, as well as legal literature, have also contributed to its crystallization. However, when it comes to the further development and concretization of the basic provisions contained in the existing conventions as regards the status of the diplomatic courier and unaccompanied diplomatic bag, there is a scarcity of international law sources—particularly in international judicial practice. This may be explained by the very delicate nature of the questions concerned and their peculiar character in terms of the confidentiality involved as well as other practical considerations.

20. Be that as it may, the Commission's work on the topic must take account, first and foremost, of State practice as reflected in treaty provisions. These are found, in particular, in: (a) codification conventions concluded under the auspices of the United Nations; (b) multilateral treaties other than United Nations codification conventions; (c) bilateral treaties concluded between States on both diplomatic and consular relations; and (d) bilateral treaties concluded between a State and an international organization.

21. The codification conventions concluded under the auspices of the United Nations relevant to the present topic are the three conventions adopted at Vienna in 1961, 1963 and 1975, as well as the 1969 Convention on Special Missions.²⁴ In particular, the provisions that embody the principle of the freedom of communication for all official purposes in those conventions are as follows: article 27 of the 1961 Vienna Convention, article 35 of the 1963 Vienna Convention, article 28 of the Convention on Special

¹⁵ *Ibid.*, p. 170, document A/34/10, footnote 789.

¹⁶ *Ibid.*, p. 184, document A/34/10, para. 164.

¹⁷ *Ibid.*, pp. 184, 189, paras. 165, 197 and 204.

¹⁸ See *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 38th and 40th to 51st meetings; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁹ See A/CN.4/L.311, chap. II, sect. F.

²⁰ A/CN.4/WP.5.

²¹ See para. 14.

²² See para. 1.

²³ See para. 11 above.

²⁴ *Idem.*

Missions, and articles 25 and 57 of the 1975 Vienna Convention. Reference must also be made to article 72 of the latter Convention, which extends to observer delegations the application of article 57 of that instrument. Furthermore, the four conventions contain the following provisions regarding transit through the territory of a third State: 1961 Convention, art. 40; 1963 Convention, art. 54; 1969 Convention, art. 42; 1975 Convention, art. 81. The texts of those articles having already been reproduced in several Commission documents relating to the present topic, the Special Rapporteur does not deem it necessary to do so again in the present preliminary report.

22. Reference should also be made in this connection to article 58 of the 1963 Vienna Convention, containing general provisions relating to facilities, privileges and immunities of honorary consular officers and consular posts headed by such officers, which extends to such officers and posts the application of article 35 and article 54, paragraph 3 of the Convention. In addition, article 58, paragraph 4, provides specifically as follows:

“The exchange of consular bags between two consular posts headed by honorary consular officers in different States shall not be allowed without the consent of the two receiving States concerned.”

23. With regard to multilateral treaties other than United Nations codification conventions, attention is drawn, in particular, to the Convention on the Privileges and Immunities of the United Nations²⁵ and the Convention on the Privileges and Immunities of the Specialized Agencies,²⁶ adopted by the General Assembly in 1946 and 1947 respectively. Article III of the 1946 convention and article IV of the 1947 convention provide for facilities in respect of communications, article IV of the 1946 convention (sect. 11) and article V of the 1947 convention (sect. 13) recognize for representatives of Member States “the right to use codes and to receive papers or correspondence by courier or in sealed bags”.

24. Reference should also be made to the Convention regarding Diplomatic Officers adopted by the Sixth International American Conference at Havana in 1928,²⁷ articles 14 and 15 of which provide as follows:

Article 14

Diplomatic officers shall be inviolable as to their persons, their residence, private or official, and their property. This inviolability covers:

...

d. The papers, archives and correspondence of the mission.

Article 15

States should extend to diplomatic officers every facility for the exercise of their functions and especially to the end that they may freely communicate with their governments.

²⁵ United Nations, *Treaty Series*, vol. 1, p. 15.

²⁶ *Ibid.*, vol. 33, p. 261.

²⁷ League of Nations, *Treaty Series*, vol. CLV, p. 259.

25. Without attempting to be exhaustive, other multilateral treaties likewise recognize the principle of freedom of communication, for instance, the General Agreement on Privileges and Immunities of the Council of Europe, signed at Paris on 2 September 1949,²⁸ the Agreement on the Status of the North Atlantic Treaty Organization, national representatives and international staff, signed at Ottawa on 20 September 1951,²⁹ the Convention concerning the juridical personality, privileges and immunities of the Council for Mutual Economic Assistance, signed at Sofia on 14 December 1959,³⁰ the Convention on the privileges and immunities of the Organization of African Unity, signed at Accra on 25 October 1965,³¹ and other similar international instruments. The above-mentioned treaties reproduce, *mutatis mutandis*, the provision of the conventions on the privileges and immunities of the United Nations and of the specialized agencies mentioned above.³²

26. As far as bilateral treaties concluded between States on *diplomatic relations* are concerned, the practice of States is evidenced mainly through exchanges of notes constituting agreements, mainly of an administrative nature, for instance, “for the exchange of official correspondence by air mail” (Brazil and Venezuela, 1946),³³ “the transmission by post of diplomatic correspondence” (the United Kingdom and Norway, 1946 and 1947),³⁴ “the exchange of diplomatic correspondence by air mail in special diplomatic bags” (Ecuador and Brazil, 1946 and 1947),³⁵ “the exchange of official mail in diplomatic pouches” (Brazil and Argentina, 1961),³⁶ “the exchange through postal channels without prepayment of postage of diplomatic bags containing non-confidential correspondence” (United Kingdom and Netherlands, 1951;³⁷ United Kingdom and Dominican Republic, 1956),³⁸ etc. It will be observed that most of the agreements referred to were concluded prior to the adoption of the 1961 Vienna Convention on Diplomatic Relations.

27. Bilateral treaties concluded between States on *consular relations* provide the best evidence of State practice as regards consular couriers and bags. The status of these couriers and bags, in particular their inviolability and protection, is recognized mainly in

²⁸ United Nations, *Treaty Series*, vol. 250, p. 12.

²⁹ *Ibid.*, vol. 200, p. 3.

³⁰ *Ibid.*, vol. 368, p. 237.

³¹ L. B. Sohn, ed., *Basic Documents of African Regional Organizations* (Dobbs Ferry, N.Y., Oceana Publications, 1971), vol. I, p. 117.

³² See para. 23 above.

³³ United Nations, *Treaty Series*, vol. 65, pp. 112, 114.

³⁴ *Ibid.*, vol. 11, pp. 187–190.

³⁵ *Ibid.*, vol. 72, pp. 30, 32.

³⁶ *Ibid.*, vol. 657, p. 117.

³⁷ *Ibid.*, vol. 123, p. 177.

³⁸ *Ibid.*, vol. 252, p. 121.

consular conventions, which normally include an affirmation of the basic principle of the freedom of communication. Examples of such conventions concluded prior to the adoption of the 1963 Vienna Convention on Consular Relations are those between the United States of America and Costa Rica (1948),³⁹ the United States of America and Ireland (1950),⁴⁰ the United Kingdom and France (1951),⁴¹ Sweden and France (1955),⁴² the Union of Soviet Socialist Republics and the German Democratic Republic (1957),⁴³ etc. Examples of bilateral consular conventions concluded after the adoption of the 1963 Convention are numerous. Most of them take the relevant articles of that Convention on freedom of communication as model provisions.

28. The bilateral treaties concluded between States and international organizations relevant to the study of the present topic are basically Headquarters Agreements. Examples are those concluded between Switzerland and the Secretary-General of the United Nations (1946),⁴⁴ the ILO (1946),⁴⁵ and the WHO (1948 and 1949),⁴⁶ and the agreement between Canada and the ICAO (1951).⁴⁷ All of these treaties recognize to the organizations concerned the right to use couriers and bags which shall have the same immunities and privileges as diplomatic couriers and bags.

29. State practice that may be relevant to the codification and progressive development of the rules of international law concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier is also evidenced by national laws and regulations. A number of those texts, mainly administrative in character, have been compiled in a volume of the United Nations Legislative Series.⁴⁸ A similar compilation, regarding national legislation of

the countries of the American continent, can be found in a publication of the Pan American Union.⁴⁹

30. Evidence of State practice of interest to the study of the present topic is also found in diplomatic correspondence and official communications or statements. Reference to these sources will be made, as appropriate, in the context of the individual draft articles to be submitted by the Special Rapporteur. Attention may, nevertheless, be drawn at this stage to the reservations made by certain States (Bahrain, Kuwait and Libyan Arab Jamahiriya) to paragraphs 3 and 4 of article 27 of the 1961 Vienna Convention, as regards the opening of the diplomatic bag, and to the objections to those reservations made by Belgium, Bulgaria, Canada, Czechoslovakia, France, the Federal Republic of Germany, Haiti, Hungary, Mongolia, Poland, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics, the United Kingdom and the United States of America.⁵⁰

31. The writings of publicists represent another source and provide valuable information and analytical doctrinal material relevant to the progressive development and codification of the present topic. Most writers have dealt in general with the principle of free communication of diplomatic missions. Without attempting to present an exhaustive bibliography, an indicative list of authors may include Fauchille,⁵¹ de Erice y O'Shea,⁵² Oppenheim,⁵³ Lion Depetre,⁵⁴ Lyons,⁵⁵ Colliard,⁵⁶ Valencia-Rodríguez,⁵⁷ Maresca,⁵⁸

⁴⁹ *Documents and Notes on Privileges and Immunities with Special Reference to the Organization of American States* (Washington, D.C., Pan American Union, 1968). See for example pp. 231, 234 and 235 (Argentina; Decree No. 4891 of 21 June 1961, modified by Decree No., 3408 of 12 April 1966); pp. 264 270-271 (Colombia: Decree No. 3135 of 20 December 1956); p. 292 (Ecuador: Supreme Decree No. 1422 of 31 December 1963); p. 338 (Paraguay: Decree-Law No. 160 of 26 February 1958); pp. 385-386 (United States of America: Code of Federal Regulations, Title 19).

⁵⁰ *Multilateral treaties in respect of which the Secretary-General performs depositary functions: List of Signatures, Ratifications, Accessions, etc., as at 31 December 1978* (United Nations publications, Sales No. E.79.V.7), pp. 55-62.

⁵¹ P. Fauchille, *Traité de droit international public*, 8th ed. of *Manuel de droit international public* by H. Bonfils (Paris, Rousseau, 1926), vol. I, part 3, p. 66.

⁵² J.S. de Erice y O'Shea, *Normas de diplomacia y de derecho diplomático* (Madrid, Instituto de Estudios Políticos, 1945), vol. I, pp. 532-533.

⁵³ L. Oppenheim, *International Law: A Treatise*, 8th ed. rev. by H. Lauterpacht (London, Longmans, Green, 1955), vo. I, p. 788.

⁵⁴ J. Lion Depetre, *Derecho diplomático*, 2nd ed., rev. and enl. (Mexico City, Porrúa, 1974), pp. 289-290.

⁵⁵ A. B. Lyons, "Personal immunities of diplomatic agents", *The British Year Book of International Law, 1954* (London), vol. 31, pp. 334, 336, 337 and 340.

⁵⁶ C. A. Colliard, "La Convention de Vienne sur les relations diplomatiques", *Annuaire français de droit international, 1961* (Paris), vol. VII, p. 22.

⁵⁷ L. Valencia Rodríguez, "Curso de derecho y prácticas diplomáticas", *Anuario ecuatoriano de derecho internacional, 1964-1965* (Quito), vol. 1, p. 69.

⁵⁸ A. Maresca, *La missione diplomatica*, 2nd ed., enl. (Milan, Giuffrè, 1967), pp. 218-220.

³⁹ *Ibid.*, vol. 70, p. 27.

⁴⁰ *Ibid.*, vol. 222, p. 107.

⁴¹ *Ibid.*, vol. 330, p. 145.

⁴² *Ibid.*, vol. 427, p. 133.

⁴³ *Ibid.*, vol. 285, p. 135.

⁴⁴ *Ibid.*, vol. 1, p. 163.

⁴⁵ *Ibid.*, vol. 15, p. 377.

⁴⁶ *Ibid.*, vol. 26, p. 331.

⁴⁷ *Ibid.*, vol. 96, p. 155.

⁴⁸ *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* (United Nations publication, Sales No. 58.V.3). See for example p. 7 (Argentina: decree No. 3437 of 22 November 1955); p. 20 (Austria: Federal Act of 15 June 1955); pp. 29-30 and pp. 45-46 (Belgium: Memorandum and Instruction concerning diplomatic immunity, 1955); p. 67 (Colombia: Decree No. 1311 of 20 April 1950); pp. 118 and 119 (Finland: Customs Act No. 271 of 8 September 1939); p. 237 (Philippines: Foreign Service Regulations dealing with the Immunities, Powers and Privileges of Diplomatic and Consular Representatives); p. 302 (Sweden: Circular of the Director General of Customs of 24 May 1918); p. 307 and pp. 323-324 (Switzerland: Rules applied by the Federal Political Department and Decision of the Executive Council of the Canton of Berne, of 24 August 1955); p. 338 and pp. 345-347 (USSR: Order of 14 January 1927 and Regulations of 26 April 1954).

Hardy,⁵⁹ Denza,⁶⁰ Levin,⁶¹ Blishchenko,⁶² Durdenevski,⁶³ Romanov,⁶⁴ Kovalev,⁶⁵ Makowski,⁶⁶ Ilin,⁶⁷ Libera,⁶⁸ Hofmann,⁶⁹ Azud,⁷⁰ Ustor,⁷¹ Zorin,⁷² Myslil,⁷³ and Graefrath.⁷⁴ More specifically on the diplomatic courier and its status, reference may be made to de Martens,⁷⁵ Hall,⁷⁶ Calvo,⁷⁷ Hurst,⁷⁸ Genet,⁷⁹ Oppenheim,⁸⁰ Lyons,⁸¹ Satow,⁸² Cahier,⁸³

Valencia Rodríguez,⁸⁴ Sen,⁸⁵ Hardy,⁸⁶ and Denza;⁸⁷ and on the diplomatic bag and its status, to Bluntschli,⁸⁸ de Garden,⁸⁹ Perrenoud,⁹⁰ Satow,⁹¹ Reynaud,⁹² Kerley,⁹³ Valencia Rodríguez,⁹⁴ Colliard,⁹⁵ Cahier,⁹⁶ Sen,⁹⁷ Denza⁹⁸ and Salmon.⁹⁹ With regard to the principle of free communication in the context of special missions and the status of the courier and the bag of the special mission, reference can be made to the work of Maresca¹⁰⁰ and Blishchenko.¹⁰¹

32. With respect to the principle of freedom of communication in consular relations and the status of the consular courier and bag, reference may be made to Hyde,¹⁰² Sen,¹⁰³ Torres-Bernárdez,¹⁰⁴ Lee,¹⁰⁵ Ilin,¹⁰⁶ Libera,¹⁰⁷ Hofmann,¹⁰⁸ Graefrath¹⁰⁹ and Fedorov.¹¹⁰ A

⁵⁹ M. Hardy, *Modern Diplomatic Law* (Manchester, Manchester University Press, 1968), pp. 36, 37 and 40.

⁶⁰ E. Denza, *Diplomatic Law—Commentary on the Vienna Convention on Diplomatic Relations* (Dobbs Ferry, N.Y., Oceana Publications, 1976), pp. 124–125.

⁶¹ D. B. Levin, *Diplomatsia, ee sushchnost, metody i formy* (Moscow, Izdatel sotsialno-ekonomicheskoi literatury, 1962).

⁶² I. P. Blishchenko, *Diplomaticheskoe pravo* (Moscow, Vyshaia shkola, 1972).

⁶³ I. P. Blishchenko and V. N. Durdenevskii, *Diplomaticheskoe i konsulskoe pravo* (Moscow, Instituta mezhdunarodnykh otnoshenii, 1962).

⁶⁴ V. A. Romanov, "Venskaia konventia o diplomaitcheskikh snosheniakh i osnovnye voprosy kodifikatsii mezhdunarodnogo prava v oblasti diplomaticheskikh privilegii i immunitetov", *Sovetskii ezhegodnik mezhdunarodnogo prava 1961* (Moscow), p. 65.

⁶⁵ A. Kovalev, *Azbuka diplomatsii* (Moscow), mezhdunarodnye otnoshenia, 1968.

⁶⁶ J. Makowski, *Prawo dyplomaticzne i organizacja sluzby zagranicznej* (Warsaw, Panstwowe wydawnictwo naukowe, 1952).

⁶⁷ Y. D. Ilin, *Osnovnye tendentsii v razvitiu konsul'skogo prava*, (Moscow, Yuridicheskaya literatura, 1969).

⁶⁸ K. Libera, *Zasady miedzynarodowego prawa konsularnego* (Warsaw, Panstwowe wydawnictwo naukowe, 1960).

⁶⁹ K. Hofmann, "Die rechtliche Regelung der konsularischen Beziehungen der DDR", *Völkerrecht-Lehrbuch* (Berlin, Staatsverlag, 1973), part I, p. 442.

⁷⁰ J. Azud, *Diplomatické imunity a výsady* (Bratislava, Vydavateľ'stvo Slovenskej Akadémie Vied, 1959).

⁷¹ E. Ustor, *A diplomáciai kapcsolatok joga* (Budapest, Közgazdasági és Jogi Könyvtudó, 1965).

⁷² V. A. Zorin, *Osnovy diplomaticheskoi sluzhby*, (Moscow, Mezhdunarodnye otnoshenia, 1964).

⁷³ S. Myslil, *Diplomatické styky a imunity* (Prague, Československá Akademie Věd, 1964).

⁷⁴ B. Graefrath, "Zur Neugestaltung des Konsularrechts", *Staat und Recht* (Berlin), 7th year, No. 1 (January 1958), p. 12.

⁷⁵ C. de Martens, *Le guide diplomatique—Précis des droits et des fonctions*, 5th ed. (Leipzig, Brockhaus, 1866), vol. 1, p. 80.

⁷⁶ W. E. Hall, *A Treatise on International Law*, 4th ed. (Oxford, Clarendon Press, 1895), p. 330.

⁷⁷ C. Calvo, *Le droit international théorique et pratique*, 6th ed., rev. and completed (Paris, Guillaumin, 1888), vol. III, pp. 329 et seq.

⁷⁸ C. Hurst, "Les immunités diplomatiques", *Recueil des cours de l'Académie de droit international de La Haye, 1926-II* (Paris, Hachette, 1927), vol. 12, pp. 153–154.

⁷⁹ R. Genet, *Traité de diplomatie et de droit diplomatique* (Paris, Pedone, 1931), vol. I, p. 509, 512–513.

⁸⁰ Oppenheim, *op. cit.*, pp. 810–813.

⁸¹ Lyons, *loc. cit.*, pp. 334–335.

⁸² E. Satow, *A Guide to Diplomatic Practice*, 4th ed., rev. by N. Bland (London, Longmans, 1957), p. 180.

⁸³ P. Cahier, *Le droit diplomatique contemporain* (Geneva, Droz, 1962), pp. 225–226.

⁸⁴ Valencia Rodríguez, *loc. cit.*, p. 69.

⁸⁵ B. Sen, *A Diplomat's Handbook of International Law and Practice* (The Hague, Nijhoff, 1965), pp. 104, 180 and 181.

⁸⁶ Hardy, *op. cit.*, pp. 39 and 40.

⁸⁷ Denza, *op. cit.*, pp. 119, 129 and 130.

⁸⁸ J. C. Bluntschli, *Le droit international codifié*, 4th ed. rev. and enl., trans. (from German) by C. Lardy (Paris, Guillaumin, 1886), p. 146.

⁸⁹ G. de Garden, *Traité complet de diplomatie, ou théorie générale des relations extérieures des puissances de l'Europe* (Paris, de Treuttel et Würtz, 1833), vol. II, p. 22.

⁹⁰ G. Perrenoud, *Régime des privilèges et immunités des missions diplomatiques étrangères et des organisations internationales en Suisse* [thesis]. (Lausanne, Librairie de l'Université, F. Rouge, 1949), p. 46.

⁹¹ Satow, *op. cit.*, p. 176.

⁹² H. J. Reynaud, "Les relations et immunités diplomatiques", *Revue de droit international, de sciences diplomatiques et politiques* (Geneva), vol. 36, No. 4 (October–December 1958), pp. 426–427.

⁹³ E. Kerley, "Some aspects of the Vienna Conference on Diplomatic Intercourse and Immunities", *The American Journal of International Law* (Washington, D.C.), vol. 56, No. 1 (January 1962), pp. 116–118.

⁹⁴ Valencia Rodríguez, *loc. cit.*, p. 69.

⁹⁵ Colliard, *loc. cit.*, pp. 24–25.

⁹⁶ Cahier, *op. cit.*, pp. 213–214.

⁹⁷ Sen, *op. cit.*, p. 257.

⁹⁸ Denza, *op. cit.*, pp. 119, 125–127 and 129.

⁹⁹ J. J. A. Salmon, *Fonctions diplomatiques, consulaires et internationales*, 3rd ed. (Brussels, Presses universitaires de Bruxelles), vol. I, 1976–77, p. 138.

¹⁰⁰ A. Maresca, *Le missioni speciali* (Milan, Giuffrè, 1975), pp. 351–353 and 355–361.

¹⁰¹ Blishchenko, *op. cit.*, pp. 59–137.

¹⁰² C. C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 2nd ed., rev. (Boston, Little, Brown, 1947) [repr. 1951], vol. 2, pp. 1330 and 1331.

¹⁰³ Sen, *op. cit.*, p. 256.

¹⁰⁴ S. Torres Bernárdez, "La Conférence des Nations Unies sur les relations consulaires", *Annuaire français de droit international, 1963* (Paris), p. 98.

¹⁰⁵ L. T. Lee, *Vienna Convention on Consular Relations* (Leyden, Sijthoff, 1966), pp. 99–102.

¹⁰⁶ Ilin, *op. cit.*

¹⁰⁷ Libera, *op. cit.*

¹⁰⁸ Hofmann, *op. cit.*

¹⁰⁹ Graefrath, *loc. cit.*

¹¹⁰ L. Fedorov, *Diplomat i konsul* (Moscow, Mezhdunarodnye otnoshenia, 1965).

number of authors have also dealt with the obligations of third States as regards couriers and bags. Among them mention may be made of Wheaton,¹¹¹ Hurst,¹¹² Lyons,¹¹³ Oppenheim,¹¹⁴ Cahier,¹¹⁵ Sen,¹¹⁶ Lee,¹¹⁷ Hardy¹¹⁸ and Denza.¹¹⁹ Finally, writings on the effects of war and other emergencies includes those of de Vattel,¹²⁰ Wheaton,¹²¹ Calvo,¹²² de Erice y O'Shea,¹²³ Lion Depetre,¹²⁴ Lyons,¹²⁵ Lee,¹²⁶ Valencia Rodriguez,¹²⁷ Sen¹²⁸ and Denza.¹²⁹

33. To complete this short survey of sources, mention may be made of private codification drafts, whether prepared by individual jurists or learned societies. They include, among those prepared by individual jurists, Bluntschli's draft code of 1868 (arts. 197, 198 and 199); Field's draft code of 1876 (sect. IV); Fiore's draft code of 1890 (arts. 366, 453, 456, 463 and 464); Pessôa's draft code of 1911 (arts. 125 and 126); Phillimore's draft code of 1926 (art. 20) and Strupp's draft code of 1926 (arts. X and XIII).¹³⁰ As to codification drafts prepared by learned societies, reference may be made to the resolution of the Institute of International Law of 1895 (arts. 2 and 4); draft No. 22, entitled "Diplomatic Agents", prepared in 1925 by the American Institute of International Law (arts. 20 and 21); the draft code adopted in 1926 by the Japanese Branch of the International Law Association and the Kokusaiho Gakkwai (art. 1, sect. VI); draft No. VII of 1927, entitled "Diplomatic agents", of the International Commission of American Jurists (arts. 19 and 20); the resolution of 1929 of the Institute of International Law (art. 8) and the Harvard Law

School draft of 1932 on Diplomatic Privileges and Immunities (art. 14).¹³¹

34. To conclude this section of the present preliminary report, attention may also be drawn to the *travaux préparatoires* of the relevant provisions of the four United Nations codification Conventions, which contain very valuable material on the topic under consideration. The documents and proceedings of the United Nations Committee on Relations with the Host Country could also provide useful information on some cases relevant to the status of the diplomatic bag.

IV. Form of the work

35. As in the case of many of the topics of international law dealt with by the Commission (e.g. law of the sea,¹³² consular relations,¹³³ law of treaties,¹³⁴ special missions,¹³⁵ representation of States in their relations with international organizations,¹³⁶ succession of States in respect of treaties¹³⁷ and most-favoured-nation clause¹³⁸), the distinction embodied in article 15 of the Commission's Statute between the method applicable to "progressive development" and the method applicable to "codification" need not be strictly maintained as regards the Commission's work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. This has been expressly acknowledged by the Commission at its thirty-first session when it entrusted the Special Rapporteur with the task of preparing a set of draft articles for an appropriate legal instrument.¹³⁹ The preparation of draft articles incorporating and combining elements of both *lex lata* and *lex ferenda* in such a manner as to make them susceptible of serving as a basis for the elaboration and adoption of an international instrument is the reflection of the consolidated procedure that has evolved in the practice of the Commission, based on the provisions of the Statute, and has proved to be the most adequate and effective method and form of identifying and embodying the rules of international law relating to a given topic. The fact that, as a methodological approach, the work is to be couched in the form of a

¹¹¹ H. W. Wheaton, *Elements of International Law*, 2nd ed., rev. and annotated by W. B. Lawrence (Boston, Little, Brown, 1863), p. 417.

¹¹² Hurst, *loc. cit.*, pp. 154 and 227.

¹¹³ Lyons, *loc. cit.*, p. 334.

¹¹⁴ Oppenheim, *op. cit.*, p. 813.

¹¹⁵ Cahier, *op. cit.*, p. 324.

¹¹⁶ Sen, *op. cit.*, p. 180-181.

¹¹⁷ Lee, *op. cit.*, p. 101-102.

¹¹⁸ Hardy, *op. cit.*, p. 88.

¹¹⁹ Denza, *op. cit.*, pp. 256-258 and 260.

¹²⁰ E. de Vattel, *Le droit des gens ou Principes de la loi naturelle* [1758], book IV, chap. VII, para. 86: *The Classics of International Law* (Washington, D.C., Carnegie Institution of Washington, 1916), vol. II, p. 320.

¹²¹ Wheaton, *op. cit.*, pp. 417-418.

¹²² Calvo, *op. cit.*, p. 329.

¹²³ De Erice y O'Shea, *op. cit.*, p. 533.

¹²⁴ Lion Depetre, *op. cit.*, p. 289.

¹²⁵ Lyons, *loc. cit.*, pp. 335 and 340.

¹²⁶ L. T. Lee, *Consular Law and Practice* (London, Stevens, 1961), pp. 272-274.

¹²⁷ Valencia Rodríguez, *loc. cit.*, pp. 69-70.

¹²⁸ Sen, *op. cit.*, pp. 105-106.

¹²⁹ Denza, *op. cit.*, pp. 119-120.

¹³⁰ Texts reproduced in: Harvard Law School, *Research in International Law, Drafts of Conventions prepared for the Codification of International Law* (Cambridge, Mass., 1932), parts I and II, "Diplomatic Privileges and Immunities" and "Legal Position and Functions of Consuls".

¹³¹ *Ibid.*

¹³² *Yearbook ... 1956*, vol. II, p. 255-256, document A/3159, paras. 25-27.

¹³³ *Yearbook ... 1961*, vol. II, p. 91, document A/4843, paras. 29-32.

¹³⁴ *Yearbook ... 1966*, vol. II, p. 177, document A/6309/Rev.1, part II, para. 35.

¹³⁵ *Yearbook ... 1967*, vol. II, p. 346, document A/6709/Rev.1, para. 23.

¹³⁶ *Yearbook ... 1971*, vol. II (Part One), p. 283, document A/8410/Rev.1, para. 50.

¹³⁷ *Yearbook ... 1974*, vol. II (Part One), p. 174, document A/9610/Rev.1, para. 83.

¹³⁸ *Yearbook ... 1978*, vol. II (Part Two), p. 16, document A/33/10, para. 72.

¹³⁹ See para. 15 above.

set of draft articles, will not prejudice the recommendations that the Commission may make under article 23, paragraph 1 of the Statute, regarding further action once the work is completed.

36. This approach adopted by the Commission at its thirty-first session has been confirmed by the recommendation of the General Assembly in paragraph 4(f) of resolution 34/141,¹⁴⁰ which specifically refers to the "elaboration of an appropriate legal instrument". This indeed conforms also with the views expressed on the point by representatives of Member States in the Sixth Committee at the thirty-fourth session of the General Assembly. In this connection it should be mentioned that in its earlier resolution 3501 (XXX) the General Assembly expressed, in more general terms, "the desirability of elaborating provisions concerning the status of the diplomatic courier", while in its subsequent resolutions on the same topic, reference was made more specifically to the elaboration of "a protocol" (resolution 31/76) or of "an appropriate legal instrument" (resolutions 33/139 and 33/140).

37. As is mentioned in the "Topical summary" referred to in above,¹⁴¹

Many representatives agreed with the Commission's conclusion in paragraphs 163 and 164 of its report that the further elaboration of specific provisions was desirable and that the Commission should make further progress by undertaking the preparation of a set of draft articles for an appropriate international legal instrument, which they hoped would soon be submitted to the Sixth Committee for consideration. It was said in this connection that sound State practice and uniform legal doctrine provided the right conditions for the speedy elaboration of a draft agreement.¹⁴²

Furthermore,

Some representatives indicated that they had an open mind regarding the nature and form of the future instrument and would take a final position on whether it should be a convention or a protocol in the light of future progress on the topic. Also, a number of representatives reserved their position on the form of the instrument to be adopted until the work on the topic had reached a more advanced stage or had been completed by the Commission.¹⁴³

The Special Rapporteur also draws the Commission's attention to the fact that in the Sixth Committee the view was expressed by one representative that no additional protocol was needed and that the Commission would discharge its duties by submitting a report along the lines of section C of chapter VI of its

report, before the end of the current term of office of its members.¹⁴⁴

38. However, the prevailing view has been that at present there is a need for more elaborated rules of international law in order to enhance the protection of the diplomatic courier and the diplomatic bag through the progressive development and codification of international law in this field subsequent to the multilateral conventions adopted under the auspices of the United Nations in the last two decades.

V. Scope and contents of the work

39. With a view to determining the precise scope of the work of progressive development and codification of the rules of international law concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, it would appear necessary at the outset to focus attention on the fact that similar means of communication in inter-State relations are provided for in the three multilateral conventions adopted after the 1961 Vienna Convention.¹⁴⁵ Those official means of communication are the consular courier and consular bag (art. 35, paras. 1 and 5, of the 1963 Vienna Convention), the courier of the special mission and the bag of the special mission (art. 28, paras. 1 and 6 of the Convention on Special Missions), and the courier of the mission, courier of the delegation, bag of the mission and bag of the delegation (art. 27, paras. 1 and 5, and art. 57, paras. 1 and 6 of the 1975 Vienna Convention).

40. It will be recalled in this connection that at its thirtieth session (1978) the Commission approved the result of the study undertaken by the Working Group established at that session to consider the topic and the possible elements of a protocol on the status of the diplomatic courier and the diplomatic bag. The Working Group had adopted as its basic position that the three multilateral conventions concluded subsequent to the 1961 Vienna Convention reflected the considerable developments that had taken place in recent years on various aspects of the question, and that, therefore, the relevant provisions of those conventions, if any, should form the basis for any further study of the question.¹⁴⁶

41. The foregoing decision of the Commission might be interpreted to the effect that recent developments, as reflected in the 1963, 1969 and 1975 conventions, should form the basis of the further development of the law relating to the status of the *diplomatic* courier and the *diplomatic* bag not accompanied by diplomatic

¹⁴⁰ See para. 1 above.

¹⁴¹ See para. 16 above.

¹⁴² A/CN.4/311, para. 237. See also *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 38th meeting, para. 49; 42nd meeting, para. 12; 43rd meeting, paras. 7 and 34; 44th meeting, para. 24; 46th meeting, para. 63; 47th meeting, paras. 49 and 57; 48th meeting, para. 18; 50th meeting, para. 40; 51st meeting, para. 15; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁴³ A/CN.4/L.311, para. 239. See also *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 40th meeting, para. 27; 44th meeting, para. 48; 48th meeting, para. 18; 51st meeting, para. 28; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁴⁴ A/CN.4/L.331, para. 238. See also *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 46th meeting, para. 22; and *ibid.*, *Sessional fascicle*, corrigendum.

¹⁴⁵ See para. 11 above.

¹⁴⁶ See *Yearbook ... 1978*, vol. II (Part Two), p. 139, document A/33/10, para. 142.

courier. Thus, that decision does not necessarily settle the question whether or not—and if so, to what extent—the status of the diplomatic courier and the unaccompanied diplomatic bag should be assimilated to that of the other official means of communication mentioned above,¹⁴⁷ or vice versa.¹⁴⁸

42. The courier and the bag, whatever their particular denomination, are all official means of communication used by a State to maintain contact with or between its missions, as the case may be—whether diplomatic, permanent, permanent observer or special—as well as its consular posts and its delegations. Besides, the corresponding provisions in the 1963, 1969 and 1975 conventions are modelled on article 27 of the 1961 Vienna Convention. Nevertheless, the use of different terms in each of those four conventions testifies to the distinctiveness of the various *official means of communication* envisaged therein.

43. The Commission had occasion to express itself on this point in the commentary to the relevant provision of its final draft on special missions, adopted in 1967, where it stated:

As to terminology, the Commission had a choice between two sets of expressions to designate the bag and courier of a special mission. It could have referred to them as “the diplomatic bag of the special mission” and “the diplomatic courier of the special mission” or, more simply, as “the bag of the special mission” and “the courier of the special mission”. The Commission chose the second alternative in order to prevent any possibility of confusion with the bag and courier of the permanent diplomatic mission.¹⁴⁹

44. The Commission also referred to the point in the commentaries to two articles of its final draft on the representation of States in their relations with international organizations, adopted in 1971. In the first, it stated:

On the basis of article 28 of the Convention on Special Missions, the article uses the expressions “the bag of the mission” and the “courier of the mission”. The expressions “diplomatic bag” and “diplomatic courier” were not used in order to prevent any possibility of confusion with the bag and courier of the diplomatic mission.¹⁵⁰

In the second, the Commission explained that:

... as to terminology, the article uses the expressions “bag of the delegation” and “courier of the delegation” for reasons similar to those set forth in paragraph (6) of the commentary to article 27.¹⁵¹

45. Also as regards this aspect of the scope of the work, it is noted that international organizations make

use of means of communication in the nature of couriers and bags. The 1946 Convention on the Privileges and Immunities of the United Nations¹⁵² provides as follows:

Article III

FACILITIES IN RESPECT OF COMMUNICATIONS

...

Section 10. The United Nations shall have the right to use codes and to dispatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

Similarly, the 1947 Convention on the Privileges and Immunities of the Specialized Agencies¹⁵³ provides as follows:

Article IV

FACILITIES IN RESPECT OF COMMUNICATIONS

...

Section 12

...

The specialized agencies shall have the right to use codes and to dispatch and receive correspondence by courier or in sealed bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

46. In accordance with the foregoing provisions, the courier and bags of the United Nations and its specialized agencies enjoy the same status as diplomatic couriers and bags. This being the case, there would appear to be no need to deal specifically with the status of those couriers and bags under the present topic. Whatever the results of the work of progressive development and codification concerning the status of the diplomatic courier and the unaccompanied diplomatic bag, they would likewise apply to the couriers and bags of those international organizations.

47. As has already been mentioned,¹⁵⁴ the Commission, at its thirtieth session (1978), approved a tentative list of issues relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier which were prepared by its Working Group on the basis of comments and proposals submitted by Governments. At its thirty-first session (1979), the Commission added to the foregoing list certain issues which the Working Group had examined and considered necessary to be studied.¹⁵⁵ The issues thus identified by the Commission provide the best indication of the possible contents of the work to be carried out and were approved by the Commission as possible elements of a protocol, in the following order:

1. Definition of “diplomatic courier”
2. Function of the diplomatic courier
3. Multiple appointment of the diplomatic courier

¹⁴⁷ Para. 39.

¹⁴⁸ See A/33/224, annex, p. 4; *Yearbook ... 1979*, vol. II (Part One), p. 218, document A/CN.4/321 and Add.1-7, Chile, sect. 1; and *ibid.*, p. 217, Byelorussian SSR, sect.6.

¹⁴⁹ *Yearbook ... 1967*, vol. II, p. 361, document A/6709/Rev. 1, chap. II, sect. D, para. (3) of the commentary to art. 28.

¹⁵⁰ *Yearbook ... 1971* vol. II (Part One), p. 302, document A/8410/Rev.1, chap. II, sect. D, para. (6) of the commentary to art. 27.

¹⁵¹ *Ibid.*, p. 318, para. (2) of the commentary to art. 58.

¹⁵² For reference, see footnote 25 above.

¹⁵³ *Idem.*, footnote 26.

¹⁵⁴ See para. 11 above.

¹⁵⁵ See para. 14 above.

4. Privileges and immunities of the diplomatic courier (general):
 - (a) Personal inviolability:
 - (i) Immunity from arrest or detention
 - (ii) Exemption from personal examination or control
 - (iii) Exemption from inspection of personal baggage
 - (b) Inviolability of residence
 - (c) Inviolability of means of transport
 - (d) Immunity from jurisdiction
 - (e) Waiver of immunities
5. Facilities accorded to the diplomatic courier
6. Duration of privileges and immunities of the diplomatic courier
7. Nationality of the diplomatic courier
8. End of functions of the diplomatic courier
9. Consequences of the severance or suspension of diplomatic relations, of the recall of diplomatic missions or of armed conflict
10. Granting of visas to the diplomatic courier
11. Persons declared not acceptable
12. Status of the diplomatic courier *ad hoc*
13. Definition of "diplomatic bag"
14. Status of the diplomatic bag accompanied by diplomatic courier
15. Status of the diplomatic bag not accompanied by diplomatic courier:
 - (a) General
 - (b) The Diplomatic bag entrusted to the captain of a commercial aircraft or of a ship
16. Respect for the laws and regulations of the receiving State
17. Obligations of the receiving State:
 - (a) General
 - (b) Obligations of the receiving State in the event of death of or accident to the diplomatic courier precluding him from the performance of his functions
18. Obligations of the transit State:
 - (a) General
 - (b) Obligation of the transit State in the event of death of or accident to the diplomatic courier precluding him from the performance of his functions
19. Obligations of the third State in cases of *force majeure*
20. Additional items to be studied:
 - (1) Facilities accorded to the diplomatic courier with respect to his entry and departure from the territory of the receiving State
 - (2) Facilities accorded to the diplomatic courier for movement within the territory of the receiving State and the transit State in the performance of his functions
 - (3) Facilities accorded to the diplomatic courier for communicating with the sending State and its diplomatic mission in the territory of the receiving State for all official purposes
 - (4) Exemption from national, regional or municipal dues and taxes
 - (5) Exemption from personal service and public service of any kind
 - (6) Obligation of the diplomatic courier not to undertake any professional or commercial activity on the territory of the receiving State or the State of transit
 - (7) Suspension of the functions of the diplomatic courier by the competent authorities of the sending State
 - (8) Application of the principle of non-discrimination with respect to the diplomatic courier, the accompanied and non-accompanied bag.¹⁵⁶

¹⁵⁶ *Yearbook ... 1979*, vol. II (Part Two), pp. 172 *et seq.*, document A/34/10, chap. VI, sects. C and D.

48. In the light of the foregoing list of issues identified by the Commission, some preliminary questions arise that could conveniently be discussed in the Commission in order to provide further guidance to the Special Rapporteur for the preparation of draft articles. By way of illustration, reference may be made, in the first place, to the question of definitions, which is intimately linked with the question of the extent to which the future draft articles should deal with all official means of communication in the nature of couriers and bags provided for in the four existing multilateral conventions. It may be noted in this connection that, both as regards the courier and the bag, the existing conventions do not contain definitions of the various terms employed as such, but limit themselves to a description of their formal characteristics. In all four conventions, the courier is a person who "shall be provided with an official document indicating his status and the number of packages constituting the bag". Likewise, as regards the bag, the four conventions basically provide that the packages constituting the bag must bear visible external marks of their character and may contain only documents or articles intended for official use.

49. In relation to *the courier*, the tentative list of issues indicates the kind of provisions that might be included in the draft as regards the determination of his status as such. Even though no specific provisions on the point are found in the existing conventions, rules could be developed on the functions of the courier and the end of those functions, his nationality, and the possibility of multiple appointment, along the lines of those established in the existing conventions for the governmental agents dealt with therein.

50. Similarly, the tentative list of issues implies a prior determination of the extent to which facilities and immunities should be granted to the courier beyond what is provided for in the existing conventions. It should be noted in this respect that, for each of the couriers involved, the corresponding conventions all recognize his personal inviolability and his immunity from arrest or detention. As to the further rules that could be elaborated, attention is drawn to the observations made by the Commission at its 1978 session, to the effect that:

... certain members stressed the importance of according the fullest possible diplomatic status to the courier, whereas others took the view that such privileges and immunities should be strictly limited to the needs of his functions.¹⁵⁷

51. Another question suggested by the tentative list of issues concerns *the status of the courier ad hoc*. Each of the four existing conventions allows for the designation of such couriers, extending to them the personal inviolability and the immunity from arrest or detention recognized in the case of the regular agents to which they relate. They also limit those immunities,

¹⁵⁷ *Yearbook ... 1978*, vol. II (Part Two), p. 140, document A/33/10, para. 144, sect. (4).

for each type of *ad hoc* courier involved, to cover only such time as elapses until he will have delivered to the consignee the bag in his charge. This limitation makes it necessary to determine to what extent the further rules to be elaborated on the privileges and immunities of regular couriers would be applicable to *ad hoc* couriers and, if they are not fully applicable, what additional specific provisions should be elaborated regarding their legal status during the time elapsing between the delivery of the bag and their being entrusted with another bag.

52. As regards *the status of the bag*, each of the four existing conventions affirms the inviolability of the bag, which shall not be opened or detained. Nevertheless, in the case of the consular bag,

... if the competent authorities of the receiving State have serious reason to believe that the bag contains something other than the correspondence, documents or articles [that can be carried therein pursuant to art. 35, para. 4, of the convention], they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin (1963 Vienna Convention, art. 35, para. 3.)

In further developing the rules of international law relating to the status of the bag, whatever its denomination, the question arises of the extent to which the foregoing provision is to be taken into account.¹⁵⁸

53. From the tentative list of issues approved by the Commission, it is evident that the future draft articles should also contain provisions dealing with the obligations of transit States and other *third States*. Under the four existing conventions, the *transit State* shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. Furthermore, each of those conventions provides that, in the cases envisaged therein, third States shall accord to couriers who have been granted a visa, if such a visa was necessary, and to bags in transit, the same inviolability and protection as the receiving State is bound to accord under those conventions. Finally, the obligations of third States regarding that inviolability and protection are extended under the four existing conventions to the corresponding couriers and bags when their presence in the territory of the third State is due to *force majeure*. The further development of the rules relating to the obligations of the receiving State may also have an impact—of which the precise extent is yet to be determined—on the obligations of third States in the circumstances already contemplated in the applicable conventional instruments.

54. Finally, the question arises whether or not to embody in the context of the future legal instrument on the status of the courier and the bag some of the *general principles* which underlie the four existing

conventions. It is our view that, together with the fundamental principle of the freedom of communication, common to all, which constitutes the legal foundation of the status of the official courier, other basic principles could appropriately be formulated therein, such as non-discrimination and respect for the laws and regulations of the receiving State. The corresponding provisions, which should be made generally applicable to the draft as a whole, may be inserted at the beginning or at the end of the draft or be embodied in the appropriate substantive parts dealing, respectively, with the status of the courier and the status of the bag.

VI. Structure of the work

55. The title of the present topic, as consistently used by the General Assembly and by the Commission, already suggests the division of the work into at least two main parts dealing respectively with the status of the diplomatic courier and that of the diplomatic bag not accompanied by diplomatic courier. Although no definition of the terms “diplomatic courier” and “diplomatic bag not accompanied by diplomatic courier” as such is found in article 27 of the 1961 Vienna Convention, their use in the title of the present topic reflects the meaning commonly attributed to them: the diplomatic bag, which has been characterized as “a bag (sack or envelope) containing diplomatic documents or articles intended for official use”¹⁵⁹ may be unaccompanied or not, the diplomatic courier being, as characterized in a report submitted to the Commission by A. E. F. Sandström, “a person who carries a diplomatic bag and who is for this purpose furnished with a document (courier’s passport) testifying to his status.”¹⁶⁰

56. By referring specifically only to the “status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier” the title might appear to be excluding the status of the diplomatic bag accompanied by such a courier; nevertheless, the fact is that, as explained in the preceding paragraph, the concept of diplomatic courier implies the existence of an accompanied diplomatic bag. This does not mean, however, that the question of the international legal regulation of the status of the diplomatic courier as such, that is, of the person so identified who carries the diplomatic bag, cannot and should not be differentiated from that of the international legal regulation of the status of the

¹⁵⁹ *Yearbook ... 1957*, vol. II, p. 138, document A/3623, chap. II, sect. II, draft articles concerning diplomatic intercourse and immunities, art. 21, para. (2) of the commentary.

¹⁶⁰ *Yearbook ... 1958*, vol. II, p. 17, document A/CN.4/116/Add.1 and 2, art. 21, para. 3. See also *Official Records of the General Assembly. Thirty-first Session, Sixth Committee*, 65th meeting, para. 41; and *ibid.*, *Sessional fascicle*, corrigendum; *ibid.*, *Thirty-third Session, Sixth Committee*, 17th meeting, para. 12; and *ibid.*, *Sessional fascicle*, corrigendum; *Yearbook ... 1979*, vol. II (Part One), p. 218, document A/CN.4/321 and Add.1–7, Chile, sect. 1; and A/33/224, annex, pp. 65 and 67.

¹⁵⁸ See para. 30 above.

diplomatic bag itself. Such differentiation has already been made in article 27 of the 1961 Vienna Convention: while paragraph 5 of that article provides for the personal inviolability of the diplomatic courier and his immunity from arrest or detention, paragraph 3 of the same article provides for the inviolability of the diplomatic bag itself, without distinguishing whether it is accompanied or not.¹⁶¹

57. In the light of the foregoing, and taking into account the tentative list of issues approved by the Commission, the Special Rapporteur concludes that the work of progressive development and codification of the topic to be undertaken by the Commission should deal in two main parts, respectively, with the status of the official courier and that of the official bag whether or not accompanied by official courier. Although the question of the use of terms for the purposes of the draft articles to be prepared will be dealt with by the Special Rapporteur at the appropriate time, when work will have advanced further, he refers to "official courier" and "official bag" as convenient working tools at the present initial stage of the work. Their use is not intended to prejudge the position that the Commission may take regarding the scope of the draft, and in particular whether it should extend to couriers and bags other than diplomatic ones, as are provided for in the 1963 Vienna Conventions, the Convention on Special Missions, and the 1975 Vienna Convention.

58. Each of the two main parts referred to in the preceding paragraph would include, arranged in a sequence modelled on the relevant multilateral conventions, as many draft articles as would be required in the light of the Commission's position concerning the extent of the facilities, privileges and immunities and the protection to be accorded to the official couriers as persons independent from the bag, and to the official bags, respectively.

59. A third part, separate from that dealing with the official courier, would include provisions on the official courier *ad hoc*, and a fourth part would be devoted to determining the obligations of the official courier towards the receiving State and those of the receiving, transit and third States with regard both to the official courier and the official bag. Additional miscellaneous provisions might be included in this part, as appropriate, dealing, for instance, with the relationship of the draft articles to existing conventions and the general principles that are basic to the progressive development and codification of the topic, such as non-discrimination and respect for the laws and regulations of the receiving State. Lastly, a part at the beginning of

the draft would comprise general provisions such as the scope of application of the draft articles, the use of terms, and the restatement of the principle of freedom of communication for all official purposes as the legal foundation of the status of the official courier and the official bag.

60. As a working method intended to facilitate the comments of members of the Commission and invite their suggestions, the structure of the draft could, therefore, be presented in the following manner:

I. GENERAL PROVISIONS

1. Scope of application of the draft articles
2. Use of terms
3. Freedom of communication for all official purposes, with special reference to the official courier and the official bag.

II. STATUS OF THE OFFICIAL COURIER

1. Appointment of official courier
2. Credentials and other relevant documents with which the official courier should be provided, indicating his status and that of the official bag
3. Multiple appointment of the official courier
4. Nationality of the official courier
5. Functions of the official courier
6. Suspension of the functions
7. Persons declared not acceptable
8. End of functions
9. Consequences of the severance or suspension of diplomatic relations, of the recall of diplomatic missions or of armed conflict
10. Facilities accorded to the official courier (general)
11. Facilities accorded to the official courier with respect to his entry (granting of visas) into the territory of the receiving State and departure from that territory
12. Facilities accorded to the official courier for movement within the territory of the receiving State and the transit State in the performance of his functions
13. Facilities accorded to the official courier for communicating with the sending State and its diplomatic, consular or other official mission in the territory of the receiving State for all official purposes
14. Facilities accorded to the official courier for obtaining suitable accommodation (residence)
15. Privileges and immunities of the official courier (general)
16. Personal inviolability
17. Inviolability of private accommodation (residence)
18. Inviolability of means of transport used in the performance of official functions
19. Immunity from jurisdiction
20. Exemption from personal examination or control
21. Exemption from inspection of personal baggage
22. Exemption from national, regional or municipal dues and taxes
23. Exemption from customs duties and inspection
24. Exemption from personal service and public service of any kind
25. Exemption from social security legislation
26. Waiver of immunities
27. Duration of privileges and immunities of the official courier
28. Obligation of the official courier not to undertake any professional or commercial activity on the territory of the receiving State or the transit State

III. STATUS OF THE OFFICIAL COURIER *ad hoc*

1. Appointment of the official courier *ad hoc*
2. Credentials and other relevant documents with which the official courier *ad hoc* should be provided, indicating his status and that of the official bag

¹⁶¹ See in this connection A/33/224, annex, pp. 59-60, and *ibid.*, p. 65; *Official Records of the General Assembly, Thirty-third Session, Sixth Committee*, 18th meeting, para.11, and 41st meeting, para. 58; and *ibid.*, *Sessional fascicle*, corrigendum; and *Yearbook . . . 1979*, vol. II (Part One), pp. 221-222, document A/CN.4/321 and Add.1-7, Czechoslovakia; and *ibid.*, pp. 225-226, United Kingdom.

3. Multiple appointment of the official courier *ad hoc*
4. Nationality of the official courier *ad hoc*
5. Functions of the official courier *ad hoc*
6. End of functions of the official courier *ad hoc*
7. Facilities, privileges and immunities of the official courier *ad hoc*
8. Duration of the privileges and immunities of the official courier *ad hoc*
9. General provisions with respect to the status of the official courier *ad hoc*

IV. STATUS OF THE OFFICIAL BAG

1. Visible external marks and content of the official bag
2. Status of the official bag accompanied by official courier
3. Status of the official bag not accompanied by official courier
4. Facilities accorded for the expeditious delivery of the official bag
5. Inviolability of the official bag
6. Exemption from customs and other inspection or control
7. Exemption from customs duties, taxes and related charges other than charges for storage, cartage and similar services
8. The official bag entrusted to the captain of a commercial aircraft or of a ship

V. MISCELLANEOUS PROVISIONS

1. Obligations of the receiving State
2. Obligations of the receiving State in the event of death or of accident to the diplomatic courier precluding him from the performance of his functions
3. Obligations of the transit State
4. Obligation of the transit State in the event of death or of accident to the diplomatic courier precluding him from the performance of his functions
5. Obligations of the third State in cases of *force majeure*
6. Respect for the laws and regulations of the receiving State
7. Non-discrimination
8. Relationship to existing conventions.

VII. Conclusion

61. The suggestions advanced in this preliminary report, particularly on the scope and the structure of the work, should be considered as an indication of the possible format of the set of draft articles on the status of all types of appropriate means of communication for official purposes through official couriers and official bags. It should also be pointed out that the denomination of the issues listed above should not necessarily be construed to suggest the titles and the order in which the respective draft articles would be placed. The tentative structure has indeed followed substantially the list of issues identified and approved by the Commission as possible elements of a protocol or appropriate legal instrument. Furthermore, taking into account the specific features of the status of the official courier and the official bag, the Special

Rapporteur has endeavoured to reflect in his suggestions, as much as possible, the relevant provisions of the four multilateral conventions elaborated under the auspices of the United Nations: namely, the Vienna Convention on Diplomatic Relations (1961), the Vienna Convention on Consular Relations (1963), the Convention on Special Missions (1969) and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (1975). It is therefore obvious that, in the course of the subsequent closer study of the topic under consideration and in the process of the elaboration of draft articles, modifications would be made both with regard to the structure and the precise formulation of the titles of the respective draft articles.

62. It would none the less be highly desirable at this stage if the Commission, as guidance for the future work of the Special Rapporteur, would express its observations and recommendations on the scope and contents of the work, particularly with respect to the proposed concept of *official courier* and *official bag*, embracing in this way all types of means of communication for official purposes through official courier and official bag, as stipulated in the relevant provisions of the above-mentioned four multilateral conventions. It is hoped that such a comprehensive approach would reflect more adequately the significant developments that have taken place since the 1961 Vienna Convention. Diplomatic law in all its facets has acquired new forms and new dimensions because of the ever-increasing dynamics of international relations in which States and international organizations are involved in very active contacts through various means, including official couriers and official bags. In view of these developments, the international regulation of the communications between various subjects of international law and, on different occasions, through official couriers and official bags has been faced substantially with the same kind of problems and has to respond to similar challenges and practical requirements, whether the courier is diplomatic, consular or is sent to a special mission or permanent mission of a State or an international organization. The increasing number of violations of the diplomatic law, some of which have raised public concern, also warrant such a comprehensive and coherent regulation of the status of all types of official couriers and official bags. In this way, all means of communication for official purposes through official couriers and official bags would enjoy the same degree of international legal protection.

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

[Agenda item 7]

DOCUMENT A/CN.4/334 AND ADD.1 AND 2*

**Preliminary report on international liability for injurious consequences arising out of acts not prohibited by international law,
by Mr. Robert Q. Quentin-Baxter, Special Rapporteur**

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ABBREVIATIONS

ECE	Economic Commission for Europe
I.C.J.	International Court of Justice
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
ILA	International Law Association
OECD	Organization for Economic Co-operation and Development
P.C.I.J.	Permanent Court of International Justice
<i>P.C.I.J., Series A</i>	<i>P.C.I.J., Collection of Judgments [to 1930]</i>
UNEP	United Nations Environment Programme

* Incorporating document A/CN.4/334/Add.1/Corr.1.

CHAPTER I

General Considerations

A. Introduction

1. As is usual, this preliminary report does not attempt a survey or assessment of State practice and doctrine in areas that may call for close study. It is concerned rather to identify such areas and their possible interrelationships, to provide in tentative outline a profile for the topic, and to assign it a provisional place in the larger scheme of the International Law Commission's work. Similarly, the sparse allusions to authority do not in themselves imply any judgement as to where the weight of authority may lie: they are intended only to accent or counterpoint propositions canvassed in the text. A preliminary report is a vehicle for the Special Rapporteur to share with his colleagues his early, imperfect perceptions of his task, so that their comments may make an immediate contribution to what should always be a collegiate enterprise.

2. The Special Rapporteur does not wish to qualify or supplement the short description of the topic contained in the report of the Working Group set up by the Commission at its thirtieth session, section II of which was reproduced as an annex to the Commission's report of that session.¹ Indeed, readers who find no easy pathway through the thickets of the present report may wish to revive their sense of direction by occasional reference to the way in which the topic was characterized by the Working Group. In this report it is intended, after the briefest possible introduction, to move directly to a consideration of the difficulties that beset the topic chosen for progressive development and codification, and that may be thought to call in question its timeliness or viability.

3. It should, however, first be recalled that this topic owes its place in the Commission's active programme to a conjunction of two circumstances. First, the Special Rapporteur for State responsibility (part I), Mr. Ago, in the course of establishing the boundaries of his own topic, had emphasized that that topic would deal only with the consequences of internationally wrongful acts, and would in no way prejudge the evolution or content of a separate regime dealing with international liability for the injurious consequences of acts not prohibited by international law.² The Commission had adopted that view.³ Secondly, the General Assembly of the United Nations, at the instance of its Sixth Committee, took note of the distinction, and has continued to urge that the present topic be taken up by

the Commission as soon as its existing programme would allow.⁴ In a sense, therefore, the General Assembly has returned a provisional verdict that the topic is viable and deserves priority.

4. The present title stems from the generic contrast between obligations that arise, respectively, from wrongful acts and others from acts which international law does not prohibit, but the specific context in which the topic is discussed has always been that of environmental hazard, caused by human activity and magnified by modern industrial and technological needs and capacities. In 1973, the year in which the Commission first gave passing attention to this spin-off from the seminal topic of State responsibility, the United Nations Conference on the Human Environment was only one year past; UNEP was in course of construction; treaty regimes of a universal character, dealing with acts not prohibited by international law, had been established in relation to space objects and to peaceful uses of atomic energy; questions of conservation in areas beyond national jurisdiction were under consideration in various international forums, including the meetings which gave rise to the Third United Nations Conference on the Law of the Sea; and there was a correspondingly high level of activity in relation to various regional, subregional and transboundary problems.

5. This torrent of activity, and the sense of urgency by which it is impelled, continue to grow. A particularly striking recent manifestation was the High-level Meeting, held in November 1979 within the framework of the Economic Commission for Europe and including Canada, the Soviet Union, the United States of America and the States of western and eastern Europe, on the Protection of the Environment.⁵ It is, however, a feature of much of this activity that questions of liability are almost a forbidden subject. The very important ECE Convention on Long-range Transboundary Air Pollution observes, in its only footnote, that "The present Convention does not contain a rule on State liability as to damage".⁶

The equally significant draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States,⁷ which was adopted in 1978 by the UNEP intergovernmental Working Group of experts on natural resources shared by two or more States, is prefaced by a comparable

¹ *Yearbook ... 1978*, vol. II (Part Two), pp. 150-152, document A/33/10, chap. VIII, sect. C, annex.

² *Yearbook ... 1973*, vol. I, pp. 13-14, 120th meeting, paras. 1-5.

³ *Ibid.*, vol. II, p. 169, A/9010/Rev.1, paras. 37-39.

⁴ For a more detailed account, see *Yearbook ... 1978*, vol. II (Part Two), pp. 149-150, document A/33/10, paras. 173-175.

⁵ See ECE/HLM.1/2 and Add.1.

⁶ ECE/HLM.1/2, Annex I, p. 5.

⁷ UNEP/GC.6/17.

disclaimer.⁸ Even so, the General Assembly of the United Nations, in taking note of the draft principles, has chosen to stress their potential practical value while reserving any opinion about their legal implications.⁹

6. In these developments, the Commission can perhaps find broad indications of the path by which it should seek to travel and the peremptory challenges it may meet with on the journey.¹⁰ In situations of great novelty and complexity, it is always difficult for lawyers and other policy-makers to achieve a perfect understanding. In the field of the environment, which now attracts a large and increasing share of the attention of international lawyers, as well as of

⁸ The explanatory note which prefaces the draft principles reads in part:

“An attempt has been made to avoid language which might create the impression of intending to refer to, as the case may be, either a specific legal obligation under international law, or to the absence of such obligation.

“The language used throughout does not seek to prejudice whether or to what extent the conduct envisaged in the principle is already prescribed by international law. Neither does the formulation intend to express an opinion as to whether or to what extent and in what manner the principles—as far as they do not reflect already existing rules of international law—should be incorporated in the body of general international law.”

⁹ General Assembly resolution 34/186 of 18 December 1979, the second and third operative paragraphs of which read as follows:

[“*The General Assembly*]

“2. *Takes note* of the draft principles as guidelines and recommendations in the conservation and harmonious utilization of natural resources shared by two or more States without prejudice to the binding nature of those rules already recognized as such in international law;

“3. *Requests* all States to use the principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States, on the basis of the principle of good faith and in the spirit of good neighbourliness and in such a way as to enhance and not adversely affect development and the interests of all countries, in particular the developing countries.”

¹⁰ One such challenge seems to come from Jiménez de Aréchaga:

“The International Law Commission wisely decided not to codify the topic of State responsibility for unlawful acts and the rules concerning the liability for risks resulting from lawful activities simultaneously, for the reason that ‘a joint examination of the two subjects could only make both of them more difficult to grasp.’”

“Several members urged the Commission to embark as soon as possible on the codification of State responsibility resulting from risks originating in lawful but hazardous conduct.

“The difficulty of making such a codification is that this type of responsibility only results from conventional law, has no basis in customary law or general principles and, since it deals with exceptions rather than general rules, cannot be extended to fields not covered by specific instruments.” (E. Jiménez de Aréchaga, “International law in the past third of a century”, *Recueil des cours de l'Académie de droit international de La Haye, 1978-I* (Alphen aan den Rijn, Sijthoff, 1979), vol. 159, p. 273.)

Nevertheless, Jiménez de Aréchaga attaches this verdict to a hypothesis more narrowly conceived than the title of the present topic or its characterization by the Working Group requires.

economists and other social and political scientists, an interdisciplinary approach is indispensable—as has been shown by the long and productive travail of the Third United Nations Conference on the Law of the Sea. Environmental lawyers, whether engaged in negotiation or in academic appraisal, have displayed a noteworthy determination “to stay with the action”, often redirecting their analytic skills from the study of a small and enigmatic body of recorded State practice to an examination, in the light of legal principle, of the needs and aspirations of the contemporary world community.¹¹

7. A concordance of legal and other policy elements is less difficult to achieve when, as in the Long-range Transboundary Air Pollution Convention, the main goal of the negotiation is commitment to a common course of action: it is more difficult when, as in the case of UNEP's draft principles, the major aim is to regulate in advance the conflicting interests that may develop among the parties. In such cases, even if there is no polarizing factor of the upstream-downstream kind, the will of Governments to reach agreement may be sapped in two main ways. First, it may be felt that, while guidelines are necessary to prevent the bruising that must occur when sovereign States act in disregard of each other's interest, it could prove even more painful to be bound by rules that cannot take into account the individuality and variety of the cases that will arise. Secondly, there may be a considerable psychological barrier to engagement in projects that seem to be directed to the aftermath of ecological disaster, rather than to its prevention.

8. As to the first of these grounds of discouragement, some balance must be struck. It is natural that Governments should feel their way towards solutions that will best accommodate separate, as well as joint, interests. Even informal guidelines, unless wholly disregarded, must provide evidence of concordant State practice; and in that degree they cannot, despite all disclaimers, be devoid of legal significance. At some point, therefore—and statements made in such forums as the recent ECE High-level Meeting leave no doubt that Governments now take a very serious view of man-made environmental hazards—the tacit and explicit elements of State practice must harden into new legal rules,

¹¹ This tendency has been authoritatively described by M.S. McDougal:

“The increasingly predominant theory (“jurisprudence” or “philosophy”) about law today is explicitly sociological or policy-oriented in emphasis. In this conception, law is not some frozen set of pre-existing rules or arrangements that inhibits constructive action about environmental and other problems but, rather, a dynamic and continuous process of authoritative decision through which the members of a community clarify and implement their common interests.” (“Legal bases for securing the integrity of the earth-space environment”, in: *Environment and Society in Transition*, P. Albertson and M. Barnett, eds., Annals of the New York Academy of Sciences, vol. 184 (7 June 1971), p. 377.)

combining regard for present-day needs with respect for pre-existing legal principle. The search for draft articles that meet these criteria and assist this process must be the central purpose of the Commission's treatment of this topic.

9. There remains the question whether lawyers concerned with the problem of liability have to detach themselves from the mainstream of international endeavour in order to apportion responsibilities for human failure. It is submitted that there could be no more damaging misconception of the thrust of the present topic. The theme of accountability for acts not prohibited comes into prominence precisely because there is need for a new and imaginative effort to reconcile the widest possible freedom of action with respect for the rights of others, and with a justified apprehension that mankind may perish through undisciplined use of industrial and technological power. The primary aim of the draft articles must therefore be to promote the construction of regimes to regulate without recourse to prohibition, the conduct of any particular activity which is perceived to entail actual or potential dangers of a substantial nature and to have transnational effects. It is a secondary consideration, though still an important one, that the draft articles should help to establish the incidence of liability in cases in which there is no applicable special regime and injurious consequences have occurred.

B. Use (and non-use) of terms

10. Although definitions are not settled until a group of draft articles is complete, something must be said about the use of terms in the present report. The choice of the term "liability" in the English version of the title of this topic stems from an exchange of views in the Commission during its twenty-fifth session, in 1973. It was suggested by Mr. Kearney that:

the term "responsibility" should be used only in connection with internationally wrongful acts and that, with reference to the possible injurious consequences arising out of the performance of certain lawful activities, the more suitable term "liability" should be used.¹²

The Commission adopted this proposal without discussion.¹³ The Special Rapporteur for State responsibility (part I), Mr. Ago, said that:

the change was pertinent so far as the English text was concerned. The word "liability" implied the necessity to make reparation and was therefore the right word in that context; "*responsabilité*" appeared to be the only word available in French to express both notions.¹⁴

11. Indeed, the distinction made by Mr. Kearney was well established, at least by the mid-1960s, in the practice of the United Nations Committee on the

Peaceful Uses of Outer Space;¹⁵ and no change is now proposed. Nevertheless, if two terms are used in English where one serves in French and in other working languages, it is necessary for the Commission to be satisfied that the variation in English is a matter of idiom (like the use of the two English terms, "President" and "Chairman", to correspond with the single French term, "*Président*"), and that it imports no distinction of substance. This would seem to be the case. Within the Commission¹⁶ and elsewhere, the English terms "responsibility" and "liability" have been used interchangeably in relation to the regime of obligation in respect of the injurious consequences of acts not prohibited by international law. The term "responsibility", no less than the term "liability", implies "the necessity to make reparation", and in the English language literature of international law the term "liability" is commonly employed to refer generically to the consequences of any legal obligation.

12. In this report, therefore, the term "liability" is used, as far as possible, without nuance and in a sense very close to its ordinary meaning: a negative asset, an obligation, in contra-distinction to a right. It is not used to mean only the consequences of an obligation, but rather to mean the obligation itself, which—like "responsibility"—includes its consequences.¹⁷ It is perhaps a disadvantage that the term "liability" has sometimes been regarded in municipal law as an equivalent of the term "responsibility" in international

¹⁵ See for example, General Assembly resolution 2777 (XXVI) of 29 November 1971, third preambular paragraph:

"Recalling its resolutions 1963 (XVIII) of 13 December 1963, 2130 (XX) of 21 December 1965, 2222 (XXI) of 19 December 1966, 2345 (XXII) of 19 December 1967, 2453B (XXIII) of 20 December 1968, 2601B (XXIV) of 16 December 1969 and 2733B (XXV) of 16 December 1970 concerning the elaboration of an agreement on the liability for damage caused by the launching of objects into outer space."

¹⁶ See, e.g. *Yearbook . . . 1973*, vol. II, p. 169, A/9010/Rev.1, paras. 38–39.

¹⁷ In the "Informal Composite Negotiating Text/Revision 2" of the Third United Nations Conference on the Law of the Sea (A/CONF.62/WP.10/Rev.2 and Corr. 2–5), three articles—139, 235 and 263—use the terms "responsibility" and/or "liability" in their titles in the English version, as well as in the text of those articles. These usages appear to draw upon the wording of relevant resolutions of the General Assembly—see, e.g., General Assembly resolution 2749 (XXV) of 17 December 1970, para. 14:

"Every State shall have the responsibility to ensure that activities in the area . . . shall be carried out in conformity with the international régime to be established. . . . Damage caused by such activities shall entail liability."

The usages appear also to draw upon the wording of Principle 22 of the Declaration of the United Nations Conference on the Human Environment (*Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I) and on the relationship of that principle to Principle 21:

"Principle 21

"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own

(Continued on next page.)

¹² *Yearbook . . . 1973*, vol. I, p. 211, 1243rd meeting, para. 37.

¹³ *Ibid.*

¹⁴ *Ibid.*, para. 38.

law.¹⁸ That is, no doubt, one reason why the title of the topic speaks of “international liability”; but in the body of this report the adjective is omitted, unless there seems a special need for its inclusion.

(Footnote 17 continued.)

environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

“Principle 22

“States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.”

In the French version of draft arts. 139, 235 and 263 of the Informal Composite Negotiating Text/Revision 2, the term “*responsabilité*” is used in parallel with:

(a) the term “responsibility”—e.g., in the titles of draft arts. 235 and 263 and in para. 1 of art. 139;

(b) the term “liability”—e.g. in the title of draft art. 139 and in the para. 3 of art. 235;

and in para. 1 of draft art. 235 in French, the term “*responsables*” is used in parallel with the word “*liable*”. (cf. the second and third paras. of draft art. 263, where the term “*responsables*” is used in parallel with the words “*responsable and liable*”. See also, for example, art. 232, where there is a broadly similar correspondence both in the title and in the text.)

In the attempt to provide an exact balance between the English and French original texts, there are other variations correlated with, and designed to compensate for those already noted, e.g.:

- (a) “Responsibility and liability” = “*responsabilités et obligations qui en découlent*”;
 “liability” = “*obligation de réparer*”.
- (b) “Responsibility and liability” = “*obligation de veiller au respect de la convention et responsabilité en cas de dommages*”;
 “States are responsible . . .” = “*il incombe aux Etats de veiller . . .*”;
 “international law relating to responsibility and liability” = “*droit international relatif aux obligations et à la responsabilité concernant l’évaluation et l’indemnisation des dommages*”.

There are other variants: see, for example, the English and French versions of the title and text of draft article 22 of annex III.

In general, the textual evidence seems consistent with the premise on which the Commission has acted; that is to say, the English terms “responsibility” and “liability” are merely facets of a single concept, rendered in French by the term “*responsabilité*”.

The terminology used in paragraph 14 of General Assembly resolution 2749 (XXV) and similar contexts, including the Declaration of the United Nations Conference on the Human Environment, was not designed to split the atom of “*responsabilité*” into its components. Rather it was influenced by the very considerations that moved the Commission in 1973, and that were accepted by the General Assembly upon consideration of the Commission’s report: that is to say, the progressive development of international law in regard to the responsibility (or liability) of States calls for separate examination of obligations that arise from wrongfulness, and those that may arise from lawful acts.

See also T. Treves, “Les tendances récentes du droit conventionnel de la responsabilité et le nouveau droit de la mer”, *Annuaire français de droit international*, 1975 (Paris), vol. XXI, p. 767.

¹⁸ *Ibid.*, p. 776.

13. The title speaks of international liability “for injurious consequences”. It is, of course, this phrase which in substance distinguishes obligations dealt with in the present topic from those that arise from wrongful acts. Once again, this phrase has its origin in the Commission’s 1973 debate: it signifies the fact that, while any wrongful act entails a duty of reparation, an act not prohibited does so only if loss or injury is caused. There is the further distinction, best dealt with in a later section, that an obligation in respect of an act not prohibited arises only when a primary rule of international law so provides.¹⁹

14. For compelling reasons, the Commission, at its 1973 session, abandoned the compendious phrases “lawful acts” or “licit acts” in favour of the awkward, but more accurate, periphrasis “acts not prohibited by international law”. A number of speakers at that time made the general point that the borderline between lawfulness and unlawfulness was often not easy to trace. Technology had allowed the creation of activities which bordered upon wrongfulness and which were perhaps on the way to becoming wrongful, but which at least carried with them an obligation to redress any loss or injuries of which they were the cause.²⁰ For the reasons then given, the phrase “acts not prohibited” is used throughout the present report; and, as there can be no onus upon an injured State to prove the lawfulness of the activities of which it complains, the phrase carries implicitly the enlarged meaning “acts, whether or not prohibited”.

15. It remains to notice the contrasted descriptions “fault” and “no-fault”, or “fault” and “risk”, often employed as a shorthand method of distinguishing the regime of responsibility for wrongful acts and that of liability in respect of acts not prohibited by international law.²¹ The antinomy of “fault” and “no-fault” may be regarded merely as labels—and unsuitable ones for the Commission’s purpose, because the great unruly concept of “fault” has been to some extent sublimated in modern international law; it nowhere makes an “on-stage” appearance in the Commission’s draft articles on State responsibility (part I),²² now nearing the completion of first reading. On the other hand, for some writers in this field, the antinomy of “fault” and “no-fault” constitutes the very nub of our problem, and it can yield a kind of *reductio ad*

¹⁹ See *Yearbook . . . 1973*, vol. I, p. 12, 1203rd meeting, para. 41 (Mr. Ushakov); p. 14, 1204th meeting, para. 4 (Mr. Ago).

²⁰ *Ibid.* See, for example, p. 7, 1202nd meeting, para. 23 (Mr. Kearney); pp. 7–8, para. 32 (Mr. Hambro); p. 10, 1203rd meeting, paras. 16–18 (Mr. Castañeda); p. 13, 1204th meeting, para. 3 (Mr. Ago).

²¹ For a full and recent examination of these concepts, see P.-M. Dupuy, *La responsabilité internationale des Etats pour les dommages d’origine technologique et industrielle* (Paris, Pedone, 1976).

²² For the text of all the articles adopted so far by the Commission, see *Yearbook . . . 1979*, vol. II (Part Two), pp. 91 et seq., document A/34/10, chap. III.

absurdum: if the practice of States in this area is in the end referable to a standard of care or due diligence, however "objectivised" that standard may be, what general need or place remains for an auxiliary regime of responsibility or liability not based on the duty of care?

16. In the present report, the expressions "fault" and "no-fault" are not used, because, above all other grounds of objection, they produce in the general reader, who is not yet an *aficionado*, a feeling of giddiness and a mistrust of experts. Are we really saying, he may ask, that sovereign States, which bend their necks so reluctantly to the yoke of the responsibility engendered by wrongfulness, owe an even higher standard of duty when performing acts that in principle are not prohibited? In the present report, the regime of liability in respect of acts not prohibited by international law is envisaged as being largely—though perhaps not entirely—the product of the duty of care or due diligence, the pervasive primary rule that is approved, and explained with equal facility, by the proponents of subjective and objective theories of responsibility.²³ At a certain point along the way, one must admit the influence of a modified principle, more closely connected with the era of interdependence; for the duty of care will have to acquire a new dimension before it can account convincingly for such phenomena as the limitation of liability or the *consideranda* embodied in Principle 23 of the Declaration of the United Nations Conference on the Environment.²⁴

17. The term "risk" is used, in the literature on this subject, in at least two senses, not always clearly distinguished. Each sense corresponds to a common English usage: "risk" may refer to an inherent danger, and may even imply an exceptionally high level of danger—a connotation more exactly expressed by the term "ultra-hazard"; or "risk" may simply indicate

²³ For a brief review of doctrine concerning the "fault theory" and the "objective theory", see *Yearbook . . . 1978*, vol. II (Part One), document A/CN.4/315, chap. III, and in particular pp. 188–201, paras. 489–511.

²⁴ For reference, see footnote 17 above. Principle 23 is worded thus:

"Principle 23

"Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries."

where a burden of responsibility (or liability) lies, as in the customary notice that users of a private thoroughfare do so "at their own risk". In this latter sense, the term "risk" is not needed at all; for there are more habitual and less emotive ways of describing the incidence of a burden of care or of responsibility. Yet, if we are to banish the term "risk" from our scientific vocabulary, we should first acknowledge that the interplay of its different meanings has greatly stimulated legal thought. If States create risks—or fail to prevent their creation within national territory, or, by national enterprises, beyond the territorial limits of any State—do those States in principle bear the created risk, or does international law leave other States without redress for the harmful acts of foreign man, as well as those of nature?

18. The delineation of "ultra-hazardous" activities will always be associated with the brilliant pioneering lectures of C. Wilfred Jenks.²⁵ At about the same time that Jenks was calling for exceptional measures to contain exceptional dangers, L. F. E. Goldie broke new ground in an influential article that stressed the continuum of human situations and of matching legal experience, of the potential for legal adaptation, and of the range and gradation of available solutions.²⁶ From these and other initiatives, there emerge definitions containing elements of magnitude. "Ultra-hazard" is perceived as a danger that rarely materializes, but that may, on those rare occasions, assume catastrophic proportions: it is seen also to include dangers, such as air pollution, that are insidious and may have massive cumulative effects.²⁷ Equally, it has been noted that possible regimes of liability in respect of acts not prohibited may vary from those that are merely "strict" to others that are "absolute", in the sense that they admit no ground of escape from liability when a chain of causality has been established. The need to make such distinctions, and their possible relevance to the Commission's work, are not in question; but in the preparation of the present report they have been set aside, because they turn upon an analysis that is quantitative rather than qualitative.

²⁵ C. W. Jenks, "Liability for ultra-hazardous activities in international law", *Recueil des cours . . . , 1966-I* (Leyden, Sijthoff, 1967), vol. 117, p. 105.

²⁶ L. F. E. Goldie, "Liability for damage and the progressive development of international law", *International and Comparative Law Quarterly* (London), vol. 14 (October 1965), pp. 1189 *et seq.*

²⁷ Jenks, *loc. cit.*, pp. 107 *et seq.*; Goldie, *loc. cit.*, pp. 1200 *et seq.*

CHAPTER II

Comparisons with responsibility for wrongful acts

A. Primary and secondary rules

19. For historical reasons,²⁸ the present topic has often been presented as if it were a challenger, in certain areas, to the traditional regime of State responsibility for wrongful acts. Being conscious of a duty of neutrality in this matter, the Commission, in its 1973 report to the General Assembly, observed:

Owing to the entirely different basis of the so-called responsibility for risk and the different nature of the rules governing it, as well as its content and the forms it may assume, a joint examination of the two subjects could only make both of them more difficult to grasp.²⁹

Care has ever since been taken not to burden the present topic with precedents drawn from the regime of responsibility for wrongful acts. Article 1 of the draft articles on State responsibility (part I)³⁰ was expressly designed not to “lend itself to an interpretation which might automatically exclude the existence of another possible source of ‘responsibility’”;³¹ and even the rules of attribution contained in Chapter II of those draft articles were thought unlikely to be applicable to the case of obligations arising in respect of acts not prohibited by international law.³²

20. Nevertheless, this scrupulous desire not to prejudice future lines of development could falsely encourage the belief that a régime of liability in respect of acts not prohibited can exist quite independently of the regime of State responsibility for wrongful acts. That would be to disregard the implications of the distinction that the Commission has already drawn between “primary” and “secondary” rules. The 1973 report noted that:

The Commission has generally concentrated on defining the rules of international law which . . . impose specific obligations on States, and may, in a certain sense, be termed “primary”. In dealing with the topic of responsibility, on the other hand, the Commission is undertaking to define other rules, which . . . may be described as “secondary” inasmuch as they are concerned with determining the legal consequences of failure to fulfil obligations established by the “primary” rules.³³

21. The distinction is best illustrated by the archetypal conventional regime contained in the

Convention on International Liability for Damage caused by Space Objects (1971).³⁴ Article 2 of this Convention provides that:

A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight.

That provision establishes for the States parties a “primary” obligation to pay compensation for injurious consequences arising out of acts not prohibited by international law. By virtue of a “secondary” rule, failure of a State party to meet its liability to pay compensation constitutes a breach of an international obligation of that State, thereby entailing its international responsibility. It can thus be seen that the regime of liability in respect of acts not prohibited does not detract from the universality of the regime of responsibility for wrongful acts, because the two regimes exist upon different planes. Obligations arising in respect of acts not prohibited are the product of particular “primary” rules: the violation of these or any other “primary” rules brings into play the “secondary” rules of State responsibility for wrongful acts.

22. The distinction here made is, of course, by no means a new one: it was clearly within the Commission’s contemplation during its 1973 debate.³⁵ The same question arose—this time in the context of obligations relating to the treatment of aliens—during the Commission’s 1977 discussion of the draft articles on State responsibility (part I), when the Commission was considering draft article 22 (Exhaustion of local remedies).³⁶ While there were differences of opinion on other points, there was no disagreement about the distinction put most succinctly by Mr. Ushakov, who pointed out that there were two categories of indemnification: indemnification in consequence of international responsibility and indemnification in consequence of a primary rule.³⁷ The question arose again, though more obliquely, during the Commission’s 1978

²⁸ See above, paras. 3–4 and para. 15.

²⁹ *Yearbook . . . 1973*, vol. II, p. 169, document A/9010/Rev.1, para. 38.

³⁰ See above, footnote 22.

³¹ *Yearbook . . . 1973*, vol. II, p. 169, document A/9010/Rev.1, para. 39.

³² See *Yearbook . . . 1974*, vol. I, p. 29, 1257th meeting, para. 25.

³³ *Yearbook . . . 1973*, vol. II, p. 169, document A/9010/Rev.1, para. 40.

³⁴ General Assembly resolution 2777 (XXVI) of 29 November 1971, annex.

³⁵ See for example *Yearbook . . . 1973*, vol. I, p. 12, 1203rd meeting, para. 41 (statement of Mr. Ushakov), and p. 14, 1204th meeting, para. 4 (reply of the Special Rapporteur, Mr. Ago):

“Mr. Ushakov had rightly said that there was a general principle linking responsibility for a wrongful act with any breach of rules of law, whereas a lawful act generated responsibility only if a substantive or primary rule so provided. If injury caused by a lawful activity—that was to say, one that was not prohibited, such as activities in outer space—entailed an obligation to make reparation, that was not, strictly speaking, a matter of responsibility, but of a guarantee . . .”

³⁶ *Yearbook . . . 1977*, vol. I, pp. 250–255 and 259–277, 1463rd and 1465th to 1468th meetings.

³⁷ *Ibid.*, p. 275, 1468th meeting, para. 14.

discussion of draft article 23 (Breach of an international obligation to prevent a given event).³⁸ A distinguishing feature of this type of obligation is that it may require of the State which is the subject of the obligation a standard of behaviour more exacting than that of due diligence, though still not an absolute standard.³⁹

23. To put the matter in a longer perspective, the Commission in 1963 decided, with the approval of the General Assembly, not to renew its earlier efforts to study the topic of State responsibility in the particular area of responsibility for injuries to the person or property of aliens, nor to take up the study of that topic in any other particular area. Instead, the Commission would study the "secondary" rules governing international responsibility as a general and independent topic, divorced from any systematic treatment of the "primary" rules whose breach entails responsibility for an internationally wrongful act.⁴⁰ The distinction between "primary" and "secondary" rules is therefore an analytic device, and the three sets of draft articles on State responsibility—under construction or projected—are designed to be multiple-fitting, so that they will repay their cost many times when applied to the various subject areas of international law. The present topic concerns one such subject area.

24. In the preceding paragraphs, the terms "primary" and "secondary" have been placed in quotation marks as an acknowledgement that they are abstractions and have only the validity one chooses to assign them as a method of clarifying issues. For many, injurious consequences—that is, loss or damage, material or non-material—are a third constituent element essential to the establishment of responsibility for wrongful acts.⁴¹ For some, on the other hand, even the factor of attribution—that is, imputability to the State as a legal person—is wrongly placed among the constituent elements.⁴² Both of these conceptions may be of some importance in testing the relationship between the regime of liability for acts not prohibited and that of responsibility for wrongful acts.

25. There is, however, one irreducible sense in which the terms "primary" and "secondary" may be permitted to escape their quotation marks: secondary rules

are merely an empty matrix in which primary rules—rules of obligation—can produce their substantive effect. So, Quadri observes:

That is why, from the point of view of method, we have always criticized the almost general tendency of learned authors and in diplomatic practice to regard most problems concerning the treatment of aliens as problems of responsibility. We refer in particular to the international obligation of the State to protect the person or property of aliens. In general textbooks on public international law, this topic is treated in the chapters concerning responsibility, with particular emphasis on denial of justice, which is regarded as typifying the international delinquency. But denial of justice is in reality only one of the ways of violating the obligation to protect aliens and hence ought to be discussed in the chapter concerning the treatment of aliens.⁴³

This comment is equally applicable to the subject-matter of the present topic—the only other substantive area of law which is persistently represented as an aspect of secondary rules.

B. The avoidance of wrongfulness

26. The shift in perspective from secondary to primary rules places this topic in a less unnatural setting. The regime of reasonable care, required of a State that engages in or permits an activity the harmful effects of which may be felt outside its own borders, might—for example—include obligations to collect and furnish information, to seek agreement upon methods of construction or operating procedures or tolerable levels of contamination, and to provide guarantees of reparation in case all precautions should fail to prevent injurious consequences. Depending upon the circumstances, the standard of reasonable care or due diligence may well require a standard more exacting than its own as part of a special regime of protection that includes guarantees of redress for the potential victims of any hazard that cannot be wholly eliminated. The general regime of State responsibility for wrongful acts will yield criteria for the classification of the various obligations that make up the special regime of protection; but the extent of any obligation will be determined by the primary rule itself.⁴⁴ Thus, the regime of absolute liability provided in the Convention on International Liability for Damage caused by Space Objects⁴⁵ may be regarded not only as an applicable conventional rule, but also as evidence of the standard of care which the authors of the Convention believed to be reasonable in relation to that particular activity.

27. One should immediately qualify the foregoing statement by noting that conventional regimes determining liability are almost always silent as to their

³⁸ *Yearbook ... 1978*, vol. I, pp. 4–19, 1476th to 1478th meetings.

³⁹ *Ibid.*, vol. II (Part Two), pp. 82–83, document A/33/10, chap. III, sect. B.2, paras. (4) and (6) of the commentary to art. 23 of the draft articles on State responsibility.

⁴⁰ See in particular *Yearbook ... 1969*, vol. II, pp. 231 *et seq.*, document A/7610/Rev.1, chapter IV., paras. 71 *et seq.*

⁴¹ See for example E. Jiménez de Aréchaga, "International law in the last third of a century", chap. X, "International responsibility" (*loc. cit.*), p. 267.

⁴² See for example R. Quadri, "Cours général de droit international public" (chap. IV: Responsabilité et garantie), *Recueil des cours ... 1964-III* (Leyden, Sijthoff, 1966), vol. 113, pp. 457–459: "Le lien de causalité est tout. La question de l'imputabilité reste du domaine exclusif du droit interne ...". (*Ibid.*, p. 459).

⁴³ *Ibid.*, p. 456.

⁴⁴ See for example remarks of Mr. Ago, Special Rapporteur, in reference to art. 23 of the draft articles on State responsibility (part I): *Yearbook ... 1977*, vol. I, p. 232, 1457th meeting, para. 21; *Yearbook ... 1978*, vol. I, p. 10, 1477th meeting, para. 5.

⁴⁵ See above, footnote 34.

relationship with customary law, and that in cases not governed by any conventional regime, settlements are usually effected upon a non-principled and *ex gratia* basis. In this may be found an essential clue to the nature of the present topic. To use metaphorically language borrowed from the law of the continental shelf, the sovereignty of each State has its "natural prolongation", which will in principle determine the delimitation of its rights and obligations vis-à-vis each other State, and vis-à-vis the areas held in common not subject to the sovereignty of any State. In practice, however, a mere invocation of principle does not readily reveal the location of each boundary line; an approximation must be agreed upon, by reference to principles of equity but also in a spirit of pragmatism, accommodating and compensating for the legitimate preoccupations, as well as meeting the just demands of each of the States that has an interest.⁴⁶ This theme is reopened in the next chapter.

28. In the field of the environment, because most dangers are new or newly perceived, the need for international regulation is widely admitted and conventional regimes are continuously under construction at universal, regional, sub-regional and transnational levels. In some areas—notably those concerning outer space, the peaceful uses of atomic energy and the sea carriage of oil—the obligations that States have undertaken (or the liabilities that they have acknowledged) include a duty to compensate, or to provide a scheme of compensation for, the victims of accidents that have not been prevented.⁴⁷ In other areas, as we

have seen, the lack of a conventional rule as to liability for injurious consequences has been specifically recognized, whether by way of disclaimer or of assertion that the gap should be filled.⁴⁸ The common thread of all the discourse is that in principle the innocent victims of an activity that entails some danger should not be left to bear their loss, even if the actor's conduct is without taint of wrongfulness.

29. In the much older field of responsibility for the treatment of aliens, customary law long ago provided for situations that can without extravagance be analysed in a similar way. In this field also, both the boundaries of lawfulness and the extent of liability when unlawfulness is not alleged are disputed. Sørensen has stated the two kinds of responsibility (or liability) as follows:

First, the State is under the obligation not to exercise its power of expropriation in an arbitrary manner. . . .

Secondly, the expropriation must not be discriminatory. . . .

If an expropriation is carried out in breach of these conditions, it exceeds the limits imposed by international law on the territorial competence and thus constitutes a wrongful act, which involves a duty of reparation. . . .

If, however, the expropriation is not wrongful, it nevertheless entails the obligation to pay compensation, but it is compensation for a lawful act and therefore less extensive.⁴⁹

For our immediate purpose, it is enough to note the underlying theme. International law does not needlessly restrict the freedom of action of States; if their aims are legitimate, and if the means of achieving these aims pay reasonable regard to the separate interests of other States and to community interests, injurious consequences that are incidental to their activities do

⁴⁶ This generalization appears to be as true of a great multilateral consultation such as the Third United Nations Conference on the Law of the Sea as of a bilateral negotiation to establish maritime boundaries. Thus, even when the assistance of the International Court of Justice is sought to clarify the principles relevant to a negotiation of the latter kind, as in the *North Sea Continental Shelf* cases, the range of applicable criteria which the Court itself adduces cannot be as definitive as its analysis of the positions taken by the respective parties. See W. Friedmann, "The North Sea continental shelf cases: A critique", *The American Journal of International Law* (Washington, D.C.), vol. 64, No. 2 (April 1970), p. 229.

⁴⁷ See for example:

Convention on the international liability for damage caused by space objects (1971) (see footnote 34 above);

Vienna Convention on Civil Liability for Nuclear Damage (1963) (United Nations, *Juridical Yearbook*, 1963 (United Nations publication, Sales No. 65.V.3, p. 148);

Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 1960) with Additional Protocol (1964) (United Kingdom, *Treaty Series* No. 69 (1968), Cmnd. 3755 (London, H.M. Stationery Office, p. 14);

Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (United Nations, *Juridical Yearbook*, 1972 (United Nations publication Sales No. E.74.V.1), p. 100);

Convention on the liability of operators of nuclear ships and Additional Protocol (Brussels, 1962) (Belgium, Ministry of Foreign Affairs and Foreign Trade, *Service des Traités, Conventions on Maritime Law (Brussels Conventions)* (Brussels, 1968), p. 85);

International Convention on Civil Liability for Oil Pollution Damage (Brussels, 1969) (United Nations, *Juridical Yearbook*, 1969 (United Nations publication, Sales No. E.71.V.4, p. 174);

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Brussels, 1971) (United Nations, *Juridical Yearbook*, 1972 (*op. cit.*), p. 103);

Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources (London, 1977) (United Kingdom, *Final Act of the Intergovernmental Conference on the Convention on Civil Liability for Oil Pollution Damage from Offshore Operations* Cmnd. 6791 (London, H.M. Stationery Office, 1977, p. 7).

⁴⁸ See para. 5 and footnote 8 above. See also Principle 22 of the Declaration of the United Nations Conference on the Human Environment (footnote 17 above) and art. 235, para. 3, of the Informal Composite Negotiating Text/Revision 2 (*ibid.*):

"With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation such as compulsory insurance or compensation funds."

⁴⁹ M. Sørensen, "Principes de droit international public" (chap. IX: Limitations de la compétence territoriale), *Recueil des cours* . . ., 1960-III (Leyden, Sijthoff, 1961), vol. 101, pp. 177-178.

not of themselves entail responsibility for a wrongful act, provided that the loss is recompensed.⁵⁰ It is a further question, also considered in the next chapter, to what extent the duty of recompense may itself be subordinated to the imperative interests of the acting State.

30. The Commission has recently had occasion to consider a third type of situation in which an obligation may arise to make good a loss without wrongfulness—that is, the case in which a State acts in breach of an international obligation by which it is bound, giving rise to injurious consequences, but the wrongfulness of its action is precluded by an exceptional circumstance such as *force majeure*, a fortuitous event, distress or a state of necessity.⁵¹ As the Special Rapporteur for State responsibility (part I), Mr. Ago, has observed, in connection with the state of necessity:

The preclusion would . . . in no way cover consequences to which the same act might give rise under another heading, in particular the creation of an obligation to compensate for damage caused by the act of necessity that would be incumbent on that State on a basis other than that of *ex delicto* responsibility.⁵²

Indeed, the Commission has acted upon that view, pointing out, in relation to the questions of *force majeure* and fortuitous event, that the preclusion of wrongfulness:

does not exclude the possibility that different rules may operate in such cases and place upon the State obligations for total or partial compensation that are not connected with the commission of a wrongful act.⁵³

⁵⁰ *Ibid.* (chap. X: Limitations de la compétence territoriale (cont.)), pp. 197–198; and Jiménez de Aréchaga, *loc. cit.* (chap. VII: Subjects of international law—the State and its territory), pp. 194–195.

⁵¹ See *Yearbook . . . 1979*, vol. II (Part Two), pp. 135 *et seq.*, document A/34/10, chap. III, sect. B.2, arts. 31 and 32; and p. 51 above, document A/CN.4/318/Add.5–7, para. 81, draft art. 33.

⁵² Page 21 above, document A/CN.4/318/Add.5–7, para. 18.

⁵³ *Yearbook . . . 1979*, vol. II (Part Two), pp. 132–133, document A/34/10, chap. III, sect. B.2, para. (39) of the commentary to art. 31.

Thus, even in the extreme case in which, by hypothesis, the actor was presented with no choice and had no possibility of avoiding the injurious consequence, the Commission has endorsed the view expressed by some of its members that it was not right for all of the burden to “fall on the State which suffered the damage either itself or in the person of its nationals”.⁵⁴

31. In summary, the pattern which appears to emerge is that, as States become aware of particular situations in which their activities, or activities within their jurisdiction or control, may give rise to injurious consequences in areas outside their territory, they take steps to reach agreement with the States to which the problem may extend about the procedures to be followed and the levels of protection to be accorded. In some cases, these measures include regimes of liability; in others, it is noted that the question of liability has not been covered. Even in the former cases there is seldom, if ever, a conscious attempt to identify a customary rule of law, but States discharge their duty of care, and ensure that they are not exposed to allegations of unlawful conduct, by defining and observing the rules relevant to any given situation. Even in the extreme situation in which any attribution to the State of wrongful behaviour is excluded, there is a disposition to recognize in principle an equitable obligation at least to share the burden of injurious consequences sustained by an innocent victim through the agency or instrumentality of that State. Nevertheless, conventional regimes, including those that establish a rule of liability, may of course have objectives other than the prevention or redress of injurious consequences: their function is to ensure that international law plays its part in accommodating and harmonizing the full range of beneficial creative activity.

⁵⁴ *Ibid.* See also *Yearbook . . . 1979*, vol. I, p.197, 1571st meeting, para. 4 (Mr. Riphagen).

CHAPTER III

Limitations of sovereignty

A. “*Sic utere tuo . . .*”: the criterion of “harm”

32. In order to understand better the hesitancy of Governments to commit themselves to specific formulations of rules as to liability in new or changing areas of the law, it is necessary to have regard to history. Until the twentieth century, there were relatively few contexts in which conflict was likely between a State’s freedom of action within its own borders and its duty towards other States. In the field of sovereign immunities, as State activity extended to

areas of trade and commerce, there were some ingredients for a reassessment of legal policy. The law of the sea was still preponderantly concerned with ensuring freedom of navigation, and the right of innocent passage through the territorial sea did not yet give rise to any active question about the balance of the flag State’s and coastal State’s interest. Similarly, though the law relating to the treatment of aliens at all times gave rise to hard cases, it did not yet present an aspect that might be seen to restrict unduly the freedom of a sovereign State to govern its own affairs. The pressures

of the twentieth century have brought these matters to the fore.

33. In the field of the environment, the navigational use of international rivers was before 1900 beginning to develop on the basis of mutual concessions; but the Harmon doctrine, first enunciated by the United States of America in 1895, denied any obligation to use non-navigable watercourses consistently with the interest of another riparian State. Although the doctrine was not explicitly abandoned by the United States until as recently as 1960, in the context of arrangements made with Canada for the management of the Columbia river, the United States had acted upon other principles in arranging with Canada the terms of reference of the tribunal jointly established by the two countries in 1935 to settle the dispute relating to the *Trail Smelter* case.⁵³ That tribunal was authorized to apply the principles both of international law and of the jurisprudence developed by United States courts in disputes between states of the Union. In its award, (1941) the tribunal declared that, in accordance with the principles both of international law and of the law of the United States:

... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.⁵⁶

34. Curiously, the question of balance between a State's freedom of action within its own territory and its duty towards other States arose in the jurisprudence of the Permanent Court of International Justice in a context which has not often given rise to disputes—that is, the question of the extent of a State's right to bring an alien to trial for an offence alleged to have been committed outside the territory of that State. In the "*Lotus*" case,⁵⁷ although the decision turned on a narrower point, and although the Court was much preoccupied with maritime law and the character of ships as State territory, the members of the Court were

almost equally divided about the nature of State sovereignty. For the dissenting judges, it was a revelation that the sovereignty of a State could be construed so narrowly and literally that it would permit another State to pry into the first State's affairs by applying its criminal laws and procedures to the conduct of a foreigner who had no design to harm that State and could not have supposed himself to be subject to its laws.⁵⁸

35. Even so, the majority of the Court in the "*Lotus*" case made a sharp distinction between the absence of right to exercise the State's power outside its own borders and its freedom to do so as it chose within those borders—provided that, in so doing, it did not act in breach of an international obligation.⁵⁹ It was not necessary for the Court to pursue to an ultimate conclusion the question whether there was any rule of customary international law that would impose such an obligation in the field of criminal jurisdiction—and that question has not again arisen before an international tribunal. Nevertheless, the principle adduced by the Court in the case of the *Lotus* governs the development of the present topic: limitations upon the sovereignty of States depend upon the existence of primary rules of obligation, and these are to be proved, not presumed. Equally, the deep division within the Court as to the unresolved major issue reflects the same preoccupation that gives the present topic its sense of urgency: the sovereignty of States becomes derisory unless it is limited in the interests of the sovereignty of other States and in the interests of the international community.

36. In the *Corfu Channel*⁶⁰ case, the International Court of Justice heavily underlined both aspects of the matter. "Between independent States, respect for territorial sovereignty is an essential foundation of international relations."⁶¹ not even grave provocation may excuse an injured State for resorting to a policy of intervention. On the other hand, the security within their own borders which respect for international law can offer States is a charter of liberty, not of licence. The Court reaches out for a principle reminiscent of that enunciated in a different context by the *Trail Smelter* tribunal, and refers to "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".⁶² It should be noted, however, that the Court is dealing with the breach of an undisputed rule of international law, the right of innocent passage, and that the Court here refers to "acts contrary to the rights of other States",

⁵³ United Nations, *Reports of International Arbitral Awards*, vol. III (United Nations publication, Sales No. 1949.V.2), p. 1911.

As to the Harmon doctrine, see for example Jiménez de Aréchaga, *loc. cit.*, pp. 188–192. But see also memorandum of the Department of State of 21 April 1958 (United States of America, Congress, Senate, "Legal aspects of the use of systems of international waters with reference to Columbia-Kootenay River System under customary international law and the Treaty of 1909" (Washington, D.C., 85th Congress, 2nd session, Senate, Document No. 118) pp. 66 *et seq.*, which records that evidence presented on behalf of the Department of State to the Senate Committee on Foreign Relations in 1945 rejected the Harmon doctrine. Mr. Frank Clayton, counsel for the United States Section of the United States–Mexican International Boundary Commission, at that time testified: "Attorney-General Harmon's opinion has never been followed either by the United States or by any other country of which I am aware . . .".

⁵⁶ United Nations, *Reports of International Arbitral Awards*, vol. III (*op. cit.*), p. 1965.

⁵⁷ Judgment No. 9, 1927: *P.C.I.J.*, Series A, No. 10.

⁵⁸ *Ibid.*, Judge Loder, pp. 34–35; Judge Weiss, p. 44; Judge Lord Finlay, pp. 56–57; Judge Nyholm, p. 60; Judge Moore, pp. 92–93.

⁵⁹ *Ibid.*, pp. 18 *et seq.*

⁶⁰ *Corfu Channel*, Merits, Judgement: *I.C.J. Reports 1949*, p. 4.

⁶¹ *Ibid.*, p. 35.

⁶² *Ibid.*, p. 22.

not to acts which "harm" or "cause injury to" other States.⁶³

37. The question that was latent in the case of the *Lotus* remains at large; the criterion of "harm" is a variable, which does not readily serve the double purpose of establishing the existence of a wrong, as well as measuring its magnitude. Moreover, there are now new questions. When substantial injury has been established, there is little disposition to deny in principle a duty to compensate, unless the injury is the consequence of an activity which the States concerned have expressly or tacitly agreed to tolerate;⁶⁴ and—except in that last contingency—it is therefore of comparatively small importance to determine whether injury is the product of a wrongful act or of an act not prohibited by international law. When, in 1954, the United States of America exploded a hydrogen bomb on Eniwetok atoll in the Marshall Islands, some Japanese fishermen on the high seas were injured and a fishing resource customarily exploited by Japan was contaminated by radioactive fall-out. The United States, as well as expressing concern and regret, tendered "*ex gratia* to the Government of Japan, without reference to the question of legal liability, the sum of two million dollars for purposes of compensation for the injuries or damages sustained", but expressed its understanding that the tendered sum would be accepted "in full settlement of any and all claims".⁶⁵

38. The most acute problem arises when the harm is potential—that is, a more or less foreseeable consequence of a particular course of action. In this situation, the criterion of "wrongfulness" or "illegality" may offer only the choice between prohibition of the activity or its acceptance as a legitimate manifestation of State sovereignty.⁶⁶ It is at this point that doctrine

⁶³ The brevity of the references in this chapter to the Trail Smelter arbitration, the Corfu Channel case and the Lake Lanoux arbitration should not mislead the reader. A large and distinguished literature surrounds these three celebrated cases. Analysts find in them either a gleam of encouragement for the evolution of a new, unfettered law of the environment or reassuring proof that respect for treaties and the classical rules of State responsibility still encompasses the whole province of international law. It would be impertinent to attempt to review this literature within the compass of the present preliminary report.

⁶⁴ See for example the Lake Lanoux arbitration:

"But it has never been alleged that the works envisaged present any other character or would entail any other risks than other works of the same kind which to-day are found all over the world." (United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), p. 303.)

⁶⁵ United States of America, *Department of State Bulletin* (Washington, D.C.), vol. XXXII, No. 812 (4 January 1955), pp. 90–91).

⁶⁶ In the Nuclear Tests case, when the International Court of Justice granted the Request for the Indication of Interim Measures, one of the six dissentients, Judge Ignacio-Pinto, seemed to touch both of the forbidding extreme positions:

"I see no existing legal means in the present state of the law which would authorize a State to come before the Court asking

falters and parts company with State practice. The simple dichotomy of what is allowed or not allowed by the general rules of customary international law fails to account for the diversity of rights and interests that must be reconciled in the regime of any international river or of any intrinsically beneficial, but dangerous, activity that has transnational effects. Legal theory chokes upon the sheer variability of the concept of "harm" as a determinant of illegality; but State practice testifies to the potency of that concept as a principle governing legal development. The maxim "*sic utere tuo ut alienum non laedas*" describes the other face of the coin of sovereignty. It has become the mainspring both of developments in customary law and of a hundred intergovernmental negotiations in a dozen different fields. Indeed, McDougal's and Schlei's description of the process of development of customary law relating to the uses of the high seas is no less applicable to the treaty-making activity of the Third United Nations Conference on the Law of the Sea, a quarter of a century later:

It is a continuous process of interaction in which the decision-makers of individual nation-states unilaterally put forward claims of the most diverse and conflicting character . . . and in which other decision-makers, external to the demanding nation-state and including both national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and the rival claimants, and ultimately accept or reject them.⁶⁷

To find an accommodation between doctrine and practice, it is necessary to develop the theory of international liability for injurious consequences arising out of acts not prohibited by international law, admitting the relevance in appropriate contexts of legitimate interests and multiple factors.

B. Legitimate interests and multiple factors

39. In the preceding paragraphs, and in Chapter II,⁶⁸ it has been emphasized that, in the modern world,

it to prohibit another State from carrying out on its own territory such activities [atmospheric nuclear testing] which involve risks to its neighbours."

And later:

"The point is that if the Court were to adopt the contention of the Australian request it would be near to endorsing a novel conception in international law whereby States would be forbidden to engage in any risk-producing activity within the area of their territorial sovereignty." (Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, *I.C.J. Reports 1973*, pp. 131 and 132.)

See, more generally, the opinion of Judge Ignacio-Pinto (*ibid.*, p. 128), and, for example, the dissenting opinion of Judge Badawi Pasha in the Corfu Channel case (Merits): *I.C.J. Reports 1949*, especially pp. 65–66.

⁶⁷ M. S. McDougal and N. A. Schlei, "The hydrogen bomb tests in perspective: Lawful measures for security", *The Yale Law Journal* (New Haven, Conn.), vol. 64, No. 5 (April, 1955), p. 656. See also, as to matters discussed in this section, G. Handl, "An international legal perspective on the conduct of abnormally dangerous activities in frontier areas: The case of nuclear power plant siting", *Ecology Law Quarterly* (Berkeley, Calif.), vol. 7 (1978), No. 1, especially pp. 6–15.

⁶⁸ See para. 26 above.

practical problems regarding the delimitation of sovereign interests can seldom be resolved merely by application of a simple governing rule. Thus, in giving judgement in the *Fisheries* case (United Kingdom v. Norway),⁶⁹ the International Court of Justice rejected the view that the rule of the mean low water mark was the only criterion for fixing the baselines of the territorial sea. In many circumstances that rule might yield an appropriate result, but not in all circumstances. In the case of Norway's deeply indented coast-line, it was a sufficient compliance with the requirements of customary international law that baselines should "not depart to any appreciable extent from the general direction of the coast", taking into account "the more or less close relationship existing between certain sea areas and the land formations which divide or surround them", and "certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage".⁷⁰

40. In the *North Sea Continental Shelf* cases,⁷¹ the factors ultimately adduced by the International Court of Justice as those that might guide the parties in their search for an agreed solution are not dissimilar to the Court's criteria in the Anglo-Norwegian *Fisheries* case: the geographical configuration; the domination of the sea by the land; the unity of any natural resources; the measurement of sea frontages according to the general direction of the coasts.⁷² When these or other agreed criteria yield no certain result, there is a further invocation of the principles of equity—or, in this case, equality within the given framework of legitimate interest.⁷³ The first emphasis, however, is on the duty to negotiate: the applicable rule of law itself requires the parties "to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement".⁷⁴

41. These enlargements in legal perspectives are not achieved without protest. In the Anglo-Norwegian *Fisheries* case, Judge McNair, dissenting, comments:

In my opinion the manipulation of the limits of territorial waters for the purpose of protecting economic and other social interests has no justification in law; moreover, the approbation of

such a practice would have a dangerous tendency in that it would encourage States to adopt a subjective appreciation of their rights instead of conforming to a common international standard.⁷⁵

Similarly, in the *North Sea Continental Shelf* cases, Judge Koretsky, also dissenting, distinguishes the political, economic and related factors which may properly guide the parties in reaching an agreement from those appropriate to the judicial function:

The assessment of such considerations is a political and subjective matter, and it is not for the Court as a judicial organ to concern itself with it unless the parties submit to it a dispute on a question or questions of a really legal character.⁷⁶

Despite the protests—and the understandable yearning for a world in which everything was simpler and law and politics were more easily separated—there is no doubt that in these two cases a watershed was crossed. The reluctant acceptance of multiformity within the sphere of operation of a single rule of law is marked by the barrage of individual concurring and dissenting opinions, of formidable proportions and great legal value, accompanying the Court's judgement in the *North Sea Continental Shelf* cases.

42. The moral is one that suits well enough the disposition of States in the late twentieth century. Wherever possible, States should, in exercise of their treaty-making power, meet problems before they arise, substituting, for the uncertain limits of the right of each to go its own way, agreed boundary lines that are easily observable or joint enterprises with defined objectives and operating procedures. As in the *North Sea Continental Shelf* cases situation, agreements reached cannot bind those who are not parties and who have a legal interest in the issue; but, as in that situation, the duty to negotiate "with a view to arriving at an agreement, and not merely to go through a formal process of negotiation" is itself an expression of a binding rule of customary law, even though the rule is of great generality. In so far as this rule concerns the conservation and utilization of the physical environment, it is reflected in the famous dictum of the *Trail Smelter* arbitral award,⁷⁷ evoked in the corresponding passage of the *Corfu Channel* judgement,⁷⁸ and confirmed in Principle 21 of the Declaration of the United Nations Conference on the Human Environment.⁷⁹ It in no way detracts from the legal force of that Principle that it is accompanied by a call for the further development of international law regarding liability and compensation (Principle 22)⁸⁰ and by an emphasis upon an especially important general category of legitimate interests (Principle 23).⁸¹

⁶⁹ *Fisheries*, Judgment [of 18 December 1951]: *I.C.J. Reports* 1951, p. 116.

⁷⁰ *Ibid.*, p. 133.

These criteria are codified in art. 4 of the 1958 Convention on the Territorial Sea and Contiguous Zone (United Nations, *Treaty Series*, vol. 516, p. 205) and in art. 7 of the "Informal Composite Negotiating Text/Revision 2" of the Third United Nations Conference on the Law of the Sea (A/CONF.62/WP.10/Rev.2 and Corr.2-5).

⁷¹ *North Sea Continental Shelf*, Judgment: *I.C.J. Reports* 1969, p. 3.

⁷² *Ibid.*, pp. 51-52.

⁷³ *Ibid.*, pp. 48-52.

⁷⁴ *Ibid.*, p. 47.

⁷⁵ *I.C.J. Reports* 1951, p. 169.

⁷⁶ *I.C.J. Reports* 1969, p. 155.

⁷⁷ See para. 33 above.

⁷⁸ See para. 36 above.

⁷⁹ See footnote 17 above.

⁸⁰ *Ibid.*

⁸¹ See footnote 24 above.

43. It is possible to approach the problems of the environment either from the standpoint of disentangling the separate interests of sovereign States, so that the interest of each achieves its maximum extension and minimum impairment, or from the standpoint of the equitable user of a common resource. The tendency has been to reserve the expression "shared resources" for smaller situations, such as those in which political boundaries do not correspond with the geomorphological unity of terrain.⁸² Nevertheless, the concepts of shared and separate interests are always complementary. Thus, for example, the Third United Nations Conference on the Law of the Sea is engaged in settling the maximum permissible seaward extensions of State sovereignty and sovereign rights; in reconciling the separate interests of flag States and of coastal States concerning such matters as the right of innocent passage through the territorial sea, including international straits, and jurisdiction beyond territorial limits; in balancing the mixed regime of shared and separate interests in the management and exploitation of the exclusive economic zone; and in developing the shared interest in the area of the seabed and ocean floor beyond the limits of national jurisdiction.⁸³

44. The Commission's own recent studies of the law of the non-navigable uses of international water-courses have stressed that the world's supply of water is finite—that a given and unchangeable quantity of water is constantly recycled by nature, but that nature's laundering cannot contend with levels and kinds of contamination that are now occurring.⁸⁴ The Long-range Transboundary Air Pollution Convention⁸⁵—apparently the first treaty instrument to include a recital of Principle 21 of the Declaration of the United Nations Conference on the Human Environment—underlines much the same point, pledging (art. 3) the contracting parties:

by means of exchanges of information, consultation, research and monitoring [to] develop without undue delay policies and strategies which shall serve as a means of combating the discharge

of air pollutants, taking into account efforts already made at national and international levels.

Air and water and the filtered light and warmth of the sun, each a pre-requisite for human survival, are threatened with irreversible degeneration as a by-product of human activity.

45. Under compulsions of this order—whether they are related to the protection of the environment, to the quest for peace, or to any other objective that vitally affects the human condition⁸⁶—the duty of reasonable care or due diligence acquires both a greater intensity and a new dimension.⁸⁷ In making effective dispositions to protect the environment, equal solicitude has to be shown for the varied circumstances of States and of their peoples. That is the purport of Principle 23 and other provisions of the Declaration of the United Nations Conference on the Human Environment, but practical illustrations are not lacking. For example, the proposals before the Third United Nations Conference on the Law of the Sea relating to production objectives and policies in the seabed area pay special regard to:

the protection of developing countries from adverse effects on their economies or on their export earnings, resulting from a reduction in the price of an affected mineral, or in the volume of the mineral exported . . .⁸⁸ Additionally, a system of compensation is envisaged "for developing countries which suffer adverse effects on their export earnings or economies . . ."⁸⁹

46. To put the matter in another way, the duty to have regard to all interests that may be affected can be seen as arising directly from the obligation to take reasonable care, but it may also be seen as arising out of an equitable principle that supplements and informs the discharge of that obligation. A State that undertakes or allows an activity that in fact causes substantial injurious consequences beyond its own borders may, despite any other precautions it has taken, be found to have failed in its duty of care, if it has not provided (or has not done everything incumbent upon it to provide) an adequate and accepted regime of compensation. If, however, the same injurious consequences occur in circumstances the possibility of which not even a vigilant State could have been expected to envisage, equity may still suggest that the State which took or allowed the action should

⁸² See for example General Assembly resolution 3129 (XXVIII) of 13 December 1973, and the valuable report on co-operation in the field of the environment concerning natural resources shared by two or more States, presented in consequence of that resolution to the Governing Council of UNEP by the Executive Director in April 1975 (UNEP/GC/44 and Corr.1 and 2 and Add.1). See also the reports of the Intergovernmental Working Group of Experts on Natural Resources shared by two or more States on the work of its second and third sessions, held in September 1976 and January 1977 (UNEP/IG.3/3 and UNEP/IG.7/3). See also footnotes 8 and 9 above.

⁸³ See "Informal Composite Negotiating Text/Revision 2" (A/CONF.62/WP.10/Rev.2 and Corr. 2 and 3).

⁸⁴ See, especially, the first report of Mr. Schwebel, Special Rapporteur (*Yearbook . . . 1979*, vol. II (Part One), p. 143, document A/CN.4/320). See also the materials relating to the United Nations Water Conference (March 1977) cited in Mr. Schwebel's second report (p. 159 above, document A/CN.4/332 and Add.1, paras. 149 *et seq.*).

⁸⁵ ECE/HLM.1/2, annex I.

⁸⁶ In this context, it should be noted that the Final Act of the Conference on Security and Co-operation in Europe (August 1975) (*Final Act of the Conference on Security and Co-operation in Europe* (Lausanne, Imprimeries Réunies 1975) foreshadowed the High-level Meeting held in the framework of the ECE on the Protection of the Environment (November 1979) (ECE/HLM.1/2 and Add.1), at which the Convention on Long-range Transboundary Air Pollution was adopted.

⁸⁷ See para. 16 above. See also Dupuy, *op cit.*, especially title II, chap. 1, pp. 259 *et seq.*

⁸⁸ "Informal Composite Negotiating Text/Revision 2" (A/CONF.62/WP.10/Rev.2 and Corr.2 and 3), art. 150, subpara. (g).

⁸⁹ *Ibid.*, art. 151, para. 4.

provide compensation for the innocent victim;⁹⁰ but other equities may outweigh that consideration.⁹¹

47. The equitable principle can be seen to operate—as it were under laboratory conditions—in circumstances in which the wrongfulness of the action is precluded;⁹² but even in that limiting case, equity operates as a function of the primary rule of obligation, which insists that liability be assessed with reference to the injurious consequences suffered by the innocent victim as well as with reference to the quality of the act.⁹³ At the other end of the spectrum, the redress of injurious consequences that arise out of activities which adjacent national communities have expressly or tacitly agreed to tolerate, may well be left in the first instance to the operation of municipal law, even though in a particular case the injurious consequences have occurred transnationally.⁹⁴ Moreover, States have always the option of extending such arrangements reciprocally to classes of case that otherwise might immediately engage international liability. This policy has, for example, been pursued by the OECD in relation to transfrontier pollution.⁹⁵

48. It is not necessary, for the purposes of the present preliminary report, to consider in any greater detail the boundless choices that States have at their disposal in constructing regimes to regulate their mutual obligations in relation to shared interests, or to activities that have, or may have, adverse transboundary effects; but reference to two kinds of model may help to

elucidate general principle. First, in the very important fields of the peaceful uses of nuclear energy and of the sea carriage of oil, internationally agreed safety and supervisory measures have been supplemented by conventional regimes regulating liability for damage.⁹⁶ In both cases, liability arises from the fact that the damage has been sustained, and is “channelled” to the “operator” of the installation or ship; the recourse of the victim, whether a Government or a private person, is to the appropriate municipal court, and any jurisdictional immunities that might otherwise have been available are waived. There are measures to ensure that liabilities incurred will be met, but the maximum liability in respect of a single incident is limited. In the case of the conventions dealing with nuclear damage, the contracting Governments are guarantors for payment of compensation within the limits of liability fixed; in the case of the conventions dealing with oil spillages, there is no corresponding degree of direct governmental involvement, but an international compensation fund has been established by some Governments to cushion losses that may be incurred both by shipowners and by the victims of accidents.⁹⁷

49. Secondly, in the Helsinki Rules on the uses of the Waters of International Rivers,⁹⁸ which deal with the reciprocal rights and obligations of States that share an international drainage basin, the International Law Association provided an early and important model for a regime of shared resources. From the standpoint of the present report, it is of particular interest that the principle of equitable utilization, stated as a rule in article IV, is linked with the duty to minimize pollution, stated in article X, and that both of these broad rules are linked with the long and non-exhaustive enumeration of relevant factors in article V.⁹⁹ The

⁹⁰ *Ibid.*, art. 59:

“In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.”

⁹¹ Cf. North Sea Continental Shelf. Judgment: *I.C.J. Reports 1969*, p. 50:

“In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.”

⁹² See para. 29 above.

⁹³ Cf. North Sea Continental Shelf. Judgment: *I.C.J. Reports 1969*, p. 48:

“Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles.”

⁹⁴ See para. 37 and footnote 64 above.

⁹⁵ See for example *International Legal Materials*, vol. 14, p. 242; OECD Council Recommendation on principles concerning transfrontier pollution (OECD document C(74) 224); *ibid.*, vol. 15, p. 1218; OECD Council Recommendation on the equal right of access in relation to transfrontier pollution (OECD document C(76) 55 (Final)).

⁹⁶ The Conventions concerned are listed in footnote 47 above.

⁹⁷ International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Brussels, 1971) (for reference, see footnote 47).

⁹⁸ For the full text of the Helsinki Rules, with commentaries, see ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 484.

⁹⁹

“Article IV

“Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.”

“Article V

“(1) What is a reasonable and equitable share within the meaning of Article IV is to be determined in the light of all the relevant factors in each particular case.

“(2) Relevant factors which are to be considered include, but are not limited to:

“(a) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;

“(b) the hydrology of the basin, including in particular the contribution of water by each basin State;

“(c) the climate affecting the basin;

“(d) the past utilization of the waters of the basin, including in particular existing utilization;

(Continued on next page.)

commentary to article IV stresses the fundamental consideration that a regime of care for the shared environmental demands equal care for the individuality, as well as the differing needs, of the States and peoples concerned.¹⁰⁰

(Footnote 99 continued.)

“(e) the economic and social needs of each basin State;

“(f) the population dependent on the waters of the basin in each basin State;

“(g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;

“(h) the availability of other resources;

“(i) the avoidance of unnecessary waste in the utilization of waters of the basin;

“(j) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and

“(k) the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State;

“(3) The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.”

“Article X

“1. Consistent with the principle of equitable utilization of the waters of an international drainage basin, a State

“(a) must prevent any new form of water pollution or any increase in the degree of existing water pollution in an international drainage basin which would cause substantial injury in the territory of a co-basin State, and

“(b) should take all reasonable measures to abate existing water pollution in an international drainage basin to such an extent that no substantial damage is caused in the territory of a co-basin State.

“2. The rule stated in paragraph 1 of this Article applies to water pollution originating:

“(a) within a territory of the State, or

“(b) outside the territory of the State, if it is caused by the State’s conduct.”

¹⁰⁰ ILA, *op. cit.*, p. 487:

“A use of a basin State must take into consideration the economic and social needs of its co-basin States for use of the waters, and *vice versa*. . . . To be worthy of protection a use must be ‘beneficial’; that is to say, it must be economically or socially valuable, as opposed, for example, to a diversion of waters by one State merely for the purpose of harassing another.

50. At the end of this chapter, one must return to the concept of “a legal interest”. The *Lake Lanoux* arbitral tribunal observed:

In fact, States are today perfectly conscious of the conflicting interests brought into play by the industrial use of international rivers, and of the necessity to reconcile them by mutual concessions. The only way to arrive at such compromises of interests is to conclude agreements on an increasingly comprehensive basis. International practice reflects the conviction that States ought to strive to conclude such agreements: there would thus appear to be an obligation to accept in good faith all communications and contacts which could, by a broad comparison of interests and by reciprocal goodwill, provide States with the best conditions for concluding agreements.¹⁰¹

Nevertheless, international law does not undermine the sovereignty of States by making their essential freedom of action within their own borders subject to a foreign veto,¹⁰² and, except in the last resort, it does not place its faith in prohibitory rules:

France is entitled to exercise her rights; she cannot ignore Spanish interests.

Spain is entitled to demand that her rights be respected and that her interests be taken into consideration.

As a matter of form, the upstream State has procedurally, a right of initiative; it is not obliged to associate the downstream State in the elaboration of its schemes. If, in the course of discussions, the downstream State submits schemes to it, the upstream State must determine them, but it has the right to give preference to the solution contained in its own scheme provided that it takes into consideration in a reasonable manner the interests of the downstream State.¹⁰³

“A ‘beneficial use’ need not be *the* most productive use to which the water may be put, nor need it utilise the most efficient methods known in order to avoid waste and insure maximum utilisation. . . . the present rule is not designed to foster waste but to hold States to a duty of efficiency which is commensurate with their financial resources.”

¹⁰¹ United Nations, *Reports of International Arbitral Awards*, vol. XII (*op. cit.*), p. 308.

¹⁰² See *Lake Lanoux* arbitral award, *ibid.*, especially pp. 306–307.

¹⁰³ *Ibid.*, p. 316.

CHAPTER IV

The nature and scope of the topic

A. The nature of the topic

51. Among the materials gathered in the preceding chapters it should be possible to find the framework of this topic, which can be tested in a preliminary way by reference to the known behaviour of States and to their expressed needs and expectations. First, the very basis of the topic is inherent in its present title. The liability with which the topic deals does not arise out of wrongfulness; it therefore can arise only out of primary rules of obligation.¹⁰⁴ Any other conclusion would

¹⁰⁴ See paras. 19–25 above.

mean setting aside the principles of State responsibility as the Commission has understood and developed them—and the costs of such unfaithfulness would be astronomically high. It is, in part, a fear of incurring costs of this order that fuels resistance to new concepts of responsibility (or liability), expressed in such terms as “risk” or “no-fault”.¹⁰⁵

52. Secondly, the principle out of which the primary obligation is born has the same elemental character as the principle that treaty obligations must be respected.

¹⁰⁵ See paras. 15–17 above.

A universe of law postulates that the freedom of each of its subjects will be bounded by equal respect for the freedoms of other subjects. In the final analysis, it is by conformity with this norm, expressed in the maxim "*sic utere tuo ut alienum non laedas*", that the extent and intensity of a State's obligations must be measured. If the secondary rules—which in reality are entirely neutral—are regarded as performing this function, there may well appear to be a fatal gap between the extent of a State's rights and that of its correlative obligations.¹⁰⁶ New theories of responsibility are sometimes advanced with a view to closing that perceived gap. With similar intentions, some learned writers have regarded questions of attribution as belonging to the sphere of the particular primary rules they accompany, rather than to the generalized sphere of secondary rules.¹⁰⁷

53. In the more usual classification that the Commission has followed, it is still the primary rule that determines the intensity of an obligation. For example, the Special Rapporteur on State responsibility (part I), Mr. Ago, has noted that:

international obligations to prevent an event might, after all, have their origin in custom or in treaties, and their subject-matter as well as the degree of prevention required might vary considerably. It was not to be excluded that some of them might be absolute. On the other hand, it was clear that a lesser degree of prevention was required for the protection of foreign private persons than for those enjoying special protection.¹⁰⁸

Secondary rules must therefore be applied with reference to the content of the relevant primary rule, in order not to frustrate the intention of that primary rule.

54. Thirdly, the developments which have led in the twentieth century to the establishment of a world organization, and to countless other forms of organized intergovernmental co-operation, have also given rise to innumerable situations of actual or potential conflict between States each of which is pursuing a legitimate right or interest.¹⁰⁹ The gap mentioned in the preceding paragraph then becomes of great practical significance. The pressures upon what might be called the "privacy" of States lead to legislative and judicial reaffirmations of their inalienable sovereignty, but also to more and more frequent warnings that the right to live in freedom depends upon respect for the rights and freedoms of others. In the *Corfu Channel* case judgement and in the Declaration of the United Nations Conference on the Human Environment—to take only two leading examples, drawn respectively from judicial and from legislative sources—these emphases are balanced.¹¹⁰

55. Fourthly, as States become more aware of, and more articulate about, the need to preserve this precarious balance between liberty and licence, the

standard of the care that they owe to each other may rise. For example, although the Convention on Long-range Transboundary Air Pollution carries a self-conscious footnote stating that it contains no rule as to liability, the terms of the Convention and the concordant statements made by delegation leaders to the High-level Meeting at which the Convention was adopted are, in their general effect, a mutual pledge to observe higher standards of vigilance.¹¹¹ Under such evolutionary pressures, whether or not derived from treaty instruments, the *Corfu Channel* case criterion of actual knowledge of a source of danger may sometimes be replaced, as the test of responsibility for wrongfulness, by an assessment as to whether a lack of knowledge is compatible with the required standard of due diligence. More than that, the standard may be purged of any subjective element by the emergence of a rule that a given level of pollution or other injury constitutes a presumption—or even conclusive proof—of wrongfulness.¹¹²

56. Nevertheless, States, balancing their need for habitual observance of stricter standards with reluctance to admit that an accidental deviation from those standards will automatically entail wrongfulness, may choose to create a buffer zone. Thus, in the Convention on International Liability for Damage caused by Space Objects (1971) States agreed, not that the accidental landing of a space object in the territory of another State would be wrongful, but that it would give rise to an obligation to pay compensation for any injurious consequences incurred.¹¹³ This approach to a problem may offer several advantages. In the first place, it satisfies the obligation—stressed, for example, in the *Lake Lanoux* arbitral award—that States engaging in an activity which may cause injurious consequences transnationally, will take reasonable account of the interests and wishes of other States likely to be affected.¹¹⁴ Secondly, it removes the taint of unlawfulness from an activity which, if properly regulated, is judged to be beneficial, despite a residual capacity to cause incidental harm. Thirdly, it should make easier a just, efficient and amicable settlement of any liability that may arise.

57. The starting-point for the construction of such a regime must be the equality of rights and obligations implied in Principle 21 of the Declaration of the United Nations Conference on the Human Environment¹¹⁵ and in every other formulation of the maxim "*sic utere tuo ut alienum non laedas*". Nor is there in principle any reason why the standard of obligation should not be an absolute standard; for that is the only standard commensurate with the completeness of a State's sovereignty, and the exclusiveness of its

¹⁰⁶ See paras. 26–28 above.

¹⁰⁷ See para. 24 above.

¹⁰⁸ *Yearbook . . . 1978*, vol. I, p. 10, 1477th meeting, para. 5.

¹⁰⁹ See paras. 32–38 above.

¹¹⁰ See paras. 36 and 42 above.

¹¹¹ See paras. 5 and 7 above.

¹¹² See Dupuy, *op. cit.*, pp. 259–274.

¹¹³ See para. 21 and footnote 34 above.

¹¹⁴ See para. 50 and footnote 101 above.

¹¹⁵ See footnote 17 above.

jurisdiction, over its territory, and over its ships, aircraft, and the activities of its nationals when beyond the territorial jurisdiction of any State. Moreover, as we have already seen, such a high standard of obligation is not inconsistent with the principles of State responsibility, or with the modern tendency to formulate detailed primary rules in ways that leave no room for a margin of appreciation. It is also consistent with the Commission's conclusion that the circumstances which preclude wrongfulness do not necessarily prevent a liability from arising from the same act or omission.¹¹⁶ The substantial deterrents to the formulation of existing rules of obligation and to the acceptance of new rules are not doctrinal: they arise from the complexity of the subject-matter.

58. Yet it is this very complexity that provides the main incentive to construct regimes regulating conduct and liabilities in respect of acts not prohibited, rather than to multiply prohibitions.¹¹⁷ Normally the interests of the parties to such a negotiation will not be polarized. Most States that are exposed to the dangers of oil spillages at sea are also dependent—as consumers, producers or shippers, or all three—on the sea carriage of oil, and a limitation of liability in respect of a single incident may seem a reasonable price to pay for the certainty of compensation within that limit, and for moderating the financial burden upon the industry.¹¹⁸ Most States that have encountered a transnational problem of short-range industrial air pollution are themselves contributors to the pollution from which they and their neighbours suffer, and their interest is in extending the area in which uniform remedial measures are taken.¹¹⁹ Where there is a plan of action that lends itself to uniform implementation through the agency of national courts, the escape from the less structured procedures of Government-to-Government negotiation in respect of each individual incident should be welcomed equally by the various interests; and the resulting regime may in some measure contribute to realizing the monist ideal of units between international and municipal law.¹²⁰

59. Where interests are uneven, the duty of care, directed and supplemented by the concept of equity, must have regard to the validity of existing human situations, as well as to the need for conservation of resources. If the acts or omissions of one State cause damage in the territory of another State in circumstances which preclude wrongfulness, there may well be a residual obligation upon the first State to make good the loss sustained by the second State,¹²¹ but,

¹¹⁶ See para. 30 above.

¹¹⁷ See paras. 42 *et seq.* above.

¹¹⁸ Cf. International Convention on Civil Liability for Oil Pollution Damage, (Brussels, 1969) and International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage (Brussels, 1971) (for references, see footnote 47 above).

¹¹⁹ See the OECD Recommendations cited in footnote 95.

¹²⁰ See for example each of the regimes cited in the two preceding footnotes.

¹²¹ See para. 29 and para. 47 above.

depending upon the actual circumstances and the elements of common disaster, it may be more equitable that the loss should be shared or should lie where it falls. If advances in science and technology expose the deleterious consequences of established industrial practices and offer better alternatives, it may be entirely equitable that States with a common interest should subsidize those of their own number upon whom the burden of re-equipment falls most heavily. Similarly, it may be just that a downstream State should contribute to the cost of an upstream development that reduces a risk of flooding; and, where there is an international interest in preserving a resource or amenity located within the boundaries of one or more States, equity may demand that the burden, as well as the benefit, be shared.

60. In short, the elaboration of the rules relating to liability for injurious consequences in respect of acts not prohibited by international law revolves around the variable concept of "harm".¹²² Where a State suffers substantial injury, or reasonably believes that it is exposed to a substantial danger arising beyond its own borders, from the acts or omissions of other States, there is a new legal relationship which obliges the States concerned to attempt in good faith to arrive at an agreed conclusion as to the reality of the injury or danger and the measures of redress or abatement that are appropriate to the situation. A State within whose jurisdiction such an injury or danger is caused is not justified in refusing its co-operation upon the ground that the cause of the danger was not, or is not, within its knowledge or control. If such an injury or danger is not caused by a breach of a specific international obligation, a State suffering such an injury or danger is not justified in demanding any limitation of the freedom of action of another State in relation to matters arising within that State's jurisdiction, except the minimum needed to ensure the redress and abatement of the injury or danger, taking into account any beneficial, though competing, interests.

61. Although this preliminary report is a forecast, not a proof, of the matters with which it deals, it is submitted that the description contained in the preceding paragraph is in general conformity with elements of existing State practice and with solemn expressions of international intent, ranging from the aims and purposes of the United Nations Charter and the enunciation of the principle of good neighbourliness in the Bandung Declaration of the first Asian-African Conference on the Promotion of World Peace and Co-operation¹²³ to the Declaration of the United

¹²² See, especially, para. 38 above.

¹²³ See Indonesia, Ministry of Foreign Affairs, *Asian-African Conference Bulletin*, No. 9 (Jakarta, 1955), p. 2. The Declaration on the Promotion of World Peace and Co-operation contains the following statement:

"Free from mistrust and fear, and with confidence and goodwill towards each other, nations should practise tolerance and live together in peace with one another as good neighbours and develop friendly co-operation on the basis of the following principles: . . ." (*ibid.*, p. 6).

Nations Conference on the Human Environment¹²⁴ and the Charter of Economic Rights and Duties of States.¹²⁵ This description may also be regarded as marking the transition of the duty of reasonable care or due diligence from the relatively limited context of the adjustment of differences between States to the more sophisticated requirements of interdependent community interests. It has not been thought necessary in this report to draw upon analogies from domestic law, because they tend to be either of such generality that they have already entered international law through the doorway of equity or in the guise of general principle, or else of such specificity that their influence will be felt at the level of the construction of a particular regime. Nevertheless, it should be acknowledged that the theme of interdependence necessarily applies at the international level emanations from the experience and sense of values gained by States in the process of governing their own affairs.

B. The scope of the topic

62. An extended treatment of the scope of the topic belongs more properly to the second report, so that the views of Commission members upon the present preliminary report may be taken into account before planning is any further advanced. There are, however, a few general issues to which the Commission's attention should be invited, even at the present stage. First, the title of the topic is abstract and of unlimited generality. The significance of that title, and of the terms it employs, has been reviewed in chapter I; and it was there noted that in practice the topic has always been discussed in the specific content of environmental hazard.¹²⁶ Throughout the present report, illustrations have been drawn from the field of the environment, but an attempt has also been made to show that the principle reflected in the title of the topic does not limit itself to the field of the environment.¹²⁷ In the view of

¹²⁴ See footnotes 17 and 24 above.

¹²⁵ Adopted in General Assembly resolution 3281 (XXIX). See in particular art. 30:

"The protection, preservation and enhancement of the environment for the present and future generations is the responsibility of all States. All States shall endeavour to establish their own environmental and developmental policies in conformity with such responsibility. The environmental policies of all States should enhance and not adversely affect the present and future development potential of developing countries. All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. All States should co-operate in evolving international norms and regulations in the field of the environment."

¹²⁶ See paras. 3 and 4 above.

¹²⁷ In 1960, in his general course, Sørensen examined at considerable length the limitations of State sovereignty (*loc. cit.*, p. 5). He traced, for example, the elements of responsibility for the treatment of aliens referred to in para. 29 of this report; accepted, more readily than some learned writers, that "Malgré ces incertitudes et difficultés il paraît justifié de conclure que l'exercice de la compétence territoriale de l'Etat est subordonné à un

the Special Rapporteur, the Commission is not here asked to espouse new principles, or to turn conventional exceptions into general rules; it is asked to develop existing principles of good lineage and great generality to meet an unprecedented need. In this task, it already has the advantage of recourse to considerable State practice.

63. Secondly, in the course of identifying the governing principles, prominence has been given—especially in chapter II of this report—to the relationship between responsibility for wrongful acts and liability in respect of acts not prohibited by international law. Any obligation may be broken; and therefore all obligations—including those which give rise to liability for injurious consequences in respect of acts not prohibited—are ultimately referable to the regime of responsibility for wrongfulness. A regime of liability in respect of acts not prohibited does not purport to fix the dividing line between lawfulness and unlawfulness: it fixes only the conditions under which custom or convention allows wrongfulness to be avoided. It is not, however, the case that regimes of liability in respect of acts not prohibited encroach upon areas in which States would otherwise be free of obligation. Much more typically, they enlarge the area of relative freedom, by reconciling and accommodating competing interests and activities without resort to prohibition.

64. Indirectly, therefore, regimes of liability in respect of acts not prohibited may play a large role in determining, if the occasion arises, an unmarked boundary line between lawfulness and unlawfulness. Some initial reference to these wider implications is part of the process of testing the validity of the present topic and its relationship with other topics. That having been done, it should not be necessary in future reports to make sustained comparisons between the regime of responsibility for wrongful acts and that of liability in respect of acts not prohibited. It satisfies the internal logic of the present topic that—as described in chapter III of this report—States have a duty to find the specific content of the criterion of "harm" whenever the occasion arises, and to govern themselves accordingly.

65. If the Commission and the General Assembly accept the view that this topic is essentially concerned with the elaboration of primary rules of obligation and that its main immediate reference is to developments

principe de bon voisinage international" (*ibid.* p. 198); but concluded that that principle was in some degree self-limiting:

"Le préjudice d'ordre économique causé à l'Etat voisin par un changement de politique commerciale d'un Etat, par le développement de ses ressources, par le perfectionnement de ses voies de communications, etc. appartient aux vicissitudes de la vie, contre lesquelles le droit international ne protège aucunement, à moins qu'il n'existe entre les parties des engagements contractuels prévoyant de telles éventualités." (*Ibid.*, p. 195.)

In the light of developments since 1960—and, especially, perhaps, the adoption by the General Assembly of the Charter of Economic Rights and Duties of States—the latter view would now require reappraisal.

within the field of the environment, it might also be agreed expressly to limit the topic, as was recommended by the Working Group set up by the Commission at its thirtieth session in 1978:

[The topic] concerns the way in which States use, or manage the use of, their physical environment, either within their own territory or in areas not subject to the sovereignty of any State. [It] concerns also the injurious consequences that such use or management may entail within the territory of other States, or in

relation to the citizens and property of other States in areas beyond national jurisdiction.¹²⁸

It might then follow that the topic would be renamed, more modestly and concretely, to reflect the ambit of its actual concern.

¹²⁸ *Yearbook ... 1978*, vol. II (Part Two), pp. 150–151, document A/33/10, chap. VIII, sect. C, annex, para. 13.

CHECK-LIST OF DOCUMENTS OF THE THIRTY-SECOND SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/318/Add.5-7	Addendum to the eighth report on State responsibility, by Mr. Roberto Ago: The internationally wrongful act of the State, source of international responsibility (part 1) (<i>concluded</i>)	Reproduced in the present Volume (p. 13).
A/CN.4/318/Add.8	State responsibility for internationally wrongful acts (part 1). Principal works cited in the reports of Mr. Ago. Document prepared by the Secretariat.	<i>Idem</i> (p. 71).
A/CN.4/326	Provisional agenda	Mimeographed. For the agenda as adopted, see A/35/10, para. 8 (vol. II (Part Two), p. 6).
A/CN.4/327 (and Corr.1)	Ninth report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter. Draft articles, with commentaries (<i>concluded</i>)	Reproduced in the present volume (p. 131).
A/CN.4/328 and Add.1-4)	State responsibility. Observations and comments of Governments on chapters I, II and III of part 1 of the draft articles on State responsibility for internationally wrongful acts	<i>Idem</i> (p. 87).
A/CN.4/329 and Add.1	The law of the non-navigational uses of international watercourses. Replies of Governments to the Commission's questionnaire	<i>Idem</i> (p. 153).
A/CN.4/330 (and Corr.1 and 3)	Preliminary report on the content, forms and degrees of international responsibility (part 2 of the draft articles on State responsibility), by Mr. Willem Riphagen	<i>Idem</i> (p. 107).
A/CN.4/331 and Add.1	Second report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur	<i>Idem</i> (p. 199).
A/CN.4/332 (and Corr.1) and Add.1 (and Add.1/Corr.1)	Second report on the law of the non-navigational uses of international watercourses, by Mr. Stephen M. Schwebel, Special Rapporteur	<i>Idem</i> (p. 159).
A/CN.4/333	Twelfth report on succession of States in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur. Draft articles on succession to State archives, with commentaries (<i>continued</i>)	<i>Idem</i> (p. 1).
A/CN.4/334 and Add.1 (and Add.1/Corr.1) and Add.2	Preliminary report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur	<i>Idem</i> (p. 247).
A/CN.4/335	Preliminary report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur	<i>Idem</i> (p. 231).
A/CN.4/L.311	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-fourth session of the General Assembly	Mimeographed.
A/CN.4/L.312	Draft articles on treaties concluded between States and international organizations or between international organizations. Texts adopted by the Drafting Committee: articles 61-80 and Annex, and titles of the parts and corresponding sections of the draft	Texts reproduced in <i>Year-book...1980</i> , pp. 205 <i>et seq.</i> (1624th meeting, para. 30).
A/CN.4/L.313	Draft articles on succession of States in respect of matters other than treaties. Draft articles on succession to State archives. Texts adopted by the Drafting Committee: articles C, D, E and F	<i>Idem</i> , pp. 223 <i>et seq.</i> (1627th meeting, para. 27).

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.314 and Add.1 (and Add.1/Corr.1)	Draft report of the International Law Commission on the work of its thirty-second session: Chapter IV	Mimeographed. For the final text, see A/35/10 (reproduced as <i>Yearbook...1980</i> , vol. II (Part Two)).
A/CN.4/L.315	<i>Idem</i> : Chapter II	<i>Idem</i> .
A/CN.4/L.316	Draft articles on the law of the non-navigational uses of international watercourses. Texts adopted by the Drafting Committee: articles 1–5 and X and explanatory note	Texts reproduced in <i>Yearbook...1980</i> , vol. I, pp. 276 <i>et seq.</i> (1636th meeting para. 24).
A/CN.4/L.317	Draft articles on jurisdictional immunities of States and their property. Texts adopted by the Drafting Committee: articles 1 and 6 and titles of parts 1 and 2 of the draft	<i>Idem</i> , p. 264 (1634th meeting, para. 43).
A/CN.4/L.318	Draft articles on State responsibility. Texts adopted by the Drafting Committee: articles 33 to 35	<i>Idem</i> , pp. 270–272, (1635th meeting, paras. 42, 53 and 62).
A/CN.4/L.319	Draft report of the International Law Commission on the work of its thirty-second session: Chapter I	Mimeographed. For the final text, see A/35/10 (reproduced as <i>Yearbook...1980</i> , vol. II (Part Two)).
A/CN.4/L.320 and Add.1–4	<i>Idem</i> : Chapter III	<i>Idem</i> .
A/CN.4/L.321 and Add.1	<i>Idem</i> : Chapter V	<i>Idem</i> .
A/CN.4/L.322	<i>Idem</i> : Chapter VI	<i>Idem</i> .
A/CN.4/L.323	<i>Idem</i> : Chapter VII	<i>Idem</i> .
A/CN.4/L.324	<i>Idem</i> : Chapter VIII	<i>Idem</i> .
A/CN.4/L.325 and Add.1	<i>Idem</i> : Chapter IX	<i>Idem</i> .
A/CN.4/SR.1584–SR.1642	Provisional summary records of the 1584th to 1642nd meetings of the International Law Commission	Mimeographed. For the final text, see <i>Yearbook...1980</i> , vol. I.

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