

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
1976

*Volume II*  
*Part One*

*Documents of the twenty-eighth session  
(excluding the report of the Commission  
to the General Assembly)*

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UNITED NATIONS





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UNITED NATIONS  
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## NOTE

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

The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook...1970*) indicates a reference to the *Yearbook of the International Law Commission*.

Part One of volume II contains the documents of the session, except for the report of the Commission to the General Assembly, which forms the subject of Part Two of this volume.

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# **FILLING OF CASUAL VACANCIES IN THE COMMISSION**

(Agenda item 1)

**DOCUMENT A/CN.4/289**

**Note by the Secretariat**

*[Original: English]  
[4 February 1976]*

1. Following the election on 17 November 1975 of Mr. Taslim O. Elias as judge of the International Court of Justice, a seat has become vacant on the International Law Commission.

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

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

Article 2 reads:

1. The Commission shall consist of twenty-five members who shall be persons of recognized competence in international law.

2. No two members of the Commission shall be nationals of the same State.

3. In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

Article 8 reads:

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

3. The term of the member to be elected by the Commission will expire at the end of 1976.





# STATE RESPONSIBILITY

[Agenda item 2]

## DOCUMENT A/CN.4/291 AND ADD.1 AND 2\*

Fifth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur

[Original: French]  
[22 March, 14 April and 4 May 1976]

*The internationally wrongful act of the State, source of international responsibility (continued\*\*)*

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### ABBREVIATIONS

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
ILC	International Law Commission
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>
<i>P.C.I.J., Series C</i>	<i>P.C.I.J., Pleadings, Oral Statements and Documents</i>

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\*

### 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.

\* Incorporating document A/CN.4/291/Add.2/Corr.1.

\* The present report is a continuation of the fourth report on State responsibility submitted by the Special Rapporteur to the Commission at its twenty-fourth session (*Yearbook* . . . 1972, vol. II, p. 71, document A/CN.4/264 and Add.1).

## CHAPTER III

## Breach of an international obligation

## I. PRELIMINARY CONSIDERATIONS

1. The Special Rapporteur indicated, in his third report, that the second condition required under international law to establish that an internationally wrongful act has been committed is represented by what it has been agreed to call the *objective element* of such an act: that which distinguishes it from the other acts of the State to which international law attaches legal consequences.<sup>1</sup> That objective element, it was explained, consists in the fact that the conduct attributed to the State, subject of international law, constitutes a failure by that State to comply with an international obligation incumbent upon it. The very essence of the wrongfulness, as a source of responsibility, is constituted, it was said, by the contrast between the State's actual conduct and the conduct required of it under international law. In other words, it is to conduct attributed to the State under international law and representing a breach on its part of an international obligation that the law of nations attaches the emergence of the new legal situations unfavourable to the State in question which are grouped under the common denomination of international responsibility. In conclusion, it was said that the link between the breach of an international obligation and the incurring of further obligations or sanctions as a consequence of that breach, demonstrates that the rules relating to the international responsibility of the State are, by their very nature, complementary to other substantive rules of international law; they are complementary to those which give rise to the legal obligations which States may be led to breach.

2. At its twenty-fifth session (1973), the International Law Commission, endorsing those principles, defined clearly in draft article 3 which it adopted in first reading, the two elements required under international law to establish that an internationally wrongful act has been committed, namely:

(a) Conduct consisting of an action or omission is attributable to the State under international law; and

(b) That conduct constitutes a breach of an international obligation of the State.<sup>2</sup>

3. In its commentary on the second element, the Commission emphasized that ample confirmation could be found in international judicial decisions, State practice and the works of the most highly qualified writers, of the facts that the objective element which characterizes an internationally wrongful act is the breach of an international obligation of the State.<sup>3</sup> The Commission also pointed out the correlation—which admits of no exceptions under international law—between the breach of a legal obligation by the State

perpetrating the internationally wrongful act and the infringement of the international subjective right of one or more other States caused by that breach.<sup>4</sup>

4. By the same token the Commission recognized that, if it was agreed that a rule limiting the exercise by the State of its rights and capacities and prohibiting their "abusive" exercise existed in general international law, then such abusive exercise would also represent a breach of an international obligation of the State: the obligation not to exceed certain limits in exercising that right and not to exercise it with the sole intention of harming others or interfering with the competence of other subjects.<sup>5</sup> The Commission therefore agreed to recognize that there were no exceptions to the general definition of the objective element of an internationally wrongful act as consisting of a breach of an obligation incumbent on a State under international law.

5. Finally, the Commission stated its reasons for preferring the term "breach of an international obligation" to that of breach of a "rule" or "norm" of international law.<sup>6</sup> It pointed out that the expression selected was not only the one most commonly used in international judicial decisions and State practice but also the most accurate, since a *rule* is the objective expression of the law, whereas an *obligation* is a subjective legal phenomenon by reference to which the conduct of a subject is judged, whether it is in compliance with the obligation or whether it is in breach of it. The Commission further recalled that, moreover, an obligation does not necessarily and in all cases flow from a rule in the true sense of the term, it may very well have been created by a legal instrument or by a decision of a judicial or arbitral tribunal. In conclusion, the Commission stated why, in the French version, it had preferred the term "*violation*" to other similar terms.

6. In the report on its twenty-seventh session (1975), the Commission briefly set forth the outline of chapter III of the draft, which was intended, in the view of the Special Rapporteur and of the Commission, to deal with the various aspects of the objective element of the internationally wrongful act.<sup>7</sup> In accordance with that outline, the fifth report of the Special Rapporteur will concentrate on developing the specific notion of "breach of an international obligation". Here, too, the aim is to determine, as was done for the notion of "act of the State",<sup>8</sup> in what circumstances and on what conditions it must be concluded that a State has committed such a breach or—and this comes to the same thing—infringed an international subjective right of one or more other States. The aim is also to define, on the basis of the conclusions thus established, the characteristics, in the different hypotheses envisaged, of such a breach and such an infringement.

<sup>4</sup> *Ibid.*, p. 182, para. 9 of the commentary.

<sup>5</sup> *Ibid.*, para. 10 of the commentary.

<sup>6</sup> *Ibid.*, p. 184, para. 15 of the commentary.

<sup>7</sup> See *Yearbook ... 1975*, vol. II, pp. 58–59, document A/10010, para. 49.

<sup>8</sup> See *Yearbook ... 1971*, vol. II (Part One), p. 233, document A/CN.4/246 and Add.1–3, para. 107; and *Yearbook ... 1973*, vol. II, pp. 188 *et seq.* document A/9010/Rev.1, chap. II, sect. B, introductory commentary to chap. II of the draft articles.

<sup>1</sup> *Yearbook ... 1971*, vol. II (Part One) pp. 214 and 219, document A/CN.4/246 and Add.1–3, paras. 49 and 61.

<sup>2</sup> *Yearbook ... 1973*, vol. II, p. 179, document A/9010/Rev.1, chap. II, sect. B.

<sup>3</sup> *Ibid.*, p. 181, para. 8 of the commentary.

7. The complications caused by the adoption of theoretical and *a priori* positions which were encountered when determining the subjective element of an internationally wrongful act and which had to be dealt with first<sup>9</sup> will probably not arise in the case of the objective element. The difficulties encountered will nevertheless be just as great. The problem which is likely to arise at nearly every stage of a study is essentially a problem of "boundaries": that of establishing how far certain aspects can be analysed without overstepping the limits of the sphere of legal wrongfulness and the resultant responsibility. For example, it will have to be asked whether the breach of an obligation created by a given source does or does not differ from a failure to comply with an obligation deriving from another source; however, this must not in any circumstances lead us to formulate a theory of the sources of international obligations in the context of the codification of international responsibility. Similarly, the content of certain different categories of international obligations will have to be taken specifically into account in order to determine against what subjects or at what time a breach of a particular category of obligation allegedly took place, for it is only on that basis that certain characterizations and essential distinctions in the field of internationally wrongful acts can be made. But that should not lead us into a search for a specific definition of the international obligations which in one sphere or another are incumbent on States. Past experience has shown how yielding to a temptation of this nature exerted a detrimental effect on the attempts to codify even the limited subject of international responsibility for damage caused to the person or property of aliens. That course would be absolutely fatal to our present goal, that of codifying the general rules of international responsibility as a whole. There would be no chance of achieving a favourable result if under the appearance of codifying international responsibility, an effort was in fact being made to codify the totality of international law.

8. That having been said, we can envisage a series of stages in our work. We shall first have to find an answer to the questions which arise concerning the formal aspects of the obligation involved. In this context, we shall have to consider first whether the customary source, conventional or other, of the obligation has any bearing on the conclusion regarding the existence of an internationally wrongful act and its characterization. We shall also have to consider whether the fact that the obligation was in force at the time when the State engaged in conduct contrary to that required by the obligation in question is an essential condition for concluding that an international obligation has been breached.

9. We shall then take up the questions relating to the way in which the content of the obligation breached affects the problems at issue. The first problem that will be encountered is one of the most delicate and important in the whole study, and one of the most decisive for the subsequent determination of the type of responsibility that international law attaches to different kinds of internationally wrongful acts, namely the problem of deciding whether a basic

distinction should be made between internationally wrongful acts according to the degree of essentiality that respect for the obligation concerned has for the international community, precisely because of the content of the obligation, and according to the seriousness of the breach of that obligation. We shall then have to decide whether, in determining if there has been a breach of an international obligation, a difference should be established between obligations whose content is such that a breach is revealed by the simple fact that the State engages in conduct different from that expressly required of it and obligations whose breach is only manifested when the conduct of the State is accompanied by an external event which that State should have prevented. We shall also have to consider the difference between the breach of an obligation of conduct, specifically requiring a particular action or omission on the part of the State machinery, and the breach of an obligation of result, which only requires the State to ensure the existence of a particular situation, without specifying the means and acts to be employed to achieve that end.<sup>10</sup>

10. Finally, we shall have to consider the various problems involved in determining the time and duration of the breach of an international obligation, that is to say what is known as the *tempus commissi delicti*, taking into account the different consequences which may arise in various forms where an immediate breach is committed, as compared with cases where the breach is of a continuing nature or cases where the breach constitutes the sum of a series of separate and successive actions.

11. Before concluding these preliminary considerations, a final remark should be made. In preparing the material to be included in chapter III, it is logical to rely mainly on the inductive method, which has already proved so useful and which consists, in connexion with the various points, in first analysing international judicial decisions and State practice and then making use of the specific results of this analysis when formulating rules. This method has proved so useful in the previous stages of our work that it would be absurd to reject it without good reason. However, one point must be made: in considering certain points in chapter III, we cannot expect to find the wealth of precedents we were able to collect, for example, in the case of determining criteria for

<sup>9</sup> See *Yearbook ... 1971*, vol. II (Part One), pp. 233 *et seq.*, document A/CN.4/246 and Add.1-3, paras. 108 *et seq.*

<sup>10</sup> We have already had occasion to observe that the existence of obligations of this second category, which are very frequent in international law especially when the obligation involves the treatment which the State should accord to individuals, in our view constitutes the reason for the existence of, and explains, a well-known principle, that which requires initial recourse to available local remedies as a prerequisite of establishing at the international level the responsibility of a State accused of having acted towards individuals in a manner contrary to its international obligations. As was stated in the Commission's report on its twenty-seventh session (*Yearbook ... 1975*, vol. II, pp. 58-59, document A/10010/Rev.1, para. 49), consideration will also be given in this chapter to this aspect of the more general question of how the basic characteristics of the obligation concerned affect the determination of whether it has been breached. But it is clear, and this must be stressed explicitly so as to avoid misunderstandings on the subject, that the rule of prior exhaustion of local remedies will only be taken into consideration from the point of view of its justification. The eventual definition of the scope of the rule, the description of the technique of its application, the analysis of its procedural aspects, and the determination of the conditions of its application in accordance with general international law and certain treaties will have to be examined in another context, that of the "implementation" ("*mise en œuvre*") of international responsibility.

the attribution of an act to the State. Where necessary, we shall therefore have to make up for this lack by giving careful consideration, as a source of guidance when defining certain rules, to the true requirements of the contemporary international community and to the more authoritative ideas and tendencies which are emerging. In other words, the progressive development of international law will sometimes have to take precedence over codification pure and simple.

## 2. SOURCE OF THE INTERNATIONAL OBLIGATION BREACHED

12. As indicated above, determination of the conditions in which the act of a State may constitute "a breach of an international obligation" of that State under draft article 3 (b), adopted in first reading by the Commission, logically requires that the following question first be posed: is the nature of the legal source of the international obligation breached likely to have a bearing on the characterization of the conduct of the State as wrongful? More specifically, is it necessary, for the purpose of answering this question, to distinguish between the various cases: does the obligation arise from a customary rule, a treaty, a general legal principle applicable within the framework of the international legal order? has the obligation been assumed by a unilateral act? has it been imposed by the decision of an organ of a competent international organization? a judgment of the International Court of Justice? by an award rendered by an international arbitration tribunal? has it been established by analogy? and so on. As already emphasized, there is absolutely no question of formulating a theory concerning these sources, or of taking a position on the question whether all the means cited or possibly even others can impose international obligations on a State. Our only task is to determine whether, on the basis of the existence of a specific international obligation of a State, the breach of such an obligation always constitutes an internationally wrongful act, whatever the source of the obligation in question.

13. The problem posed logically involves another: that of establishing whether the diversity of the sources of international obligations should not at least have some influence on the determination of different régimes of responsibility and, correlatively, of different types of internationally wrongful acts. Most systems of internal law make a distinction, for example, between two different régimes of liability for civil wrongs<sup>11</sup> one of which applies to the breach of an obligation assumed by contract, the other to the breach of an obligation created by another source (statutes, rules, etc.). On this basis, legal theory has distinguished two types of civil wrongs, contractual and extra-contractual.<sup>12</sup> Should the same course be followed in

<sup>11</sup> The two régimes are differentiated on the basis of determination of burden of proof, forms of reparation, types of judicial action to which recourse may be had, and so forth.

<sup>12</sup> In French legal terminology (in Spanish and Italian roughly similar terms are used), the extra-contractual wrongful act includes "*délits*" and "*quasi-délits*". In English, the term generally used for an extra-contractual wrongful act is "tort", whereas the term "breach of contract" is used for a contractual wrongful act.

the case of international law? Should international law make provision for different régimes of responsibility depending on whether the obligation breached is established by a treaty or a customary rule, or whether it arises from a general normative treaty or a treaty intended only to establish special legal relationships?

14. In order to answer the two questions raised, particularly the second, two other points must be made before going on to consider international judicial decisions and State practice. First and foremost, it must be stressed that the possible application to internationally wrongful acts of different régimes of responsibility, based on the difference in the source of the obligation breached by the State in various cases, should not be taken into account here unless general international law so provides. In the text of a particular treaty concluded between them, some States may well provide for a special régime of responsibility for the breach of obligations for which the treaty makes specific provision; obviously if such a breach occurred, the perpetrator would be subject to the special régime established by the treaty in question. But this clearly has nothing whatsoever to do with the problem under consideration which, as just stated, is to establish whether the source of the obligation breached should be taken into consideration for the purpose of determining the régime of responsibility of States by the general rules of international law and not by the provisions of a specific treaty.<sup>13</sup> In order to conclude that the breach of an obligation of conventional origin constitutes under general international law a wrongful act which differs from the breach of an obligation arising from customary law or some other source, it must be possible to prove that the régime of responsibility applied in the first case is *always* a different régime, even when the convention containing the obligation breached contains no special provision relating to responsibility.

15. Secondly, it may be useful to recall that any conclusion relating to these questions should not be affected by the existence of a fairly widespread terminology which, it must be admitted, can lead to misunderstandings. Some writers sometimes refer to "the contractual responsibility of States" or "the international responsibility of States with regard to contracts",<sup>14</sup> while others make a distinction, in the context of the international responsibility of States, between the "contract situation" and the "tort situation".<sup>15</sup> In fact, the responsibility referred to in such expressions does not in any way constitute a special part or particular

<sup>13</sup> Similarly, to establish whether a given system of internal law provides for a distinction between "contractual" and "extra-contractual" wrongful acts, reference may be made to the consequences which such a legal system attaches to the breach of obligations created by contracts and that of obligations established by legislation or by another general normative instrument. The special provisions of a specific contract are not taken into account for these purposes.

<sup>14</sup> This was done recently by H. Pazarci, in *Responsabilité internationale des Etats en matière contractuelle*, (Ankara, Political Science Faculty Publications, 1973, No. 350). Note in this connexion the copious bibliography provided by Pazarci on pp. 137 *et seq.*

<sup>15</sup> See D. P. O'Connell, *International Law*, 2nd ed. (London, Stevens, 1970), vol. II, pp. 962 *et seq.* and 976 *et seq.* The parallel which the author believes can therefore be drawn with the distinction existing in internal law seems to the Special Rapporteur to be a false analogy.

aspect of the responsibility incurred by States within the framework of the international legal order. What these writers have in mind is State responsibility for the breach, not of an international obligation proper, but of an obligation, generally of a purely economic nature, provided for in a "contract", i.e. by an instrument of internal law, which retains that status even when it is concluded by one State with another State, and which is, moreover, generally concluded between a State and foreign individuals. Such contracts are not agreements in which the contracting State or States participate as subjects of international law, and they are therefore in no way "international treaties". They are generally governed by the legal system of the State (or one of the States) which concludes them; according to some writers, they are sometimes governed by another legal system, a "transnational" law,<sup>16</sup> an "international law of contract",<sup>17</sup> a "quasi-international" law.<sup>18</sup> There is no need to discuss these questions here: it is sufficient to emphasize that such contracts are not governed by the international legal order.<sup>19</sup> The breach by the State of an obligation it has entered into under a contract of this kind does not therefore constitute as such the objective element of an internationally wrongful act and is scarcely likely to entail international responsibility on the part of that State; it is governed by a different legal order, and whether that order is national or of another kind is largely immaterial. This situation would change only if the existence of a genuine international obligation was established, the source of which was a custom or a treaty making it incumbent upon the State to respect a specific "contract" or "contracts" concluded with individuals. But, even then, the material conduct of failing to respect the "contract" would constitute an internationally wrongful act only if such conduct also entailed the breach by the State of the international obligation it had assumed on the subject.<sup>20</sup>

<sup>16</sup> This is the well-known terminology of P. Jessup (*Transnational Law* (New Haven, Yale University Press, 1956)); and J.-F. Lalive ("Contracts between a State or a State agency and a foreign company", *International and Comparative Law Quarterly* (London), vol. 13 (July 1964), pp. 1006 *et seq.*).

<sup>17</sup> See P. Weil, "Problèmes relatifs aux contrats passés entre un Etat et un particulier", *Recueil des cours de l'Académie de droit international de la Haye, 1969, III* (Leyden, Sijthoff, 1970), vol. 128, pp. 189 *et seq.*

<sup>18</sup> See H. Pazarci, *op cit.*, pp. 49 *et seq.*

<sup>19</sup> The weaknesses of the rare divergent opinions on the matter have been effectively revealed by the vast majority of writers who have dealt with this question. See, among many others, C. F. Amerasinghe, *State Responsibility for Injuries to Aliens* (Oxford, Clarendon Press, 1967), p. 118: "The contract not being located in the international legal system, breach of such a contract would not *per se* be a breach of international law. At most the breach would amount to a breach of transnational law".

<sup>20</sup> The writers who deal with the problem naturally pay particular attention to the question of the existence or non-existence of an international customary rule establishing this obligation: a rule which, if it really existed, would be one of the pillars of the part of international law which deals with the treatment of aliens. But, according to the findings of Pazarci (*op. cit.*, p. 44), "In short, it can be affirmed that, for all the reasons cited, positive public international law has not considered the failure to execute a contract *per se* as an internationally wrongful act" [Translation from French]. It may be added, as a pure hypothesis, of course, that if it was agreed that international law imposed on the State an obligation to respect certain contracts and that this same law provided for a special régime of responsibility for the breach of such an obligation, the special régime would in any case be the consequence not of the source of the international obligation breached in this specific case, but of its content, since the said obligation would be purely economic in nature.

16. To our knowledge, international judicial decisions have not had occasion to deal specifically with the question whether the fact that a given international legal obligation has been imposed on a State by one source rather than another, does or does not have a bearing on the characterization of conduct engaged in by the State in breach of that obligation as wrongful. None the less, a number of elements provide a very precise idea of the opinion of international judicial and arbitral bodies on this subject. In the first place, we may cite the award rendered on 27 September 1928, in the *Goldberg* case, by Mr. R. Fazy, the arbitrator appointed under paragraph 4 of the annex to articles 297 and 298 of the Treaty of Versailles. The arbitrator was required to establish whether the paragraph in question, which provided for the right to obtain reparation for damages caused by "acts committed by the German Government" covered all prejudicial acts committed by that Government, or only those which were contrary to the law of nations. Having chosen the second interpretation, the arbitrator wondered what should be understood by acts contrary to "the law of nations". In this connexion, he observed:

The expression "the law of nations" has a different meaning according to whether it is restricted to *written* international law or extended to cover all that falls within the wider notion of general international law.

In the interpretation of the clause in question, there is no possible doubt. First, as the Anglo-German arbitrator has already pointed out, the text of paragraph 4 contains nothing to suggest that the Treaty intended that the right to reparation should be confined to exceptional cases where the damage resulted from an act contrary to an express rule of written international law. Secondly, the third preambular paragraph of the Treaty makes a clear reference to the understandings of international law as a whole. Lastly, and most important of all, the fact that the Treaty left the settlement of so-called "neutrality" damages to a tribunal equivalent to the international arbitral tribunals usually set up to decide such questions, makes it clear that it tacitly accepted that the sole arbitrator should follow the practice of those tribunals in the application of the law of nations. That practice has always been based not only on the written rules of international law but also on international custom, the general principles recognized by civilized nations, and judicial decisions, the last-named as subsidiary means for the determination of rules of law.

An act contrary to the law of nations, for the purpose of the clause in question, ought therefore to be defined as follows: *any act which, in the pre-war relations between State and State, could, if submitted to an international arbitral tribunal, have entailed an obligation to make reparation, in accordance with the ordinary rules of general international law.*<sup>21</sup>

It would appear from the foregoing that in the arbitrator's opinion, any act contrary to an international obligation, no matter what its source, entails an obligation to make reparation for damage.

This opinion is explicitly expressed when a court acknowledges the right of a State to have recourse to it when that State can allege a breach of an obligation created by a rule of international law, and when at the same time that body expressly states that such a rule may equally well be a conventional rule or any other kind of rule. In the judgment delivered by the International Court of Justice on 5 February 1970, in the case concerning the *Barcelona Traction, Light and Power Company, Limited*, we read that:

... the Belgian Government would be entitled to bring a claim if it could show that one of its rights had been infringed and that the acts

<sup>21</sup> United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949.V.1), pp. 908-909 [translation by the United Nations Secretariat].

complained of involved the breach of an international obligation arising out of a treaty or a general rule of law.\*<sup>22</sup>

In the same context, mention might be made of the award rendered on 22 October 1953, in the *Armstrong Cork Company* case, by the Italian-United States Conciliation Commission set up under article 83 of the Peace Treaty of 10 February 1947. Having first stated its approval of the definition of the internationally wrongful act given by K. Strupp (who regards as wrongful all actions of a State which are in contradiction "with any rule whatsoever of international law"\*), the Commission affirms that the responsibility of the State entails the obligation to repair the damages suffered to the extent that said damages are the result "of the inobservance of the international obligation"\*.<sup>23</sup> In this way, the Commission makes it clear that it regards the breach of any obligation arising from any rule whatsoever of international law as an internationally wrongful act.

17. Silence may also be proof of the same conviction. An example of this would be when an international judge or arbitrator gives a general definition of the conditions for the existence of an internationally wrongful act and State responsibility and mentions to that end the breach of an international legal obligation or, which comes to the same thing, the infringement of an international subjective right of another State or, which also comes to the same thing but in a slightly less correct form, the breach of a rule of international law, but imposes no restrictions in this connexion as to the source of the obligation, law or rule involved.

Thus, in a number of awards concerning *Claims by Italian subjects residing in Peru* rendered on 30 September 1901, the arbitrator Gil de Urbarri, appointed under the Italian-Peruvian Convention of 25 November 1899, recalled that:

... it is a universally recognized principle of international law that a State is responsible for breaches of public international law committed by its agents...<sup>24</sup>

In the same way and more specifically, the Mexico/United States General Claims Commission set up under the Convention of 8 September 1923, in its award of July 1931 concerning the *Dickson Car Wheel Company*, indicated what it considered to be the conditions for attributing international responsibility to a State, by requiring that:

... an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard.\*<sup>25</sup>

18. Finally, another very simple but none the less important observation must be made. One has only to

<sup>22</sup> *I.C.J. Reports 1970*, p. 46. The term "general rule of law", in the language of the Court, refers first and foremost to international customary rules, but it obviously also covers general rules based on general principles of law or analogy. The term "treaty" clearly also covers any rules established by a normative procedure set up by a treaty.

<sup>23</sup> United Nations, *Reports of International Arbitral Awards*, vol. XIV (United Nations publication, Sales No. 65.V.4), p. 163.

<sup>24</sup> *Ibid.*, vol. XV (United Nations publication, Sales No. 66.V.3), p. 399 (Chiessa claim), p. 401 (Sessarego claim), p. 404 (Sanguinetti claim), p. 407 (Vercelli claim), p. 408 (Queirolo claim), p. 409 (Roggero claim) and p. 411 (Miglia claim).

<sup>25</sup> *Ibid.*, vol. IV (United Nations publication, Sales No. 1951.V.1), p. 678. In another award of July 1931, relating to the case of the

consider the enormous mass of international decisions in which the existence of an internationally wrongful act and, hence, of international responsibility of the State has been recognized, to observe that the breach attributed to the State in these awards was sometimes the breach of an obligation established by a treaty, sometimes the breach of an obligation originating in customary law, and sometimes, though less frequently, the breach of an obligation arising from a different source of international law. This observation is quite enough to convince us that, in the opinion of the judges and arbitrators who rendered these awards, the breach of an international obligation is always an internationally wrongful act, regardless of the source of the obligation in question.

19. It is therefore clear that international judicial decisions do not consider that the source of the obligation breached has any bearing on the characterization of the conduct constituting the breach as internationally wrongful. That having been said, there is still a case for asking whether, according to the same judicial decisions, the source of the international obligation affected by the State's conduct likewise has no bearing on the determination of the régime of international responsibility arising from this conduct, and whether, depending on the source of the obligation breached, a distinction should not be made between different categories of internationally wrongful acts. This is another problem that does not seem to have been brought directly to the attention of an international tribunal. But a comprehensive review of international judicial decisions shows clearly that the source of the various obligations likewise played no part in this connexion. Determination of the consequences of an internationally wrongful act makes no distinction according to such a criterion. When, in certain cases, the guilty State has been subject to a special régime of responsibility, no connexion has been established between the choice of that régime and the source of the obligation breached. The customary, conventional or other nature of the obligation breached is never invoked to justify the choice of a given form of reparation. A comprehensive review of the content of the responsibility attached by international tribunals to wrongful acts with which they have had to deal makes it perfectly clear that this content is in no way based on the source of the international obligation breached in the various cases. On the contrary, if we examine responsibility as defined in relation to breaches of international obligations which have different sources but relate to the same subject, we note that the same régime of responsibility was applied to acts involving the breach of a customary obligation and acts constituting a breach of a conventional obligation.

20. Moreover, State practice leaves no doubt as to the reply to be given to the questions under consideration. Thus, it will suffice to recall the opinions expressed by Governments during the preparatory work for the Conference for the Codification of International Law, held at The Hague in 1930, and, subsequently, in the discussions in the Third Committee of the Conference.

International Fisheries Company, the same Commission affirmed that it held States responsible for any conduct which violated "some principle of international law" (*ibid.*, p. 701).

21. The "request for information" addressed to Governments by the Preparatory Committee of the Conference contained no proposals which were specifically designed to ascertain the views of the countries invited to the Conference as to whether the breach of a treaty obligation should have consequences different from those arising from failure to observe a customary or other obligation. However, this question was contained implicitly in the wording of points II, III and IV.

22. Under point II, Governments were asked whether they agreed with the content of a long proposal which first stressed that membership of "the community governed by international law" implies an obligation for those States to conform to certain "standards of organization" and "rules which in general govern the conduct" of the community, and then drew the conclusion "that a State which fails to comply therewith . . . incurs responsibility".<sup>26</sup> The terms "standards of organization" and "rules which . . . govern the conduct" were general and vague, but conveyed all the better the desire not to make a distinction according to source among the different categories of obligation, and not to attribute to that distinction any consequences as regards responsibility. It is interesting to note that, among the replies of Governments, which although differently worded were all in the affirmative, we find a number which are particularly significant for our purposes: the very detailed reply by Austria, for instance. That reply made a clear distinction, according to source, between three different categories of rules of international law which imposed obligations on States concerning the treatment of foreigners: provisions of treaties, special rules of customary law and general principles of customary law. It then stated that infringement of any obligation deriving from these three sources "directly involved the responsibility of a State".<sup>27</sup>

23. Point III, No. 1, of the "request for information" inquired whether the State became responsible by virtue of having enacted legislation

incompatible with the *treaty*\* rights of other States or with its *other international obligations*.\*

or of having failed to enact legislation necessary

for the purpose of implementing the *treaty obligations of the State* or its *other international obligations*.\*<sup>28</sup>

Under point IV, No. 2, the same question was posed regarding the adoption of decisions of the tribunals

. . . irreconcilable with the *treaty obligations*\* or the *international duties of the State*.\*<sup>29</sup>

All the Governments which replied to these specific questions did so in the affirmative. None of them proposed that a distinction should be drawn in respect of State responsibility between the breach of a treaty obligation and the breach of an obligation arising from another source,

whatever it might be.<sup>30</sup> Taking into account the replies received, the Preparatory Committee drafted the following two Bases of Discussion:

*Basis of discussion No. 2*

A State is responsible . . . as the result either of the enactment of legislation incompatible with its international obligations, *resulting from treaty or otherwise*,\* or of failure to enact the legislation necessary for carrying out those obligations.<sup>31</sup>

*Basis of discussion No. 5*

A State is responsible . . . as the result of the fact that . . . a judicial decision which is final . . . is incompatible with the *treaty obligations or other international obligations of the State*.\*<sup>32</sup>

24. When the Third Committee of the Conference considered these Bases, the discussion continued for several meetings. Its purpose was not, however, to determine whether only the breach of obligations imposed by certain sources—to the exclusion of others—entailed State responsibility; the entire discussion focused on what *the sources of international obligations were*.<sup>33</sup> It was finally agreed to refer to three of them: treaties, custom and the general principles of law. The following text was accordingly approved by 28 votes to 3:

*Article 2*

The expression "international obligations" in the present Convention means (obligations resulting from treaty, custom or the general principles of law) which are designed to assure to foreigners in respect of their persons and property a treatment in conformity with the rules accepted by the community of nations.<sup>34</sup>

<sup>30</sup> *Ibid.*, pp. 25 *et seq.*, 41 *et seq.* and League of Nations, *Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, Supplement to vol. III (C.75(a).M.69(a),1929.V)*, pp. 2, 6 *et seq.*

<sup>31</sup> League of Nations, *Bases of Discussion . . . (op. cit.)*, vol. III, p. 30 and *Yearbook . . . 1956*, vol. II, p. 223 document A/CN.4/96, annex 2.

<sup>32</sup> *Ibid.*, pp. 48 and 223 respectively. Basis No. 7, relating to the acts of executive powers, reproduced the wording of Basis No. 2 in the French text, and that of Basis No. 5 in the English text (*ibid.*, pp. 55 and 223 respectively).

<sup>33</sup> At the outset of the Committee's work, the Italian representative, Mr. Cavaglieri, proposed that the clause "resulting from treaty or otherwise" should be deleted or, at the very least, replaced by the words "resulting from treaties or from recognized principles of international law". In any event, he considered that it was neither necessary nor appropriate to specify the sources of international obligations in the convention. However, the Committee did not share that view and entered into a thorough discussion of the question of sources, which thus was dealt with first by the Committee for three meetings, then by an *ad hoc* sub-committee, and then again by the Committee itself (League of Nations, *Acts of the Conference for the Codification of International Law* (held at The Hague from 13 March to 12 April 1930). vol. IV, *Minutes of the Third Committee (C.351(c).M.145(c).1930.V)*, pp. 32 *et seq.*, 112 *et seq.*, 116 *et seq.*, 159 *et seq.*). The Committee's insistence on dealing with the question of sources was probably attributable to the fact that the draft convention was supposed to cover all substantive aspects of the obligations of States with regard to the treatment of foreigners. The discussion dealt in particular with the question whether general principles of law could be adduced to establish the international obligations of States with regard to the treatment of foreigners.

<sup>34</sup> The Drafting Committee then proposed that the words "... obligations resulting from treaty, custom or the general principles of law" should be replaced by the words "... obligations which result from treaties as well as those which are based upon custom or the general principles of law . . ." (League of Nations, *Acts of the Conference . . . (op. cit.)*, p. 237), but the Committee was no longer in a position to examine that proposal. The two versions of article 2 are reproduced in *Yearbook . . . 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.

<sup>26</sup> 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. 20.

<sup>27</sup> *Ibid.*, p. 21.

<sup>28</sup> *Ibid.*, p. 25.

<sup>29</sup> *Ibid.*, p. 41.



The language is not particularly precise and, from the standpoint of the problem which was discussed at such great length, it can in the end be deemed incomplete, for it appears to ignore the possible existence of international obligations arising from sources other than those expressly mentioned in the article.<sup>35</sup> However, there can be no doubt as to the answer to the question at issue, which is not whether such obligations exist with regard to the treatment of foreigners, but rather, whether the breach of any existing acknowledged international obligation entails State responsibility. The Committee intended undoubtedly to accord equal status, as regards responsibility resulting from the breach of an international obligation, to all international legal obligations which exist with respect to the treatment of foreigners, without for this purpose drawing any distinction between the source of such obligations. None of the many speakers who took part in the discussion gave any indication that he envisaged the existence of international obligations the breach of which would not constitute an internationally wrongful act.

25. An equally negative conclusion will be drawn with regard to the question whether the fact that the obligation breached derived from a particular source could have a bearing, if not on the existence of an internationally wrongful act, at least on the relevant régime of responsibility. In drawing up the "request for information", the Preparatory Committee of the 1930 Conference sought the observations of Governments on the proposition that a State having breached certain "standards" or "rules" of international law "incurs responsibility and must make reparation in such form as may be appropriate". A single form of responsibility, the obligation to make reparation for the injury caused, was thus envisaged for all breaches of international obligations concerning the treatment of foreigners. No Government which replied expressed a different view.<sup>36</sup> Moreover, in point XIV of the "request for information", which in fact deals with reparation, various forms of reparation were envisaged, although the choice among them in no way depended on the source of the obligation breached.<sup>37</sup> Neither did the source play a role for the purposes of the distinction, drawn in Basis of Discussion No. 29, between the various types of consequences arising out of the breach of international obligations with regard to injury to foreigners.<sup>38</sup> During the debate on this Basis in the Sub-Committee and then in the Committee itself, no one suggested that different types of responsibility should be applied depending on whether the obligation breached resulted from a treaty, custom or some other source.<sup>39</sup>

<sup>35</sup> This is the error already criticized under the heading "Preliminary considerations" in this chapter, namely the attempt, in defining the rules relating to responsibility, to determine the sources of international law, instead of simply stipulating that the breach of any international legal obligation, whatever its source, entails the responsibility of the State.

<sup>36</sup> League of Nations, *Bases of Discussion ... (op. cit.)*, vol. III, pp. 20 *et seq.* and *Supplement to vol. III (op. cit.)*, pp. 2 and 6.

<sup>37</sup> See, for point XIV and the replies of Governments, League of Nations, *Bases of Discussion ... (op. cit.)*, pp. 146 *et seq.* and *Supplement to vol. III (op. cit.)*, pp. 4 and 24 *et seq.*

<sup>38</sup> League of Nations, *Bases of Discussion ... (op. cit.)*, pp. 151-152 and *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 2.

<sup>39</sup> League of Nations, *Acts of the Conference ... (op. cit.)*, p. 111 and 129 *et seq.*

Article 3, adopted by 32 votes to none, read as follows:

The international responsibility of a State imports the duty to make reparation for the damage sustained in so far as it results from failure to comply with its international obligation.<sup>40</sup>

Read together with article 2, this text thus shows that, for the participants in the Conference, the breach of an international obligation with respect to the subject proposed for codification always entailed the application of the same régime of responsibility, whether that obligation resulted from a treaty, custom or a general principle of law.

26. Before concluding the discussion of the views of Governments and their official representatives in the course of efforts to codify international responsibility, it would seem useful to recall that it was never suggested in the discussion of the reports of the International Law Commission in the Sixth Committee of the General Assembly that breaches of obligations resulting from treaties, custom or some other source should be subject to different régimes of responsibility. While it is true that members of the Sixth Committee at times recommended that the International Law Commission should devote particular attention to the consequences of the breach of obligations arising out of certain principles of the Charter of the United Nations or certain "legal" resolutions of the General Assembly,<sup>41</sup> those suggestions obviously were prompted by the particularly important content of the obligations in question rather by their source.

27. The codification drafts relating to State responsibility drawn up by private bodies as well as those prepared under the auspices of international organizations, are based on the same criteria as international judicial decisions and State practice. Most of those drafts attach international responsibility to the breach of an international obligation, without taking into account the origin of the obligation.<sup>42</sup> In a few rare cases, the proposition that failure to comply with an international obligation entails the responsibility of the State is followed by an indication of what are deemed to be the sources of the international obligations. All that can be deduced from this, however, is that for the authors of these drafts the only international obligations which exist are those derived from the sources enumerated; there can be no doubt

<sup>40</sup> *Ibid.*, p. 237 and *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.

<sup>41</sup> Such suggestions were made by the representative of Jamaica at the twenty-fifth session, in 1970, and by the representative of Romania at the twenty-eighth session, in 1973 (*Official Records of the General Assembly, Twenty-fifth Session, Sixth Committee*, 1188th meeting, para. 35 and *ibid.*, *Twentieth-eighth Session, Sixth Committee*, 1405th meeting, para. 18).

<sup>42</sup> Among the drafts drawn up by private bodies, see that of the Kokusaiho Gakkwai of 1926, article 1 (*Yearbook ... 1969*, vol. II, p. 141, document A/CN.4/217 and Add.1, annex II); rule 1, first para. of the resolution adopted by the Institute of International Law in 1927 (*Yearbook ... 1956*, p. 227, document A/CN.4/96, annex 8); the 1930 draft of the Deutsche Gesellschaft für Völkerrecht, article 1, para. 1, (*Yearbook ... 1969*, vol. II, p. 149, document A/CN.4/217 and Add.1, annex VIII); the 1927 draft by K. Strupp, article 1, first para. (*ibid.*, p. 151, document A/CN.4/217 and Add.1, annex IX); the 1932 draft by A. Roth, article 1 (*ibid.*, annex X); and the very recent one prepared by B. Gräfrath and P. A. Steiniger, "Kodifikation der völkerrechtlichen Verantwortlichkeit", *Neue Justiz* (Berlin), vol. 8 (1973), p. 227. Among the drafts prepared under the auspices of international organizations, see the bases of discussion prepared by F. V. Garcia Amador (*Yearbook ... 1956*, vol. II, p. 219, document A/CN.4/96, para. 241).



that, in the view of these authors, the breach of an international obligation, whether it results from one or another of such sources, always constitutes an internationally wrongful act and always entails international responsibility.<sup>43</sup> It is of particular interest to note that the preliminary draft prepared in 1957 by F. V. García Amador explicitly provides that international obligations whose breach entails State responsibility are those "resulting from any of the sources of international law".<sup>44</sup> It should be added that none of the drafts to which reference is made envisages the possibility of applying different régimes of responsibility according to whether the obligation breached results from one source rather than from another.

28. The works of writers who have discussed the international responsibility of States give but scanty treatment in their works to the question of the possible significance of the source of the international obligation breached. Many writers are content merely to state that an internationally wrongful act and, hence, international responsibility, exist if there has been a breach of an international obligation. Thus they do not refer explicitly to the source of the international obligation breached, either in order to make it the basis for the characterization of the conduct inconsistent with that obligation as wrongful, or in order to draw conclusions from it regarding the régime of responsibility applying to that conduct. Clearly, this silence is tantamount to an implicit recognition of the fact that the source of the obligation has no bearing on the conclusions

reached on these two matters.<sup>45</sup> It is of interest to point out, too, that there are also writers who state explicitly that at the present stage international law does not distinguish between internationally wrongful acts according to the source of the obligation breached and who sometimes formulate this conclusion in very clear terms.<sup>46</sup>

<sup>45</sup> This, for instance is the conclusion reached by the following writers in works dealing with the topic of international responsibility of States in general: Ch. de Visscher, "La responsabilité des Etats", *Bibliotheca Visseriana* (Leiden, Brill, 1924), vol. II, pp. 91 and 118-119; C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), pp. 3 *et seq.* and 182 *et seq.*; R. Ago, "Le délit international", *Recueil des cours ... 1939-II* (Paris, Sirey, 1947), vol. 68, pp. 419 *et seq.* and especially pp. 441 *et seq.*; H. Accioly, "Principes généraux de la responsabilité internationale d'après la doctrine et la jurisprudence", *Recueil des cours ... 1959-I* (Leiden, Sijthoff, 1960), vol. 96, pp. 353 *et seq.* and 413 *et seq.*; D. B. Levin, *Otvetstvennost gosudarstv v sovremennom mezhdunarodnom prave* (Moscow, Mezhdunarodnye Otnosheniya, 1966), especially p. 19; E. Jiménez de Aréchaga, "International Responsibility", *Manual of Public International Law*, M. Sørensen, ed. (London, Macmillan, 1968), pp. 531 *et seq.* and especially pp. 533-534. Among the works which are confined to the study of the consequences of internationally wrongful acts, see J. Personnaz, *La réparation du préjudice en droit international public* (Paris, Sirey, 1939). In the category of general works on international law, see C. C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 2nd ed., rev. (Boston, Little, Brown, 1951), vol. 2, p. 882; H. W. Briggs, *The Law of Nations*, 2nd ed. (London, Stevens, 1953), especially pp. 615 *et seq.*; G. Morelli, *Nozioni di diritto internazionale*, 7th ed. (Padua, CEDAM, 1967), p. 347; State Institute of Law of the Academy of Sciences of the Soviet Union, F. I. Kozhevnikov *et al.*, general eds., *Kurs mezhdunarodnogo prava* (Moscow, Nauka, 1969), vol. V, especially p. 420.

According to L. Reitzer, the origin of the obligation breached does not entail differences in the régime of responsibility, but, where a treaty is breached by one of the contracting parties, the other party is entitled to denounce it—which he would consider as a form of reprisal—without first having tried to obtain reparation. Whereas, in the case of a breach of a customary obligation, recourse to reprisals would only be admissible when reparation could not be obtained (*La réparation comme conséquence de l'acte illicite en droit international* (Paris, Sirey, 1938), pp. 80 *et seq.* and 213).

It should also be mentioned that certain authors affirm that where there is a breach of obligations established by a multilateral treaty, any State party, even if it is not directly injured, is entitled to invoke the responsibility of the offending State, whereas in the case of a breach of obligations arising from a rule of customary law, these authors appear to consider that only the State directly injured is entitled to invoke this responsibility. In this connexion, see the authors quoted by B. Bollecker-Stern, *Le préjudice dans la théorie de responsabilité internationale* (Paris, Pédone, 1973), pp. 55 *et seq.*

<sup>46</sup> Thus, in the opinion of K. Strupp, "Das völkerrechtliche Delikt", *Handbuch des Völkerrechts*, F. Stier-Somlo, ed. (Stuttgart, Kohlhammer, 1920), vol. III, sect. 4, pp. 9 *et seq.*, the rules of international law that are likely to be breached by a State are both those of customary law and those established in a normative agreement or specific treaties. The same writer holds that a breach of the provisions of the latter is also an infringement of the principle of objective law *pacta sunt servanda* and thus justifies subjecting this infringement to the same treatment as the former. L. Oppenheim (*International Law: A Treatise*, 8th ed. [Lauterpacht] (London, Longmans, 1955), vol. I, p. 343) observes that the term "international delinquencies" applies "both to wrongs consisting of breaches of treaties and to wrongs independent of treaty". B. Cheng (*General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), p. 171) maintains that "It is the violation of the international obligation, whether arising from treaty or from general international law, that constitutes the international unlawful act ...". According to G. Schwarzenberger (*International Law*, 3rd ed. (London, Stevens, 1957), vol. I, p. 582), "... the breach of any international obligation, whether it rests on *lex inter partes* of a treaty, a rule of international customary law or general principle of law recognized by civilized nations, constitutes an international tort". C. F. Amerasinghe (*op. cit.*, p. 43) expresses himself in even more general terms: "The obligation referred to ... is, as pointed out, an international obligation.

(Continued on next page.)

<sup>43</sup> According to conclusion I of the 1926 Guerrero Report to the League of Nations,

"Since international responsibility can only arise out of a wrongful act, contrary to international law, committed by one State against another State, damage caused to a foreigner cannot involve international responsibility unless the State in which he resides has itself violated a duty contracted by treaty with the State of which the foreigner is a national, or a duty recognized by customary law in a clear and definite form." (*Yearbook ... 1956*, vol. II, p. 222, document A/CN.4/96, annex 1.) See also conclusion 3 (*ibid.*)

In the "opinion" prepared by the Inter-American Juridical Committee in 1965 on the "Principles of international law that govern the responsibility of the State in the opinion of the United States of America", article I provides that a State which fails to comply with international law incurs international responsibility; subsequently, reference is made, in the first paragraph of article II, to legislation which is incompatible with international customary law or treaty rights, and, in article III, para. (b), to decisions of tribunals that are irreconcilable with the treaty obligations or the international duties of the State (*Yearbook ... 1969*, vol. II, pp. 153-15, document A/CN.4/217 and Add.1, annex XV).

Finally, para. 165 of the *Restatement of the law* prepared in 1965 by the American Law Institute provides that

"Conduct attributable to a State and causing injury to an alien is wrongful under international law if it

- (a) Departs from the international standard of justice, or
- (b) Constitutes a violation of an international agreement".

The paragraph goes on to state that the "international standard of justice" derives from

"(a) The applicable principles of international law as established by international custom, judicial and arbitral decisions, and other recognized sources or, in the absence of such applicable principles,

(b) Analogous principles of justice generally recognized by States that have reasonably developed legal systems" (*Yearbook ... 1971*, vol. II (Part One), p. 193, document A/CN.4/217/Add.2).

<sup>44</sup> Article 1, para. 2 (*Yearbook ... 1957*, vol. II, p. 128, document A/CN.4/106, annex). The same wording is used in article 2, para. 2 of the revised draft submitted in 1961 (*Yearbook ... 1961*, vol. II, p. 46, document A/CN.4/134 and Add.1, addendum).

29. From the analysis contained in the preceding paragraphs we can see that there is no established practice which points to the existence of any customary rule providing for different régimes of responsibility according to the source of the international obligation breached. Nor is there anything to indicate that such a rule is in the process of formulation at the present time. This being the case, therefore, we can only question whether or not it is advisable to promote changes in the existing state of international law through the introduction—in the name of the progressive development of the law, if one wishes—of differentiation of régimes of responsibility somewhat along the lines of that normally made in the national legal order. Here again, we observe that those few writers who have in the past approached the question from such an angle have generally answered in the negative.<sup>47</sup> Nevertheless, a few observations on this question may still serve a useful purpose. We shall discuss successively the various possible ways of drawing the distinction in question.

30. The formula which comes most readily to mind would be patterned exactly on the model of internal law. The responsibility entailed by the breach of obligations created by treaties would thus be contrasted with the responsibility arising from the breach of obligations established by custom. Nevertheless, as some of the writers cited have pointed out, it would be arbitrary to base oneself solely for that purpose on the apparent double parallelism, internal law-international custom; contracts in internal law-

international treaties.<sup>48</sup> As a justification for the application of different régimes of responsibility, specialists in private law point to the fact that legislation establishes rules of objective law, whereas contracts usually give rise solely to legal relationships which provide only for an exchange of benefits between certain subjects. In addition, legislation is the manifestation of a single will, directed towards a single end and having a single content; contracts, on the other hand, are the result of the expression of two or more separate wills, each having a different content and pursuing different goals, even though they may converge in a single outcome. Furthermore, it is stressed that the obligations created by legislation are aimed at promoting the general and basic interests of society, whereas contracts seek only the protection of individual interests. Even though such assertions cannot be taken as absolute truths and require a number of reservations, they can on the whole be accepted as a description of the actual situation prevailing in internal law. In international law, however, only some—and by no means the greater part—of the vast mass of treaties are of a character similar to contracts in private law. In the legal order of the international community there is no instrument like legislation, which is at the same time voluntary and authoritative, for establishing rules of objective law. Thus, treaties—in particular multilateral treaties—are increasingly relied upon for that purpose since customary rules alone do not suffice to meet the many needs of the international community today.<sup>49</sup> In this category of treaties, the wills of the contracting parties are accordingly not different in content, do not pursue different ends and do not give rise solely to legal relationships between given subjects; together they pursue a single goal, namely the establishment of common rules of conduct. It is also obvious that the object of such multilateral treaties is the protection of interests which are every bit as general and essential for the international community as those with which international customary rules are concerned.<sup>50</sup> A differentiation of régimes of responsibility based on the distinction between treaties and custom as different sources of international obligations could only be the result of a mistaken assumption that the situation existing in international law is the same as the situation peculiar to internal law, which is in fact quite different. Obviously, should the parties concluding a treaty wish to provide for special guarantees for the obligations set out therein by making possible breaches subject to a special régime of responsibility, there is nothing to prevent them from including in

(Foot note 47 continued)

The sources of such obligation are coextensive with the sources of international law in general". A. Verdross (*Völkerrecht*, 5th ed. (Vienna, Springer, 1964), p. 373), refers to the breach of a rule of general or particular international law as the source of the responsibility of subjects of international law. A. Schüle ("Delikt, völkerrechtliches", *Wörterbuch des Völkerrechts*, 2nd ed. (Berlin, de Gruyter, 1960), vol. I, pp. 329 *et seq.*), states that: "It may be a breach of international law of any kind . . . of customary law, whether general or particular, of contractual law, as established in bilateral treaties or multilateral agreements, and, finally, of law expressed in universally recognized general principles". (Translation from German.) I. von Münch (*Das völkerrechtliche Delikt in der modernen Entwicklung der Völkerrechtsgemeinschaft* (Frankfurt-am-Main, Keppler, 1963), p. 136), states that "The rule breached by the wrongful conduct may have arisen from any source of international law whatsoever". (Translation from German.) I. Brownlie (*Principles of Public International Law* (Oxford, Clarendon Press, 1966), pp. 354–355), states that the term "international responsibility" ". . . relates only to the breach of treaty and to other breaches of a legal duty" and adds (p. 356) that in international law ". . . there is no acceptance of a contract and delict (tort) dichotomy".

<sup>47</sup> Some specialists in international law have considered specifically the desirability of extending to international law the distinction drawn in internal legal orders between contractual and extra-contractual responsibility. They have done so by studying the question in the light of the logic of the principles involved rather than by seeking the answer in the actual practice of States. Even so, they have generally come to a negative conclusion: see M. Scerni, "Responsabilità degli Stati", *Nuovo Digesto Italiano* (Turin), vol. XI (1939), pp. 472–473; P. Reuter, "La responsabilité internationale", *Droit international public* (cours) (Paris, Les Nouvelles Institutes, 1955–1956), p. 55; A. P. Sereni, *Diritto internazionale* (Milan, Giuffrè, 1962), vol. III, p. 1515; L. Delbez, *Les principes généraux du droit international public*, 3rd ed. (Paris, Librairie générale de droit et de jurisprudence, 1964), pp. 352–353; G. I. Tunkin, *Droit international public; Problèmes théorétiques* (Paris, Pédone, 1965), pp. 192–193; E. Vitta, "Responsabilità degli Stati", *Novissimo Digesto Italiano* (Turin) vol. XV (1968), pp. 736–737; R. Monaco, *Manuale di diritto internazionale pubblico*, 2nd ed. (Turin, Unione tipografico-editrice torinese, 1971), pp. 549–550.

<sup>48</sup> For a criticism of this parallelism, see Scerni, *loc. cit.* and Vitta, *loc. cit.*

<sup>49</sup> L. Delbez (*op. cit.*, p. 353), draws attention to the fact that there are still writers today who regard international custom as a tacit treaty. For those who hold this view it is impossible to conceive of the application of different régimes of responsibility in the case of breaches of obligations deriving from sources which, to their way of thinking, are of the same nature.

<sup>50</sup> G. I. Tunkin, *op. cit.*, pp. 192 *et seq.*, calls attention to the fact that many rules of international customary law have now been codified by means of multilateral treaties, so that the same obligation is covered by a customary rule and a rule contained in a codification convention. It would not be logical to apply two different régimes of responsibility to two identical actions simply because in one instance the State committing the action was a party to the codification convention and the other was subject only to the obligations resulting from custom.

the text special provisions to that end. Apart from this case, however, there would seem to be no justification for making breaches of obligations arising from conventions subject to a different kind of responsibility from that entailed by breaches of obligations arising from custom.

31. Another possible distinction (much closer to that drawn in internal law between contractual liability and extra-contractual or delictual liability), is that which might be made between the breach of an obligation established by a normative treaty or treaty-law and the breach of an obligation established by a treaty-contract. In the category of treaty-contracts would be included those conventions which give rise only to specific relationships between given subjects, whereas the category of normative treaties would comprise multilateral conventions concluded for the purpose of establishing rules of objective law. The responsibility entailed by the breach of an obligation arising from a normative treaty, like the responsibility entailed by the breach of obligation arising from custom, would thus be considered to be delictual responsibility; the responsibility entailed by the non-observation of an obligation created by a treaty-contract would be defined as contractual responsibility. To adopt such an approach, however, may be of questionable usefulness.<sup>51</sup> While perhaps easy to establish in theory, the distinction between the two categories of treaty may become much less easy to maintain in actual practice.<sup>52</sup> A large grey area inevitably remains between treaties that clearly fall within the treaty-law category and those which unquestionably fall in the category of treaty-contracts. This observation has compelled several writers to abandon the idea of a distinction, despite the attraction the idea has exercised on them. Those who have remained faithful to the idea of a distinction have nevertheless avoided drawing consequences from it in such delicate areas as that of responsibility. To establish a distinction in the régime of responsibility for internationally wrongful acts on such a basis would entail a dangerous confusion of boundaries. This is not likely to serve the true interests of the international community, which require above all that there should be clarity in the definition of the primary legal obligations of States and most especially in the determination of the consequences entailed by the breach of such primary obligations.

32. Some writers see the “constitutional” or “fundamental” principles of the international legal order as an independent and higher source of legal obligations—a source higher than either customary rules or rules contained in treaties. The proponents of such a theory might suggest another distinction with a view to the application of

different régimes of responsibility—the distinction between the breach of an obligation flowing from a “constitutional” principle and the breach of an obligation established by some other source. In support of such a suggestion it could be maintained that a stricter régime of responsibility should be laid down for the breach of an obligation imposed by principles which form the very basis of the system. It cannot be denied that this argument has some semblance of a foundation. However, after careful consideration, the question arises whether, in the event of a breach of certain obligations, a stricter régime of responsibility can really be justified by the fact that such obligations result from a source ranking higher than the source of other obligations. It is only by arbitrarily equating the situation under international law with that under internal law that it has become possible to think of “constitutional” or “fundamental” principles of the international legal order as being determined according to the theory of the sources of this legal system. In the international legal order there is no special procedure for “creating” “constitutional” rules. As most writers admit, the principles which one has in mind when using the terms in question are themselves customary rules, rules embodied in treaties, or even rules emanating from bodies or procedures which have themselves been established by treaties. They are determined on the basis of what they prescribe and not on the basis of their origin. It is undeniable that the obligations imposed on States by some of these principles sometimes affect the vital interest of the international community. However, as has just been stated, the pre-eminence of these obligations over others is determined by their content and not by the process through which they were created. It is precisely because of this content that respect for the obligations in question appears sufficiently important to the international community as a whole to justify more serious consequences for the perpetrator of a breach. In other words, the responsibility entailed by a breach of an international obligation should be more serious not because the obligation has one origin rather than another, or because it is embodied in one document rather than another, but because international society has a greater interest in ensuring that its members act in accordance with the specific requirements of the obligation in question. In the final analysis, any distinction between the régimes of responsibility to be applied to breaches of the different types of obligation should be based on considerations quite other than those of the “source” of those obligations. It will therefore be necessary to consider this important question in detail in another section of this chapter.

33. It seems appropriate at this point to review the observations made and the considerations presented. A study of international judicial decisions and State practice has led to the two following conclusions: under existing international law, the source of the international obligation affected by the conduct of a State has no bearing on the characterization of such conduct as an internationally wrongful act. Nor does it have any bearing on the régime of responsibility applicable to the internationally wrongful act. As to the advisability or inadvisability of promoting a change in the existing situation, a succession of different hypotheses has been advanced but in each case the findings

<sup>51</sup> On this subject P. Reuter (*loc. cit.*, p. 55) rightly observes:

“Although the outlines of this theory remain somewhat vague, it may very well embody a certain amount of truth; it is, however, impossible to derive from it any difference with respect to the régime of international responsibility. Moreover, in French civil law, the differences which exist between the régime of contractual liability and delictual liability are based on express legislative provisions. Furthermore, they are secondary in relation to another fundamental distinction which will be discussed later.” [Translation from French.]

<sup>52</sup> In fact, instead of making a distinction between two separate categories of treaty, a distinction should be made between two different purposes for which a treaty may be used. There is nothing to prevent the parties from using a single treaty to accomplish both purposes.

have been negative. If the International Law Commission agrees with the Special Rapporteur on this point, it will then remain only to decide on appropriate terms for the translation of these findings into an article in the draft.

34. Would the principle that the source of the obligation has no bearing on the characterization of the act of the State committed in breach of the obligation as internationally wrongful be sufficiently clear if the subject were simply passed over in silence? Would it be sufficient to stress in the report of the Commission that this principle is already implicit in the wording of article 3(b) of the draft adopted by the Commission in first reading? An affirmative answer to these questions would not perhaps be wrong. However, it is not at all certain that the text of article 3 (b) alone would suffice to rule out an interpretation—which, while it might be tendentious, would by no means be impossible—according to which the condition indicated by this clause would not necessarily relate to any obligation irrespective of category. In any event, it seems preferable that the State which has suffered an infringement of its rights should be able to base its legitimate reaction on a clear and explicit text. It would be regrettable if, because the convention made no mention of this point, the State which committed the infringement were provided with an excuse, however feeble, for evading its responsibility. Furthermore, the statement of the principle that the breach of an international obligation by the State must be considered as an internationally wrongful act, regardless of the source of the obligation in question, appears essential for another reason, namely, that this principle is the logical premise of the other principle which must also be stated, namely that a difference in the source of the obligation breached in no way justifies a difference in the régime of responsibility to be applied.

35. As for the formulation to be used, there is no need to repeat here what has already been emphasized in the preliminary considerations of this chapter—that it is absolutely essential to avoid embarking on an exhaustive enumeration of all possible sources of international obligations. For example, any attempt to find an incidental answer to the question whether, through a given special procedure, it is possible to create international obligations incumbent on States would involve us today in difficulties even more serious than those encountered by the 1930 Conference for the Codification of International Law. The solution recommended by the Special Rapporteur would be to avoid mentioning any type of “source” in the text of the article. The expression “regardless of the source of the international obligation breached”<sup>53</sup> therefore appears to be both the simplest and the most comprehensive. If it was felt absolutely essential to be more explicit with regard to the concept in question, a clarification, by no means exhaustive in character, could be added. For example, the words “custom, treaty or other” could be placed in parentheses after the word “source”. It will be for the Commission to decide.

<sup>53</sup> It has already been noted (para. 27 and note 44 above) that Mr. García Amador proposed similar wording in article 1, para. 2, of the preliminary draft submitted by him in 1957 and article 2, para. 2, of the revised draft submitted in 1961.

The formulation of the principle that follows, that the source of the obligation breached has no bearing on the régime of responsibility to be applied, should not present any difficulty.

36. On the basis of the foregoing considerations, it appears possible to propose the adoption of the following text:

#### Article 16. Source of the international obligation breached

1. The breach by a State of an international obligation incumbent upon it is an internationally wrongful act, regardless of the source of the international obligation breached.

2. The fact that the international obligation breached results from one source rather than from another does not justify, in itself, the application of a different régime of responsibility to the breach complained of.

#### 3. FORCE OF AN INTERNATIONAL OBLIGATION

37. We have already shown<sup>54</sup> that, in addition to the question of the “source” of the obligation breached, we have to consider another question, still in connexion with the formal aspects of the obligation, namely, that of its “force”. We have to consider whether the fact that the international obligation was *in force* at the time when the State engaged in conduct incompatible with the obligation is or is not an essential condition for concluding that an international obligation has been breached.

38. The problem is then to establish how the question of the time when the obligation arose and the time when it expired—if it did—affects the characterization of an act of the State as a “breach of an international obligation” and consequently of an “internationally wrongful act” of the said State. The problem as thus stated arises as a result of the succession in the course of time of the rules of international law and of the obligations laid on States by those rules. If obligations did not change in the course of time, there would be no problem; all that would be needed in each specific case in order to conclude that the conduct of a State constituted a breach of an international obligation of the State and thus an internationally wrongful act would be to establish that the conduct of the State had not been in conformity with what was required by an international obligation incumbent upon it at the time. But the real situation is quite different. The international legal order is far from being a static system: international obligations, like the norms from which they derive, come into being and then die. And since conduct of a State takes place at a given time or over a given period, there are three possible cases to be considered: (a) either the conduct in question is different from that required by an obligation which came into existence but also ceased to exist for the State concerned before it adopted the said conduct; (b) or the conduct is different from that required by an obligation which came into existence for the State concerned before it adopted the said conduct but to which it was still subject at the time it adopted the said conduct; (c) or the conduct is different from that required by an obligation which was not incumbent on the State concerned until after

<sup>54</sup> See para. 8 above.

it adopted the said conduct. We must therefore consider the question, what rule of international law is applicable to the three possible cases we have just stated?

39. In the case of international disputes, the problem referred to above has generally been solved implicitly rather than explicitly. It is rare to find in the jurisprudence of the practice of States a firm statement expressly relating to the point with which we are concerned. Among the few cases of this kind, mention should be made first of certain opinions which may be applicable in each of the three possible cases set out above.

40. Sometimes these opinions are not directly concerned with the determination of the existence of a breach of an international obligation; they may nevertheless be applicable in this case also. The best known statement of the kind is to be found in the award rendered on 4 April 1928 by the arbitrator, Max Huber, in the *Island of Palmas* case between the Netherlands and the United States of America. The point which had to be decided was whether the fact that Spain had discovered the Island of Palmas in the 16th century was or was not sufficient to establish Spain's sovereignty over the island. The arbitrator took the view that the rules governing the acquisition of territories which were *res nullius* had changed since the time the island was discovered. What he had to decide first, therefore, was whether the question should be settled on the basis of the rules in force at the time of the discovery, or on the basis of the rules in force at the time when the dispute arose or at the time it was settled by the arbitral award. On this point the arbitrator stated:

Both Parties are also agreed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.<sup>55</sup>

Admittedly the occasion of this opinion was the determination of the juridical scope of a lawful act; it is nonetheless true that it was formulated in such general terms that it can be applied in other areas also,<sup>56</sup> including that of the determination of the conditions for the existence of a breach of an obligation and consequently of the existence of an internationally wrongful act.

41. There are also a number of opinions relating more specifically to the determination of the existence of a breach of an international obligation. The compromise relating to certain disputes in the matter of international responsibility specify that the arbitrator shall apply to the dispute the rules of international law in force at the time when the acts of which the lawfulness is disputed took place. Thus, for example, article 4 of the compromise of 24 May 1884 between the United States and Haiti in the *Pelletier* case

<sup>55</sup> United Nations: *Reports of International Arbitral Awards*, vol. II, (*op. cit.*), p. 845.

<sup>56</sup> P. Tavernier, *Recherche sur l'application dans le temps des actes et des règles on droit international public (Problèmes de droit intertemporel ou de droit transitoire)*, (Paris, Librairie générale de droit et de jurisprudence, 1970), p. 129, observes: "the rule formulated by Max Huber was expressed in deliberately broad terms and that confers on it a scope which goes well beyond the simple case under consideration ... The notion of appreciation covers, in our opinion, not only the question of the interpretation of instruments and rules but also that of the determination of their validity and their effects" [Translation from French].

specified that, before entering on his duties, the arbitrator should make the following declaration:

I do solemnly declare that ... all questions laid before me by either Government in reference to said claims shall be decided by me according to the rules of International Law existing at the time of the transactions complained of.<sup>57</sup>

In the declarations exchanged between the Government of the United States of America and the Russian Government on 26 August/8 September 1900, for the submission to arbitration of certain disputes involving the international responsibility of the Russian Empire, it is stated:

... The Arbitrator, guided by the general principle of the law of nations and the spirit of the international agreements applicable in the matter, shall decide with regard to each claim formulated against the Imperial Russian Government, whether it is well-founded, and if so, whether the facts on which each claim is based have been proved.

It is understood that this stipulation shall have no retrospective effect and that the Arbitrator will apply to the cases in dispute the principles of the law of nations and the international treaties which were in force and binding upon the parties involved in the dispute at the time when the seizure of the above ships took place.<sup>58</sup>

It seems beyond doubt that these stipulations were made by way of explicit confirmation of a generally recognized principle and not as a departure from that principle.

42. Each of the three possible cases contemplated above can now be examined separately. The easiest to settle is the first case, where the international obligation which required the State to adopt some particular conduct ceased to exist for that State before it adopted different conduct. If at the time of the conduct with which it is charged, the State is no longer under obligation, there can be no question of attributing to it "a breach of an international obligation" as provided for in draft article 3 (b) and of regarding it as having committed an internationally wrongful act. Whenever the problem has arisen in this form in a specific case, it has been settled in accordance with that rule, either by diplomacy or judicially. Admittedly, the rule has never, as far as can be ascertained, been stated explicitly, but that could well be because no one has ever thought of questioning its validity. The rule is so obvious that there is no point in stating it expressly. This first case therefore need detain us no longer.<sup>59</sup>

<sup>57</sup> 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. 2, p. 1750. For French text, see G. F. de Martens, ed., *Nouveau Recueil de traités* (Göttingen, Dieterich, 1887), 2nd series, vol. IX, p. 801.

<sup>58</sup> United Nations, *Reports of International Arbitral Awards*, vol. IX (United Nations publication, Sales No. 59.V.5), p. 58 [translation from French].

<sup>59</sup> There is one further point worth remembering. Very occasionally, a treaty provides that some of its provisions shall continue to apply after the termination of the treaty itself. Article XIX of the Convention on the Liability of Operators of Nuclear Ships, of 25 May 1962, has been mentioned in this connexion (*Yearbook ... 1964*, vol. II, p. 179, document A/5809, chap. II, Sect. B, draft articles on the law of treaties, para. 6 of the commentary to article 56; and P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1967), vol. I, p. 219). The article in question simply states that certain obligations created by the Convention with regard to damage caused by nuclear incidents shall remain in force for a given period, notwithstanding the termination of the Convention and the other obligations it creates. Consequently, if a nuclear incident takes place after the termination of the treaty and a State

43. In the second case, conduct contrary to the obligation is adopted by the State at a time when the obligation is still in force. A positive solution to this question might be thought just as obvious as the negative solution to the previous one, for the general view would be that in this case the conduct of the State undoubtedly represents a breach of an international obligation incumbent on that State, and consequently is an internationally wrongful act attributable to it. But things are not always so simple. This conclusion may be irrefutable in cases where the obligation is still in force at the time of settlement of the dispute—no State practice or international jurisprudence need be cited to support that—but in cases where the obligation ceases to exist between the time the act is committed and the time when the dispute fails to be settled, the conclusion may be different. In most internal law systems, the principle generally applied in matters of civil liability is that reparation can be sought for damage caused by an act committed by someone in breach of an obligation which was incumbent on him at the time when he committed the act, regardless of whether the obligation has ceased by the time judgment is given. In penal law, on the other hand, the principle is that no criminal liability attaches to a person who commits an act in breach of an obligation which was incumbent on him at the time when he committed the act, but has ceased to exist at the time when judgment is given. This follows the general principle that, where there is a succession of penal provisions, it is always the provision most favourable to the accused that is applied. The question therefore arises, what is the situation in international law?

44. *A priori*, it seems quite logical that international law should reject the internal penal law principle of applying the most favourable law to the accused. Although such a principle may be justified in a relationship where the individual is opposed to society, as represented by the State, it seems out of place in a relationship where one State is opposed to another State. To apply the most favourable law to a State which commits an offence would mean applying the most unfavourable law to the State which is injured by the offence. Moreover, if we follow the general logical principle stated by Max Huber in his award in the *Island of Palmas* case,<sup>60</sup> we are obliged to answer in the affirmative the question whether international responsibility exists where the conduct of a State at the time the conduct takes place is in breach of an international obligation then in force, regardless of whether the obligation has ceased to be in force by the time the dispute is settled.

45. In any case, to proceed inductively in accordance with our usual practice, what appears to be decisive is the fact that in specific cases where the question has arisen, the attitude of adjudicators and diplomats fully confirms the conclusion which would seem to follow in the first place from considerations of principle. To begin with, there are

(Foot-note 59 continued)

fails to discharge the obligations contemplated in article XIX, an internationally wrongful act and responsibility will certainly result, but they will do so because the obligation was in force when the State's conduct took place, and not because, as a matter of exception, that conduct is characterized as internationally wrongful despite having taken place after the obligation ceased to exist.

<sup>60</sup> See para. 40 above.

the awards delivered by J. Bates, umpire of the United States-Great Britain Mixed Commission set up under the Convention of 8 February 1853. The cases referred to the Commission included a number relating to the conduct of British authorities towards American vessels engaged at the time in the slave trade. The United States claimed compensation from Great Britain because British authorities had freed a number of slaves who were on board American vessels and belonged to American nationals, or had seized vessels fitted out for the slave trade. In the view of the umpire, the answer to the question whether the conduct of the British authorities was a breach of an international obligation depended upon the answer to the preliminary question whether slavery was "contrary to the law of nations". In the umpire's opinion, if the answer to the preliminary question was in the negative, the conclusion must be that the conduct of the British authorities was a breach of the international obligation to respect and protect the property of foreign nationals and to afford shelter in British ports to foreign vessels in distress. In that case, the British Government would be required to pay compensation, but it would not be if the answer to the preliminary question was in the affirmative. Now the incidents referred to the Commission had taken place at different times. The umpire therefore set out to establish whether or not at the time each incident took place, slavery was "contrary to the law of nations". On that basis, he found as regards the earlier incidents—dating back to a time when, in his view, the slave trade still existed by law in "several countries", including some British dominions—that the conduct of the British authorities was a breach of an international obligation and entailed the international responsibility of Great Britain.<sup>61</sup> The later incidents, on the other hand, he held to have occurred when slavery, in his opinion, had been "prohibited by all civilized nations", including the United States, whose protection the slave owners were accordingly unable to claim. No responsibility, he therefore held, could be imputed to Great Britain.<sup>62</sup> To sum up, the umpire laid

<sup>61</sup> This is what happened in the case of the *Enterprise*, which in 1835, being in distress, had had to put into harbour in the British colony of Bermuda. The local authorities had freed the slaves found on board. While condemning slavery on grounds of justice and humanity, the umpire said that it was not "contrary to the law of nations" at the time and that the *Enterprise* was as much entitled to protection as though her cargo consisted of any other description of "property". He therefore found the behaviour of the Bermuda authorities a breach of the law of nations and awarded compensation, to be paid by Great Britain to the owners of the slaves (J. B. Moore, *op. cit.*, vol. 4, pp. 4372-4373). The umpire applied the same principles in the *Hermosa* and *Creole* cases (*ibid.*, pp. 4374 *et seq.*). For the French text of these awards, see A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux* (Paris, Les éditions internationales, 1957), vol. I, pp. 703 *et seq.*

<sup>62</sup> He made this award in the case of the *Lawrence*, a vessel which in 1848 was forced to seek the coast of Sierra Leone, a country under British dominion. When the vessel arrived at Freetown, it was seized, condemned and confiscated, along with its cargo, for having been equipped for the slave trade in a British port. The umpires award stated that "since the African slave trade, at the time when the vessel was condemned, was prohibited by all civilized nations, it was contrary to the law of nations"; and since it was prohibited by United States law, the owners of the *Lawrence* could claim no protection from their Government. The umpire therefore held that the owners of the *Lawrence* could "have no claim before this Commission" (Moore, *op. cit.*, vol. 3, pp. 2824-2825). (For the French text of this award, see A. de Lapradelle and N. Politis, *op. cit.*, p. 741.) The umpire followed the same principles in his award in the *Volusia* case (*ibid.*).



down as a condition for establishing that there had been a breach of an international obligation, and consequently a wrongful act entailing responsibility, that the conduct of the organs of the State has been contrary to an obligation *in force* at the time when the conduct took place. And having ruled that at the time in question the obligation still existed, the fact that it later ceased to exist and was no longer in force at the time of the award was in his opinion irrelevant.

46. The same attitude is found in the awards of T. M. C. Asser, who was appointed arbitrator between the United States of America and Russia by the *compromis* of 26 August/8 September 1900, the terms of which are recalled above.<sup>63</sup> The origin of the disputes referred to the Arbitrator lay in the seizure and confiscation by the Russian authorities, outside Russia's territorial waters, of United States vessels engaging in seal-hunting. In his award in the *James Hamilton Lewis* case, rendered on 29 November 1902, the Arbitrator states:

Whereas the Arbitrator has to decide:

I. Whether the seizure and confiscation of the schooner *James Hamilton Lewis* and its cargo, as well as the imprisonment of its crew, are to be considered as unlawful acts;

II. ...

*Ad. I.* Considering that this question should be settled according to the general principles of the law of nations and the spirit of the international agreements in force and binding upon the two High Parties at the time of the seizure of the vessel;

That at that time there was no Convention between the two Parties providing for a derogation in the special case of seal-hunting, from the general principles of the law of nations with respect to the breadth of territorial sea;

...

Considering that any agreements concluded between the Parties after the date of the seizure and confiscation of the *James Hamilton Lewis* cannot affect the consequence resulting from the principles of international law generally recognized at the time when those acts were performed;

...

The Arbitrator then examines the question whether, according to the principles in force at the time of the alleged acts, Russia had the right to seize the American schooner. Having answered that question in the negative, he concluded that "Since the seizure and confiscation of the *James Hamilton Lewis* and its cargo, as well as the imprisonment of the crew, must consequently be considered as unlawful acts"; Russia was required to pay damages to the United States for the acts in question.<sup>64</sup> Mr. Asser therefore states even more clearly than Mr. Bates the principle that conduct of a State constitutes an internationally unlawful act entailing its international responsibility if such conduct is contrary to an international obligation in force when the conduct took place, even where the obligation has subsequently ceased to exist and is no longer in force at the time of the award. It is true that, in the case in point, the arbitrator was bound by the *compromis* itself to apply the law in force at the time the acts were performed; consequently, his position is primarily a reflection of a

<sup>63</sup> See para. 41 above.

<sup>64</sup> United Nations, *Reports of International Arbitral Awards*, vol. IX (*op. cit.*), pp. 69 *et seq.* [translation from French]. Arbitrator Asser developed the same arguments in his decision in the *C. H. White* case (*ibid.*, p. 74 *et seq.*).

treaty rule. However, as already stated<sup>65</sup> all the indications are that, by expressly embodying the principle in the *compromis* the parties simply wished to confirm the application of the principle in question and not to establish an exception to a different principle hallowed by custom.

47. More recently, we find the same principle stated once again in the decision rendered on 5 October 1937 by Arbitrator J. C. Hutcheson in the *Lisman* case. Before examining the facts of the complainant's claim, the Arbitrator ruled that these facts

are to be read, examined, and interpreted in the light of the applicable principles of international law, as that law existed in 1915, when the acts complained of are alleged to have transpired, the wrongs complained of to have been inflicted, and the claim, if ever, arose.<sup>66</sup>

Lastly, it may be recalled that the International Court of Justice has recently recognized the same principle in its Judgment of 2 December 1963 in the *Northern Cameroons* case between Cameroon and the United Kingdom. The Court found that

if during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship Agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust.<sup>67</sup>

48. All the decisions analysed therefore confirm the validity of the principle that a State shall be held to have incurred international responsibility if it has adopted conduct different from that required by an international obligation incumbent on it at the time such conduct took place. They also confirm that this conclusion is in no way impaired if the obligation has ceased to exist for the State concerned by the time when the dispute arising from the unlawful conduct falls to be settled. The International Law Commission itself emphasized this point by expressly referring to the above-mentioned Judgment of the International Court of Justice when adding the following commentary to article 56, of the draft articles on the law of treaties adopted in first reading at its sixteenth session:

On the other hand, the treaty continues to have effects for the purpose of determining the legality or illegality\* of any act done while the treaty was in force or of any situation resulting from its application; in other words, rights acquired under the treaty, whether in consequence of its performance or its breach,\* do not lapse on its termination.<sup>68</sup>

49. That being the case, the question now arises whether the rule thus stated is really an absolute rule. As far as we know, there are no instances of exceptions to be found in international practice and jurisprudence. But is that sufficient reason for concluding that there cannot be any?

<sup>65</sup> See para. 41 above.

<sup>66</sup> *Ibid.*, vol. III (United Nations publication, Sales No. 1949.V.2), p. 1771.

<sup>67</sup> *I.C.J. Reports 1963*, p. 35.

<sup>68</sup> *Yearbook ... 1964*, vol. II, p. 179, document A/5809, chap. II, sect. B, para. 6 of the commentary to article 56. Article 56, para. 2 lays down that the provisions of a treaty do not apply "to a party in relation to any fact or act which takes place or any situation which exists after the treaty has ceased to be in force with respect to that party, unless the treaty otherwise provides" (*ibid.*, p. 177). Referring, in the same commentary, to draft article 53, the Commission noted, in re-examining that article, that "its wording might need some adjustment in order to take account of acquired rights resulting from the illegality of acts done while the treaty was in force" (*ibid.*, p. 179).

In our view, it is important to consider certain possible cases which, though they may not have arisen in the past and are unlikely to arise in the future, except very seldom, should nevertheless not be disregarded. This will perhaps be clearer if we have another look at the freeing-of-slaves cases mentioned above.<sup>69</sup> In a first series of cases, Umpire Bates held Great Britain responsible for having freed a number of slaves found aboard a United States vessel, since in his opinion such an act was a breach of the international obligations incumbent on Great Britain at the time when the slaves were freed. Yet he acknowledged, at least implicitly, that such an act would have been lawful if it had taken place at the time when he rendered his award. Now if we ourselves had to decide the *Enterprize* case, should we reach the same conclusion as Umpire Bates? There is no doubt that we should be loath to do so,<sup>70</sup> for the simple reason that, between the date of the Umpire's decision and the present day, a profound change has occurred in the rules of international law concerning the question to which this case related. We should be forced to take a different decision from Umpire Bates by the fact that slavery and the slave trade are no longer merely—as Bates noted at the time—practices prohibited by the law of “civilized nations”: they have become practices banned by a humanitarian rule of international law which is considered by the international community as a whole, as fundamental and, we believe, “peremptory”.<sup>71</sup> States have reciprocally undertaken to combat such practices by all the means at their disposal. This is therefore a rule which, in our opinion, would prevent us, even as far as the past is concerned, from finding a source of international responsibility in conduct which has in the meantime become not only “lawful”, as at the time of the Bates' decisions, but also “due”: the refusal to grant protection to individuals engaging in a practice which is unanimously condemned, and action designed to prevent this practice from attaining its inhuman goals.

50. Of course, it could be objected that it is difficult to imagine an arbitrator being entrusted, now, with the settlement of a dispute caused by conduct adopted at a time when the slave trade was still internationally lawful. But other situations can be envisaged in which the lapse of time between the moment when a State adopted conduct contrary to an existing international obligation incumbent upon it, and the moment when that obligation was abrogated or even replaced by a contrary obligation, as a result of the supervention of a “peremptory” rule of international law, would not be so long. For instance, it is

<sup>69</sup> See para. 45 above.

<sup>70</sup> Whereas we would probably have no hesitation in settling a dispute of the kind in the *James Hamilton Lewis* case (see para. 46 above) in terms similar to those of Arbitrator Asser's award.

<sup>71</sup> No one can challenge the *jus cogens* character—as defined in article 53 of the Vienna Convention on the Law of Treaties<sup>a</sup>—attaching to the rule prohibiting slavery and the slave trade and binding all States to cooperate in punishing this practice. It is difficult to imagine a more typical example of a void treaty than a treaty concluded between two States for mutual assistance in the trade in slaves.

<sup>a</sup> For the text of the Convention (referred to hereafter as the “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.V.5), p. 289.

not inconceivable that an arbitrator could today be called upon to decide an old dispute concerning the international responsibility of a State which, being required under a treaty in force to deliver arms to another State, had refused to fulfil its obligation, knowing that the arms were to be used for the perpetration of genocide or aggression, and had done so before the norms of *jus cogens* proscribing genocide and aggression had been adopted. Can anyone imagine an arbitrator condemning a State which had refused to pay compensation for evading, at that time, the fulfilment of an obligation which would today appear as participation in an international crime? There are other possible cases too which could arise in the future. Consequently, if the Commission agrees, the Special Rapporteur would be inclined to recognize an exception<sup>72</sup> to the basic rule that the lawfulness or unlawfulness of particular conduct is decided by reference to the obligations incumbent on the State at the time when the conduct was adopted: the exception would state that conduct of a State which, although wrongful at the time of its adoption would, in the light of contemporary international law, be judged not only lawful, but legally required under a peremptory rule of that law, does not entail the international responsibility of that State.

51. It remains to examine the third case,<sup>73</sup> which may be summarized as follows: The State adopts a given conduct at a time when that conduct is not contrary to any international obligation incumbent upon it; subsequently, a new obligation is imposed on the State, in the light of which conduct such as that previously adopted by the State is characterized as wrongful. Is it possible to see a breach of the new obligation, and consequently an internationally wrongful act entailing responsibility, in the conduct adopted by the State at a time when the new obligation did not yet exist or, at least, did not exist for the State implicated? That is the question.

52. In internal law, the principle that a person may not be held criminally liable for an act which was not prohibited at the time he committed it (*nullum crimen sine lege praevia*) is a general rule of all legal systems. It is always included in the general provisions of the penal code and sometimes even in the constitution of the State: in the latter case there is even a prohibition on derogation from the principle by ordinary legislation. The same principle is stated in the Universal Declaration of Human Rights of 10 December 1948,<sup>74</sup> in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950,<sup>75</sup> and in the International Covenant on Civil and

<sup>72</sup> This exception would not, of course, have any retrospective effect on the lawfulness of what might have happened at the time as a legitimate reaction to conduct then considered wrongful.

<sup>73</sup> see para. 38 above.

<sup>74</sup> General Assembly resolution 217 A (III). Article 11, paragraph 2 of the Declaration provides that:

“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed . . .”.

<sup>75</sup> United Nations, *Treaty Series*, vol. 213, p. 221. Article 7, paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides that:

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed . . .”.



Political Rights of 16 December 1966.<sup>76</sup> In matters of civil responsibility, the principle in question is not so often expressly stated, but there is no doubt that in this sphere too it constitutes the general rule. Moreover, the *raison d'être* of the principle is obvious: first, since the main function of rules imposing obligations on subjects of law is to guide their conduct in a certain direction and divert it from another, this function can only be fulfilled if the obligation exists before the subjects prepare to act; secondly, and above all, the principle in question provides a safeguard for the said subjects of law, since it enables them to foresee the legal consequences of their acts or omissions<sup>77</sup>—or, more precisely, to establish in advance what their conduct must be if they wish to avoid a penal sanction or having to pay compensation for damage caused to others.

53. As this is a general principle of law universally accepted and based on reasons which are undeniably valid for every legal system, we think it evident that the principle indicated must also be applicable to the international responsibility of States. The European Commission of Human Rights has often had occasion to state this principle. The clearest statement on the subject is to be found in its decision on application 1151/61. A Belgian national, relying on article 5, paragraph 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, claimed compensation from the Government of the Federal Republic of Germany for the damage caused him by the detention and death of his father in a German concentration camp in 1945. The Commission rejected this claim, pointing out that:

While it is true that article 5, paragraph 5 of the Convention, relied upon by the applicant, provides that "Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation", the Commission has nevertheless found, on a number of occasions, that only a deprivation of liberty subsequent to the entry into force of the Convention for the respondent State can be effected "in contravention of" the aforesaid article 5 . . . ; and that the arrest and detention of the applicant's father, however blameworthy they may have been from the standpoint of morality and fairness, took place at a time when the Convention did not yet exist and to which the Contracting States have not made it retroactively applicable.<sup>78</sup>

Moreover—and this is the most important point—an examination of international practice and jurisprudence shows that the principle referred to has been implicitly

applied—except in the cases which will be mentioned later—to all disputes in which the question has in fact arisen. In affirming or denying the existence of State responsibility, reference has always been made to an international obligation in force at the time when the act or omission of the State took place. No significance has ever been attributed, for the purposes of the conclusion to be reached, to the fact that an obligation subsequently supervened and was thus incumbent on the State at the time of settlement of the dispute.

54. The International Law Commission itself appears to have recognized the validity of the principle set out here when it was preparing the draft convention on the law of treaties, even if it did so less explicitly than when it expressed its support for the principle applicable to the second of the three possible cases we are considering. Article 53, paragraph 1, of the draft Convention on the law of treaties as approved by the Commission on first reading read as follows:

. . . the lawful termination of a treaty:

(b) Shall not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty.<sup>79</sup>

It is an inescapable consequence of such a provision that any conduct authorized by a treaty and adopted by the State while the treaty is in force continues to be considered lawful even if prohibited by a customary rule coming into force between the parties after the termination of the treaty or by a new rule laid down by a new treaty. We have already quoted<sup>80</sup> the passage from the Commission's commentary to article 56, paragraph 2, which states that, after its termination, "the treaty continues to have effects for the purpose of determining the legality or illegality of any act done while the treaty was in force or of any situation resulting from its application; in other words, rights acquired under the treaty, whether in consequence of its performance or its breach, do not lapse on its termination." Admittedly, this commentary relates primarily to the case of conduct prohibited by a rule of a treaty which has terminated, but permitted by a customary or treaty rule which has succeeded it. But it can also relate to the converse case, that of conduct authorized by a rule of the treaty but prohibited by a customary or treaty rule which has succeeded it.<sup>81</sup>

55. In conclusion we can say that there is no doubt regarding the legal force as a basic rule, of the principle which rules out the possibility of an internationally wrongful act and, consequently, of international responsibility, where the obligation alleged to have been breached entered into force for the State at a time subsequent to its adoption of the conduct complained of. It only remains for us to consider whether, here again, the rule should or should not allow for exceptions.

<sup>79</sup> *Yearbook . . . 1963*, vol. II, p. 216, document A/5509, chap. II, sect. B.

<sup>80</sup> See para. 48 above.

<sup>81</sup> The wording of article 56 was changed in the Commission's final draft and in the text subsequently adopted at Vienna, so that the question of the legality or illegality of acts committed when the treaty was in force is no longer a direct issue.

<sup>76</sup> General Assembly resolution 2200 A (XXI), annex. Article 15, paragraph 1 of the Covenant provides that:

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed . . ."

<sup>77</sup> M. Sørensen, "Le problème dit du droit intertemporel dans l'ordre international", Provisional report, *Annuaire de l'Institut de droit International*, 1973 (Basle), vol. 55, p. 21, notes that:

"If a new rule were thus applied to acts which took place before it was even possible to suspect its existence, that solution would conflict with one of the primary purposes of any legal order, expressed in the term 'legal stability'. The essence of this concept, as already indicated above, is that the subject of law must be able to appreciate the legal consequences of his acts at the time when he undertakes them. This is an elementary and fundamental requirement of a legal order". [Translation from French.]

<sup>78</sup> Council of Europe, European Commission of Human Rights, *Collection of Decisions* (Strasbourg), No. 7 (March 1962), p. 19 [translation from French].

56. Theoretically, exceptions to this principle are conceivable. Even in internal law, and even in the matter of the criminal liability of the individual—the field in which this principle has been proclaimed with most force—it is sometimes subject to exceptions.<sup>82</sup> We cannot therefore rule out *a priori* the possibility of exceptions in international law, a legal system in which the reasons for the application of the principle of non-retroactivity may even seem less strict. However, the theoretical possibility of exceptions to the general rule does not mean that exceptions are in fact allowed for by international law, or that it is desirable to allow for them. *De jure condito* we may say that there is not, to our knowledge, a single case in which, on the strength of some customary general rule laid down after the event, a State has been held to be responsible for an act that was not internationally wrongful at the time when it was committed. Furthermore, leaving aside for the moment the question of what individual treaties may say on the subject, we can affirm without fear of contradiction that it is out of the question that general international law should provide for exceptions to the rule. *De jure condendo*, moreover, we see no valid reason to apply to international law certain “precedents” furnished by internal criminal law, where acts that were previously permitted, and that took place before the adoption of the new law, have been held retroactively to be punishable. The situation at international law is too radically different for anyone even to talk of “precedents” in this connexion.<sup>83</sup> The principle of the non-retroactivity of international legal obligations—and, in particular, of the impossibility of considering *ex post facto* as wrongful acts which were not wrongful at the time they were committed—should not, we feel, be discarded, even if the new law prohibiting such acts henceforth should be a rule of *jus cogens*. For it would not then be a matter, as in the second of the three possible cases under consideration, of declaring retrospectively that conduct regarded as wrongful at the time it took place does not entail responsibility. It would be a matter of attributing retrospectively the character of wrongfulness to an act which at the time of its commission was not wrongful and this would be a much more serious distortion of the basic principle.<sup>84</sup> An effect of such

<sup>82</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms (article 7, para. 2) and the International Covenant on Civil and Political Rights (article 15, para. 2) provide in more or less identical terms that the general principle stated, as we have seen, in paragraph 1 of those articles shall not prejudice the trial and punishment of a person guilty of an act or omission which, at the time when it was committed, was criminal “according to the general principles of law recognised by civilised nations” or “according to the general principles of law recognized by the community of nations”. This exception however, does not affect the applicability of a law which has entered into force at a time subsequent to the commission of the act. It establishes the primacy, in relation to “national or international” positive law, of a principle of law which is generally recognized and which was in force at the time when the act was committed.

<sup>83</sup> Furthermore, in internal criminal law there are sometimes special punitive provisions which, in certain circumstances, lay down harsher penalties for certain crimes or even create new crimes where none existed before, all with retroactive effect. Even in internal law, however, it is inconceivable that criminal law should exclude in principle, for the future, the application of the general rule of non-retroactivity to certain classes of obligation, as would have to be done in international law if we were to embark on that course.

<sup>84</sup> Even at particularly grave moments in history, such as those at the end of the Second World War, when the punishment of acts such as

magnitude would hardly be acceptable to the legal conscience of members of the international community.

57. What has been said above about the position in general international law does not, of course, preclude the possibility that a treaty might apply different criteria. Just as there is nothing to prevent a treaty from providing expressly that certain acts, although contrary to international obligations in force at the time of their commission, shall henceforth cease to be considered as wrongful acts entailing responsibility, so there is nothing to prevent a treaty from providing that certain forms of conduct of one of the parties at a time when there was no prohibition of such conduct shall be considered wrongful and entailing responsibility. The arguments for accepting the principle advanced in the foregoing paragraphs lose much of their force if the parties concerned agree to allow exceptions to that principle. The only problem that might arise in that connexion is the possibility that there might be a rule of *jus cogens* that a State cannot be held responsible for conduct which was not wrongful at the time when it took place. In that case, any treaty provision allowing for exceptions to that rule would be void.<sup>85</sup> It is doubtful whether the principle in question can be regarded as a principle of *jus cogens*; however, that problem does not have to be solved in the present article.

58. It may be useful, on the other hand, to add one small point of detail. A treaty sometimes provides that the obligations it imposes on the parties shall be retroactive. This is expressly permitted by article 28 of the Vienna Convention.<sup>86</sup> Now the fact that the clauses of a treaty provide for retroactive obligations in no way signifies that the parties have necessarily agreed to consider unlawful the conduct adopted by one of them before the treaty entered into force, which would naturally be different from the conduct required by the treaty. D. Bindschedler-Robert cites as an example the Convention of 17 October 1951 between Italy and Switzerland, concerning social insurance.<sup>87</sup> This Convention stipulates that it shall enter into force on the day of the exchange of instruments of ratification (which took place on 21 December 1953), but with retroactive effect to 1 January 1951. Obviously this stipulation does not mean that a government bound by the treaty to provide certain insurance services and not having provided those services before the treaty entered into force, is therefore to be considered as the author of an internationally wrongful act. The stipulation in question only imposes on the Government concerned the obligation, after the entry into force of the treaty, to provide the required services for

starting a war of aggression or committing genocide had to be undertaken, care was taken to show that the prohibition of such crimes was covered by the international law in force at the time of their commission, and thus that there was no question of applying new international obligations retroactively.

<sup>85</sup> An “ordinary” law in a system of internal law would also be void if it derogated from the principle *nullum crimen sine lege praevia* if, in the system in question, that principle was enshrined in the constitution and thus could be derogated from only in virtue of a constitutional law.

<sup>86</sup> The non-retroactivity of the provisions of a treaty is only affirmed in the Convention subject to the reservation “Unless a different intention appears from the treaty or is otherwise established . . .”.

<sup>87</sup> D. Bindschedler-Robert, “De la rétroactivité en droit international public”, *Recueil d'études de droit international en hommage à Paul Guggenheim* (Geneva, Faculty of Law, Institute universitaire de hautes études internationales, 1968), p. 193.

the two previous years also.<sup>88</sup> As the above-mentioned writer notes, in a case of this kind

... the extent of obligations to provide ... services depends on previous facts and situations. Nevertheless, the rule of conduct thus established is not in itself retroactive, it only creates obligations for the future, and does not mean that the conduct of a State during the period preceding the convention is to be judged, as to its legality, in the light of the convention, so that any such conduct would constitute a wrongful act, with all the consequences entailed thereby.<sup>89</sup>

59. The writers who have dealt with the international responsibility of States have devoted only very limited attention to the problem discussed in this section. It is rather in works on the succession of rules of international law in the course of time that we find some cursory investigations of this subject. Among the most interesting may be mentioned a monograph by P. Tavernier,<sup>90</sup> the reports of M. Sørensen to the *Institut de droit international*,<sup>91</sup> and articles by J. T. Woodhouse,<sup>92</sup> H. W. Baade,<sup>93</sup> D. Bindschedler-Robert,<sup>94</sup> and M. Sørensen.<sup>95</sup> The manuals of international law of P. Guggenheim,<sup>96</sup> Ch. Rousseau<sup>97</sup> and R. Monaco<sup>98</sup> contain outlines of the question. All these writers recognize that, apart from the case in which a contrary intention appears from a particular treaty, the lawfulness or wrongfulness of an act must be established on the basis of obligations deriving from the rules in force at the time the act was performed.<sup>99</sup> No mention is made of possible exceptions to the general rule.

60. The draft codifications of the international responsibility of States do not deal with the problem we are discussing, but the resolution on "The Intertemporal Problem in Public International Law", adopted by the Institute of International Law in 1975, does touch on it indirectly. According to this resolution:

1. Unless otherwise indicated, the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in the light of rules of law that are contemporaneous with it.

<sup>88</sup> Another example is the Agreement of 20 August 1971 between Italy and Tunisia concerning fishing in Tunisian waters. The Agreement, concluded for a certain number of years as from 1 January 1971, came into force in accordance with its provisions on 2 January 1973. After that date, the Italian Government was required to pay the Tunisian Government the annual sum stipulated in the treaty and also to pay it for 1971 and 1972. But that was all.

<sup>89</sup> D. Bindschedler-Robert, *loc. cit.*, p. 194 [translation from French].

<sup>90</sup> *Op. cit.*, p. 119 *et seq.*, 135 *et seq.*, 292 *et seq.*

<sup>91</sup> *Loc. cit.*, pp. 1 *et seq.*, and in particular pp. 38 and 56 *et seq.*

<sup>92</sup> "The principle of retroactivity in international law", *The Grotius Society. Transactions for the Year 1955* (London), vol. 41 (1956), p. 69 *et seq.*

<sup>93</sup> "Intertemporales Völkerrecht", *Jahrbuch für Internationales Recht*, vol. 7, nos. 2-3 (January 1958), p. 229 *et seq.*

<sup>94</sup> *Loc. cit.*, p. 184 *et seq.*

<sup>95</sup> "Le problème inter-temporal dans l'application de la Convention européenne des droits de l'homme", *Mélanges offertes à Polys Modinos* (Paris, Pedone, 1968), pp. 304 *et seq.*

<sup>96</sup> P. Guggenheim, *op. cit.*, pp. 215 *et seq.*

<sup>97</sup> Ch. Rousseau, *Droit international public* (Paris, Sirey, 1970), vol. I, pp. 198 *et seq.*

<sup>98</sup> *Op. cit.*, pp. 173 *et seq.*

<sup>99</sup> See, in particular, P. Tavernier, *op. cit.*, p. 135 *et seq.*; M. Sørensen, "Le problème dit du droit intertemporel ..." (*loc. cit.*), pp. 38 and 56 *et seq.*

2. In application of this principle:

...  
(f) any rule which relates to the licit or illicit nature of a legal act, or to the conditions of its validity, shall apply to acts performed while the rule is in force;

...  
3. States and other subjects of international law shall, however, have the power to determine by common consent the temporal sphere of application of norms, notwithstanding the rules laid down in Paragraphs 1 and 2 and subject to any imperative norm of international law which might restrict that power.<sup>100</sup>

61. The investigation conducted so far has established with certainty the existence of a basic principle which, although subject, as we have seen, to an exception relating to a very special situation, undoubtedly has general validity, provides a solution applicable to all the different cases we have successively considered, and is unanimously recognized by international jurisprudence, State practice, and the learned writers who have dealt with the question. According to this principle, there is a breach of a specific international obligation by a State if that obligation was in force for the State at the time when it adopted conduct contrary to that required by the obligation. The time might thus have come to formulate this principle as an article, were it not necessary, before concluding, to take account of certain complications introduced by the complexity and the great variety of State conduct. For the application of the basic principle would not give rise to difficulties in the case of "instantaneous" conduct, or, indeed, in the case of conduct which, although spread over a period of time, nevertheless fell wholly within the period for which the obligation was in force or, conversely, took place entirely outside that period. But difficulties of application could arise if the conduct was continuous over a period of time and began while prohibited by an obligation but ended after the extinction of the obligation or, vice versa, began at a time when the State was free to act in the matter and continued after the entry into force, for the State, of an obligation prohibiting such conduct. And matters might become further complicated if the non-coincidence of the duration of an act of the State with the continuous period in force of the international obligation of which the act constituted a breach, related not to "continuing" conduct of the State remaining, as such, identical throughout its duration, but to a series of separate acts relating to separate concrete situations which in aggregate could constitute a breach of the obligation in question ("composite" wrongful act), or to a succession of acts connected with the same situation, the conjunction of which would render complete and final the breach begun by the first of those acts ("complex" wrongful act).<sup>101</sup> It will therefore be necessary to devote some

<sup>100</sup> *Annuaire de l'Institut de droit international, 1975*, vol. 56 (Basle), pp. 537 and 539.

<sup>101</sup> The determination of the distinction to be made between "instantaneous" internationally wrongful acts and "continuing" internationally wrongful acts (permanent wrongs, *Dauerverbrechen, illiciti permanenti*), between "simple" acts and "complex" acts, between "single" acts and "composite" acts, etc. will be one of the tasks that must be taken up later in this chapter, with special reference to the question of fixing the *tempus commissi delicti* and its consequences, in particular as regards reparation due. For the time being the Special Rapporteur will merely refer, for fuller treatment, to what he said on the subject in his lecture on "Le délit international" (R. Ago, *loc. cit.*, pp. 506 *et seq.*, 518 *et seq.*, 522 *et seq.*).

attention to these different possible situations, in order of succession.

62. Let us take first the case of a "continuing" act of the State consisting, as we have just said, of conduct extending over a period of time and of a lasting character, for example, the act of maintaining in force a law which the State is internationally required to repeal, or, conversely, the act of not passing a law that is internationally required; or again, the act of improperly occupying the territory of another State, or of improperly obstructing the innocent passage of foreign ships through a strait, or of establishing an unlawful blockade of foreign coasts or ports, etc. There is no real difficulty here in applying the basic principle. There will be a breach of the international obligation with which the conduct of the State is in conflict in so far as, for a certain time at least, the continuance of the act of the State and the existence of the obligation incumbent on it are simultaneous. If the conduct began before the obligation came into force for the State and continues thereafter, there will be a breach of the obligation from the moment when it began to exist for the State.<sup>102</sup> If, on the other hand, the obligation was incumbent on the State at the time when the conduct began and ceased to exist for the State before the conduct ceased, there will be a breach of the obligation, and an internationally wrongful act, from the time of the beginning of the conduct until the extinction of the obligation for the State.

63. The European Commission of Human Rights has recently applied these criteria. It has declared admissible applications revealing a "continuing violation" of the European Convention for the Protection of Human Rights and Fundamental Freedoms if the conduct constituting such violation, although it had commenced, prior to the entry into force of the Convention, continued thereafter. The clearest expression of the Commission's jurisprudence is to be found in the celebrated *De Becker* case. There the Applicant complained that, as a result of a conviction in 1947, he had *ipso facto* been deprived for life of certain rights, including the right to exercise his profession as a journalist and writer. He argued that this deprivation constituted a violation of the right to freedom of expression recognized by article 10 of the Convention. The respondent Government objected that the fact which lay at the origin of the situation complained of by the Applicant had occurred well before the entry into force of the Convention. However, the Commission stated that it was called upon to examine whether the Applicant's claim concerned facts which, "although prior in origin to the date on which the Convention came into force in respect of the respondent Government, might constitute a *continuing violation*\* of the Convention extending after that date". The Commission therefore disregarded the period prior to the date on which the Convention had come into force in respect of the respondent; as far as the period following that date was concerned, however, it found that the Applicant was placed "in a continuing situation" in respect of which he claimed to

<sup>102</sup> "... if an essentially permanent conduct is in no way unlawful when it begins to be followed, but during its continuation comes to be characterized as unlawful by a new rule of international law, it is then transformed ... into a wrongful act." (R. Ago, *loc. cit.*, p. 521) [translation from French].

have been the victim of a "violation of the right to freedom of expression guaranteed by Article 10 of the Convention". Accordingly, it ruled that the Application was admissible in so far as it concerned "this continuing situation".<sup>103</sup>

64. Let us now deal with the other cases mentioned above:<sup>104</sup> those of acts of the State which are neither instantaneous nor constituted by a single and continuing conduct but (a) by a series of separate acts relating to separate situations, which in the aggregate could constitute a breach of an international obligation; or (b) by a succession of acts connected with the same situation, the conjunction of which would render complete and final the breach begun by the first of those acts.

65. In the case described under (a) (a so-called "composite" internationally wrongful act)<sup>105</sup> there are two possible situations: either the separate acts which, in the aggregate would constitute a breach of an international obligation, may, severally, be internationally lawful; or each such act in itself may constitute a breach of an international obligation other than that breached by the acts as a whole.

<sup>103</sup> *Yearbook of the European Convention on Human Rights, 1958-1959* (The Hague), vol. 2, (1960), p. 232 *et seq.* The Commission's reasoning is brought out very clearly by M. Sørensen, "Le problème inter-temporel dans l'application ...", (*loc. cit.*), pp. 313 *et seq.* This writer goes on to cite other cases decided by the Commission which concern the intertemporal problem in connexion with *continuing violation*. For the purpose of the point we are considering, a clear distinction should be made between cases of *continuing* State conduct and cases of *instantaneous* conduct producing *lasting effects* (on this point, see R. Ago, *loc. cit.*, pp. 519 *et seq.*). In the latter case, the existence of a breach of an international obligation must be established solely on the basis of an obligation in force with respect to the State concerned at the time the *instantaneous* act occurred, and the conclusion reached cannot be amended by reason of the fact that the effects of the act continue. Again, it is the jurisprudence of the European Commission of Human Rights that has brought out, from specific cases, the distinction between a "continuing violation" and an "act producing lasting effects". In various cases where the applicants complained of such acts, the Commission observed that the acts (awards or court orders) dated back to a period prior to the entry into force of the Convention with respect to the respondent Contracting Party and could *ipso facto* be classified as *instantaneous acts* prior to the date of entry into force of the Convention. The Commission also noted that the consequences of such acts, although lasting, were nevertheless no more than simple effects (*European Commission of Human Rights, Documents and Decisions, 1955-1956, 1957* (The Hague, 1959), pp. 159 and 266 *et seq.*; *Yearbook of the European Convention ... (op. cit.)*, pp. 412 *et seq.*; and Council of Europe, *op. cit.*, p. 128. See also the pertinent comments of M. Sørensen ("Le problème inter-temporel dans l'application ...") (*loc. cit.*), p. 311 *et seq.*) Another case different from that mentioned above is the case where the element of duration is an integral part of the content of the obligation. Thus, under article 5, paragraph 3, of the European Convention on Human Rights, "everyone ... detained ... shall be entitled to trial within a reasonable time or to release pending trial". It would seem clear that, if only part of the period of detention pending trial occurred while the obligation was in force and part after the obligation had ceased, extension of the detention after the obligation had ceased would not constitute an internationally wrongful act. If, however, to take the opposite case, the obligation had entered into force at a time when detention had already commenced, the extension of such detention for more than a generally reasonable time, would, in our view, be internationally wrongful, even if much of the period of detention had occurred prior to the entry into force of the obligation. For comments on the Commission's somewhat unclear jurisprudence on this point, see Sørensen, "Le problème inter-temporel dans l'application ..." (*loc. cit.*), pp. 309 *et seq.*

<sup>104</sup> See para. 61 above.

<sup>105</sup> On the distinction between a "composite" internationally unlawful act and a "single" internationally unlawful act, see Ago, *loc. cit.* pp. 522 *et seq.*

Rejection of an application for employment by a worker of a particular nationality or race may not, as such, qualify as a breach of an international obligation, but rejection of a series of applications by persons in the same category may constitute a "discriminatory practice" prohibited by treaty. Again, a decision to expropriate an alien of an industrial or commercial enterprise may constitute as such, a breach of an international treaty obligation to refrain from such expropriations, but a series of expropriations of aliens of the same nationality or of aliens in general may, in the aggregate, qualify as a breach of another international treaty obligation, namely, the obligation to refrain from "discriminatory practices" in regard to industrial or commercial activities or from restricting the exercise of particular activities to nationals.

66. In the cases envisaged above, an intertemporal problem may obviously arise if some of the acts which in the aggregate could constitute a breach of an international obligation prohibiting discriminatory practices occurred before, and some after, the entry into force of the international obligation concerned. The opposite case, namely, where some of the acts took place before and some after the obligation ceased, is also possible. But the solution of this problem does not appear to present any particular difficulty. What is required is, in each separate case, to take into account the various conducts, whether lawful or wrongful *per se*, a matter of little importance for our purpose, adopted by the State during the period when the obligation making a particular practice unlawful was incumbent upon it. If the sum of such conducts, although limited in effect, is nevertheless sufficient to constitute the practice condemned, the unavoidable conclusion will be that there has been a breach of the obligation; if it is not sufficient, then the conclusion is the opposite.

67. The case postulated under (b) above is that of a so-called "complex" internationally wrongful act. As will be shown later in this chapter, customary or treaty rules of international law often commit the State, not to a specific act or omission, but to the achievement of a certain result,<sup>106</sup> frequently leaving the State to decide how it should set about achieving that result and particularly, allowing it to do so by means which are to some extent extraordinary if the result could not have been achieved by ordinary means. If that is conceded, it would not be logical to regard the achievement of the result required by the international obligation as finally precluded so long as it is only one organ or certain organs of the State that have adopted a line of conduct different from the one which would have enabled the desired result to be achieved, and it is still possible for a superior organ to remedy the deficiency of the former. In such a case, a breach of the international obligation has undoubtedly been initiated but is not really complete. If, however, the last organs still capable of bringing about the situation required by the international obligation also fail to do so, the breach of the obligation will then be complete and will definitely entail the international responsibility of the State. For the purposes of the present discussion, it is

important to note that such a breach, "initiated" by the act or omission of a given organ and "completed" by its confirmation by other organs, is thus constituted by a conjunction of separate successive acts of separate organs.<sup>107</sup>

68. This much having been established, it is clear that the intertemporal problem can also arise in such a case. The obligation to achieve a certain result may have been laid on the State following an initial action or omission clearly not motivated by any idea of achieving the result which would not be required until later by the international obligation. Conversely, the obligation may have ceased before the competent superior organs have given their ruling, either annulling the decision taken by the organ first involved and eliminating its unfortunate consequences, or, confirming the decision, thereby finally precluding the achievement of the result required by the international obligation. In both cases, however, we believe that the solution should be the same, and that the time at which the obligation needs to have been in force in order to establish a breach of the obligation must always be the time at which the complex process of the State's action in breach of the obligation began.

69. In judging the validity of this conclusion, it is essential to bear in mind that, in the case we are considering, the relationship in a specific instance between the initial conduct of a State organ in breach of the requirement of an international obligation and any subsequent conduct by other organs is in no way comparable to the mere juxtaposition of a series of similar but quite separate and independent acts which may in the aggregate constitute a single "composite" act representing a breach of an international obligation. In the case we are considering, the conducts of the different organs succeed each other in the context of one and the same case and are in no respect independent of each other. Of these, it is the conduct of the first organ which initiates the process of breach. The other organs take their place in the process later—either, as already mentioned, halting it and ensuring the achievement of the internationally desired result by annulling the initial decision and eliminating its consequences, or, conversely, completing the process by confirming the action or omission of the first organ. But it is the initial conduct of the State which will then be the starting-point of the "complex" breach, which any subsequent acts will merely complete and make final.

70. In the light of the two possible effects of the intervention of the intertemporal factor, mentioned above,<sup>108</sup> it seems beyond doubt that, if an organ acted when the obligation on the State did not exist, the conduct of the organ was entirely legitimate under international law. The superior organs, even if appealed to by the interested parties after the entry into force of the new obligation, to amend the decision of the first organ, are not internationally bound to do so, since the decision in question was in no way contrary to international law at the time. A refusal to rescind that decision would not mean that the initial

<sup>106</sup> On the significance of the distinction between obligations of conduct and obligations of result and its importance for the determination of breaches, see P. Reuter, *loc. cit.*, p. 56 *et seq.*

<sup>107</sup> In this case, we can speak of a "complex" internationally wrongful act, as distinct from a "simple" wrongful act constituted immediately by the conduct of a single organ. See R. Ago, *loc. cit.*, pp. 522 *et seq.*

<sup>108</sup> See para. 68 above.

conduct was not in conformity with the result required by an international obligation then in force; it could not therefore have the effect of completing and making final a breach which had not until that time begun. Refusal to rescind the previous decision may, however, be accompanied by a refusal to allow a fresh application addressed direct to these superior organs. In that case, the refusal, as such, may represent the beginning of a complex process of breach of the obligation in question. The condition for the existence of a breach of obligation is accordingly the existence of an organ, whatever its nature, which by its act or omission has initiated the process of breach of an international obligation which has already entered into force. That breach will then undeniably have begun and unless action is taken to eliminate it completely, it will continue. Subsequent termination of the obligation may preclude future breaches of it, but cannot alter the fact that a breach has already begun. Consequently, if the other organs competent to intervene in the matter wish to prevent the breach from becoming consolidated and final and producing its effects in the sphere of international responsibility, they must act to bring the *ab initio* situation into conformity with the result required by the obligation, regardless of the fact that the obligation has meanwhile ceased.<sup>109</sup> The validity of the solution suggested above<sup>110</sup> therefore seems to be confirmed, regardless of how the intertemporal problem arises in the case considered.

71. In the light of the points raised in the foregoing analysis, the Special Rapporteur feels he can now propose the following text for adoption by the Commission:

*Article 17. Force of an international obligation*

1. An act of the State contrary to what is required by a specific international obligation constitutes a breach of that obligation if the act was performed when the obligation was in force for the State implicated.

2. However, an act of the State which, at the time it was performed, was contrary to what was required by an international obligation in force for that State, is not considered to be a breach of an international obligation of the State and hence does not engage its international responsibility, if subsequently, an act of the same nature has become proper conduct by virtue of a peremptory rule of international law.

3. If an act of the State contrary to what is required by a specific international obligation

(a) is an act of a continuing nature, it constitutes a breach of the obligation in question if the obligation was in force for at least part of the duration of the continuing act and so long as the obligation remains in force;

(b) is an act consisting of a series of separate conducts relating to separate situations, it constitutes a breach of the obligation in question if that obligation was in force while at least some of the conducts making up the act were taking place and those conducts were sufficient by themselves to constitute the breach;

(c) is a complex act comprising the initial act or omission of a given organ and the subsequent confirmation of such act or omission by other

organs of the State, it constitutes a breach of the obligation in question if that obligation was in force when the process of carrying out the act of the State not in conformity with such obligation began.

4. CONTENT OF THE INTERNATIONAL OBLIGATION  
BREACHED

72. The problems dealt with in the present section of chapter III have certain features in common with those considered in section 2. Here, too, the question arises of making a possible distinction between breaches of different kinds of international obligations—whether for the purposes of characterizing the conduct of the State committing such a breach as internationally wrongful or, more important, for the purposes of determining the type of responsibility entailed by that conduct. But here the criterion for the distinction changes. It is no longer a purely formal criterion, like the criterion of the “source” of the obligation in question. It is a substantive criterion—the criterion of the “content” of the obligation in question, of the matter to which the conduct required of the State by the obligation relates. The problem, specifically, is to determine:

(a) Whether or not it should be recognized that, regardless of the content of an international obligation incumbent upon the State, a breach of this obligation always constitutes an internationally wrongful act;

(b) Whether it must be concluded that, regardless of the content of an international obligation incumbent upon the State, a breach of this obligation always gives rise to one and the same category of internationally wrongful acts and, consequently, justifies the application of a single régime of responsibility or whether, instead, a distinction should be made, on this basis, between different types of internationally wrongful acts and different régimes of international responsibility.

73. There is no need for lengthy and laborious research in order to answer the first of the two questions posed above. Discussions are frequently held, in connexion with a specific case, concerning the exact content of an obligation placed by international law on a State, with a view to determining whether, in that particular instance, there has or has not been a breach of that obligation.<sup>111</sup> But once it is established that a State is subject to an international obligation having a given content and that it has breached that obligation, the fact that the breach constitutes an internationally wrongful act has never been called in question. The specific content of a given obligation or the particular type of conduct which this requires of the State have never constituted grounds for excluding such a characterization or the consequences deriving from it. It has never been contended that only breaches of international obligations relating to a given field

<sup>109</sup> Suppose, for example, that an alien applies to the appropriate authority for admission to a country to exercise a certain profession, and that at the time the State is internationally bound to allow such application. A refusal by that authority would be wrongful and would remain so even if the obligation subsequently ceased. Either, then, the superior organs must intervene to annul that decision and eliminate the adverse consequences it might have given rise to, or the wrongful act will arise and will entail the international responsibility of the State.

<sup>110</sup> See para. 68.

<sup>111</sup> C. Th. Eustathiades, “Principes généraux de la responsabilité internationale des Etats”, *Etudes de droit international, 1929-1959* (Athens, Klissionis, 1959), vol. I, pp. 515-516, says “... the main legal question that will arise in a dispute concerning international responsibility will be the determination of the rule of international law requiring a certain type of conduct of the State. If it could be demonstrated that the State failed to fulfil an obligation imposed by an international norm, this would establish beyond doubt that it incurred responsibility. Consequently, the main point in a dispute concerning international responsibility is the interpretation of the international norm requiring a certain attitude on the part of the State.” [Translation from French.]



or requiring the State to behave in a particular way entail international responsibility. International judicial decisions, State practice and the authors of specialized works are unanimous on this point.

74. As regards international judicial decisions, it must be noted at the outset that there is not a single judgment of the Permanent Court of International Justice or of the International Court of Justice, nor a single international arbitral award, that explicitly or implicitly recognizes the existence of international obligations the breach of which would not be a wrongful act and would not entail international responsibility. Furthermore, the international decisions specifying in general terms the conditions for the existence of an internationally wrongful act and the creation of international responsibility mention the breach of an international obligation without setting any restrictions regarding the content of the obligation breached.<sup>112</sup> Lastly, a study of international decisions also shows that breaches of international obligations varying widely in content have been considered wrongful, and thus a source of responsibility for the State.

75. The same conclusions are to be reached when considering the positions taken by States. It is true that the work of codification on State responsibility accomplished under the auspices of the League of Nations, and the initial work done by the United Nations, was confined to responsibility incurred through the breach of obligations relating to the treatment of foreigners. But this was because interest, at that time, centred mainly on that particular subject, and certainly not because it was considered that only a breach of obligations in that specific area constituted an internationally wrongful act, that was a source of responsibility. The replies by States to the request for information submitted by the Preparatory Committee for the 1930 Conference<sup>113</sup> and the positions taken by the representatives of Governments at the Conference itself<sup>114</sup> demonstrate beyond all possible doubt that, in their opinion, a breach of an international obligation, whatever its content,

was an internationally wrongful act and entailed State responsibility. The same conviction is apparent from the attitude taken by the representatives of States in the Sixth Committee of the United Nations General Assembly during the discussions on the codification of international responsibility.<sup>115</sup>

76. Many writers who have dealt with State responsibility have also paid special attention to the consequences of breaches of international obligations regarding the treatment of foreigners. It would be absurd to conclude that this proves that, in their opinion, only a breach of obligations in this area should be considered wrongful and entail State responsibility. Similarly, the fact that, more recently, other international lawyers have emphasized the consequences of breaches of obligations relative to the safeguarding of international peace and security by no means suggests that, in their view, a breach of international obligations having a different content is not an internationally wrongful act and does not involve international responsibility on the part of the State.<sup>116</sup> Among those who have studied this subject in depth it is generally taken for granted that a breach by the State of an international obligation is an internationally wrongful act whatever the content of the obligation breached. This conclusion is clearly implied in their writings, either because the characterization of a breach of an international obligation as internationally wrongful is not made subject to any restriction as regards the content of the

<sup>115</sup> See, in particular, the discussions on future codification work held at the sixteenth session (713th to 730th meetings) and the discussions held on the report of the International Law Commission at the fifteenth (649th to 672nd meetings), seventeenth (734th to 752nd meetings), eighteenth (780th to 793rd meetings), twenty-fourth (1103rd to 1111th and 1119th meetings), twenty-fifth (1186th to 1193rd and 1197th to 1200th meetings), twenty-sixth (1255th to 1265th, 1279th and 1280th meetings), twenty-seventh (1316th to 1329th, 1332nd, 1336th to 1339th meetings), twenty-eighth (1396th to 1407th and 1414th to 1416th meetings), twenty-ninth (1484th to 1496th, 1507th and 1509th meetings) and thirtieth (1534th, 1535th, 1538th to 1550th and 1575th meetings) sessions of the General Assembly. (For each of the sessions indicated, see *Official Records of the General Assembly, Sixth Committee, Summary records of meetings.*)

There is no reason to assume that there was any doubt about the principle in question simply because some representatives (those of Nigeria and the United Republic of Tanzania at the twenty-eighth session (*ibid.* Twenty-eighth Session, Sixth Committee, 1401st meeting, para. 2 and 1405th meeting, para. 30)) at times expressed dissatisfaction over the tendency to regard a breach of any international obligation as internationally wrongful. They considered that some of these obligations were not "just" and, consequently, that it was not always wrong to breach them. These positions shed doubt on the very existence of certain "primary" obligations, rather than on the validity of the principle of the wrongfulness of a breach of any obligation recognized as existing, regardless of the subject-matter involved. For more details on this point, see the statement made by the representative of Zaire in the Sixth Committee (*ibid.*, 1399th meeting, para. 14).

<sup>116</sup> See, for example, G. I. Tunkin, "Alcuni nuovi problemi della responsabilità dello Stato nel diritto internazionale," *Istituto di Diritto internazionale e straniero della Università di Milano, Comunicazioni e Studi*, vol. XI (1960–1962), (Milan, Giuffrè, 1963) pp. 45 *et seq.*; D. B. Levin, *op. cit.*, pp. 19 *et seq.*; State Law Institute of the Academy of Sciences of the Soviet Union, *op. cit.*, vol. V, pp. 420 *et seq.*; P. Kuris, *Mezhdunarodnye pravonarushenia i otvetstvennost gosudarstva*, (Vilnius, Mintis, 1973), pp. 110–111 and 124 *et seq.* While dealing essentially with that category of internationally wrongful acts which may be called "international crimes", these works indicate that a breach by the State of any international obligation is an internationally wrongful act and entails responsibility of the State, even if in different ways.

<sup>112</sup> In this connexion, attention is drawn to the international judicial and arbitral decisions already mentioned (see para. 16 above), regarding the irrelevance of the "source" of the international obligation breached to responsibility; attention may be drawn, in particular, to the decision of the Italian–United States Conciliation Commission in the *Armstrong Cork Company* case. Reference may also be made to the two judgments of the Permanent Court of International Justice in the *Chorzów factory* case, that of 26 July 1927 (Jurisdiction) (*P.C.I.J.*, series A, No. 9, p. 21) and that of 13 September 1928 (Merits), (*P.C.I.J.*, Series A, No. 17, p. 29); and the advisory opinion of the International Court of Justice concerning *Reparation for injuries suffered in the service of the United Nations* (*I.C.J. Reports 1949*, p. 184). In the three decisions it is stated that "any breach of an international engagement" entails international responsibility, which logically implies that the content of the obligation breached has no bearing on the characterization as internationally wrongful of the conduct adopted in breach of that obligation. See also the advisory opinion of the International Court of Justice concerning the *Interpretation of peace treaties with Bulgaria, Hungary and Romania* (second phase) (*I.C.J. Reports 1950*, p. 228).

<sup>113</sup> See, in particular, the replies to point II of the request for information (League of Nations, *Bases of Discussion . . .* (*op. cit.*), pp. 20 *et seq.*; and *Supplement to volume III*, pp. 2 and 6).

<sup>114</sup> See the discussions held at the 2nd, 3rd, 4th and 13th meetings (League of Nations, *Acts of the Conference . . .* (*op. cit.*), pp. 26–59 and pp. 159–161).

obligation,<sup>117</sup> or because they are careful to specify that a breach of *any* international obligation may be involved.<sup>118</sup>

77. With regard to the codification drafts on State responsibility, it will be noted that only the bases of discussion prepared by F. V. Garcia Amador in 1956 and the three private drafts prepared respectively by K. Strupp, A. Roth and B. Graefrath and P. A. Steiniger, cover the entire subject of State responsibility for internationally wrongful acts in general. In each of these drafts, the objective condition for the existence of an internationally wrongful act, giving rise to responsibility, is simply defined as the breach of an international obligation or of international law. As in the case of the "source", no restrictions are laid down regarding the "content" of the obligation.<sup>119</sup> All the other drafts deal only with responsibility for damage occasioned to foreigners who are in the territory of the State. They are therefore not particularly relevant to the question under discussion here. It should, however, be noted that on the specific subject of breaches of obligations concerning the treatment of foreigners, no restriction is laid down regarding the "content" of the obligation.

78. In conclusion, it is clear that the only answer to the first of the questions raised in this section<sup>120</sup> is the following: a breach by the State of an international obligation incumbent upon it is an internationally wrongful act regardless of the content of the international obligation breached. No restrictions are to be laid down in this regard.

79. It is less easy to answer the second of the two questions, namely, whether there is justification for drawing a distinction between different types of internationally wrongful act on the basis of the content of the international obligation breached. In posing this question we have in mind the possibility of drawing a distinction of normative scope rather than purely descriptive value. It is not a question of whether, from the theoretical and above all the didactic standpoint, it is useful to make classifications of internationally wrongful acts in law manuals, mainly on the

<sup>117</sup> See, for example, K. Strupp, *loc. cit.*, pp. 6 and 60; D. Anzilotti, *Corso di diritto internazionale*, 4th ed. (Padua, CEDAM, 1955), p. 386; J. Spiropoulos, *Traité théorique et pratique de droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1933), p. 274; Ch. Rousseau, *op. cit.*, p. 361; B. Cheng, *op. cit.*, p. 170; P. Reuter, *loc. cit.*, p. 52; A. Schüle, *loc. cit.*, p. 329; G. Balladore Pallieri, *Diritto internazionale pubblico*, 8th ed. rev. (Milan, Giuffrè, 1962), p. 245; G. Morelli, *op. cit.*, p. 347; E. Jiménez de Aréchaga, *loc. cit.*, p. 534.

<sup>118</sup> See, for example, L. Oppenheim, *op. cit.*, pp. 337 and 343; C. C. Hyde, *op. cit.*, p. 882; G. Schwarzenberger, *op. cit.*, p. 563. Other writers, such as C. Eagleton (*op. cit.*, pp. 3 and 22); H. Accioly (*op. cit.*, p. 353); P. Guggenheim (*op. cit.*, vol. II, (1954), pp. 1-2); J. H. V. Verzijl (*International Law in Historical Perspective* (Leiden, Sijthoff, 1973), vol. VI, p. 627) and G. Ténékidès have emphasized the link existing between any international obligation, the wrongful act and responsibility. According to Ténékidès ("Responsabilité internationale", *Répertoire de droit international* (Paris, Dalloz, 1969), vol. II, p. 783), "To compile a list of breaches giving rise to responsibility is tantamount to specifying the content of all the rules of international law". [Translation from French.]

<sup>119</sup> See basis of discussion No. 1, para. 1, prepared in 1956 by F. V. Garcia Amador (*Yearbook . . . 1956*, vol. II, p. 219, document A/CN.4/96, para. 241); article 1 of the draft prepared by K. Strupp (*Yearbook . . . 1969*, vol. II, p. 151, document A/CN.4/217 and Add.1, annex IX); article 1 of the draft prepared by A. Roth (*ibid.*, annex X); and article 1 of the draft prepared by B. Graefrath and P. Steiniger, (see note 42 above).

<sup>120</sup> See para. 72 above.

basis of the matter to which the obligation breached relates, or on the basis of the importance which the international community attaches to respect for that obligation. There is no reason for making such classifications in the text of an international convention on State responsibility if they are only of theoretical value. For their inclusion to be justified they must constitute the basis of a normative distinction. It would be absurd to propose that a distinction should be made in this draft between different categories of internationally wrongful acts on the basis of the content of the obligation breached if this distinction does not involve the application of different régimes of international responsibility. It must therefore first be established whether the régime of the international responsibility of the State should be the same for all internationally wrongful acts or whether a distinction must be made between different régimes of responsibility corresponding to breaches of international obligations having a different content.<sup>121</sup> That is one of the most difficult aspects of the task to be carried out in codifying the rules of international law relating to State responsibility.

80. Formerly, nearly all international jurists held the view that the rules of general international law relating to State responsibility provided for a single régime of responsibility applying to all internationally wrongful acts of the State, whatever the content of the obligations breached by such acts. Today this view is being hotly disputed. Already in the period between the two World Wars doubts were expressed from various quarters concerning the validity of the "classical" view. However, it was not until after the Second World War that a real current of opinion emerged favouring a different view, which is gaining increasing support. According to this view, general international law provides for two completely different régimes of responsibility. One would apply in the case of a breach by the State of an obligation whose respect is of fundamental importance to the international community as a whole, for example the obligation to refrain from any act of aggression, the obligation not to commit genocide and the obligation not to practise *apartheid*. The other régime would apply in cases where the State had merely failed to respect an obligation of lesser and less general importance. On this basis, the advocates of this view distinguish between two very different categories of internationally wrongful acts of the State: a more limited category comprising particularly serious offences, generally known as international "crimes", and a much broader category covering a whole range of less serious offences, generally known as "simple breaches".<sup>122</sup> The following problem therefore arises: does this latter current of opinion correctly interpret the recent development of international law on the subject, or is it the "classical" view which still corresponds today to the realities of international legal life?

81. International judicial and arbitral bodies never seem

<sup>121</sup> The difference of régime referred to must be substantive rather than purely "marginal". It is only then that the content of the obligation breached can constitute the criterion for making a true distinction between different categories of internationally wrongful acts, which would, as such, have a place in this chapter.

<sup>122</sup> No references to the writings of jurists are given at this stage. The positions of different writers will be considered in detail later.



to have considered the question which concerns us *per se*. None of their decisions show that they have deliberately raised questions regarding a possible difference in régimes of responsibility, based on the content of the obligation breached, for internationally wrongful acts of States. The analysis of international judicial decisions will therefore have to be based on indirect research; it will seek to establish whether any view of judges and arbitrators on the problem can be deduced indirectly from their decisions.

82. In this context, it is logical to ask the following question first: have the international tribunals in fact applied to States committing internationally wrongful acts different forms of responsibility according to the varying content of the obligations breached? The answer to that question is clear: except perhaps in a few marginal cases, which can in any event be interpreted in different ways,<sup>123</sup> the responsibility applied by international tribunals always derives from the same general concept, that of "reparation". It is clearly of little importance that in some cases States have been ordered by way of reparation to execute the initial obligation they had improperly refused to perform, and in other cases to restore matters to the state they had been in before the wrongful act, and in yet others to provide compensation for another act made impossible by that act; it is also of little relevance that States have also been asked to compensate for material or moral damage, and so on. It may be added that the choice between different types of reparation has never been made on the basis of the content of the obligation breached. One can seek in vain in the different decisions a statement indicating, for example, that a State is obliged to make amends for the moral damage caused by its action because in that particular case the content of the obligation breached is of particular importance to the international community, or vice versa.

83. However, this observation does not justify our drawing mistaken conclusions therefrom. In ruling as they did on the cases brought before them, international judges and arbitrators by no means went so far as to exclude the possibility that under international law different forms of responsibility for wrongful acts could exist or that a possible difference in the régime of responsibility could be related to the difference in the content of the international obligations breached. It is true that international tribunals have always recognized the existence of an obligation to make reparation on the part of the State committing an internationally wrongful act; however, there is no justification for deducing

<sup>123</sup> Reference is made here to some awards where international arbitral tribunals have required States to pay what are known as "penal damages". The question raised by the application of these "pecuniary penalties" has already been referred to in the commentary on article 1 of this draft (see *Yearbook . . . 1971*, vol. II (Part One), p. 207, document A/CN.4/246 and Add.1-3, foot-note 26), and it will be considered in more detail in the chapter to be devoted specially to the forms of State responsibility. At the present stage, it is enough to indicate that for our purposes it is not very relevant to know whether in certain specific cases—which, moreover, are very rare—international tribunals have required States to pay sums as "pecuniary penalties" rather than as damages. Whatever might be the true justification and significance of these so-called "penalties", they have never been imposed on a State because of the particular content of the obligation it failed to respect. On this basis, therefore, international judicial decisions cannot be viewed as endorsing the theories of those who distinguish between two different categories of internationally wrongful acts on the basis of the content of the obligation breached.

therefrom that, in their view, the State could never be subject to any form of responsibility *other* than that of making reparation, particularly when the content of the obligation breached was of special importance.

84. Upon due reflection, moreover, it is easy to explain the fact that international judicial and arbitral bodies have not had occasion to determine whether a form of responsibility other than the obligation to make reparation could be applied to internationally wrongful acts. While it may be assumed that, in certain circumstances, international law authorizes recourse to "sanctions" against a State which breaches certain obligations, States which intend to avail themselves of that authorization in a given case have not usually applied to an international tribunal to ask whether the application of such a form of international responsibility was or was not justified in the case in question. The jurisdiction of international judicial bodies always depends on the will of States. A State which deems itself injured by a breach of its own right will, if it is entitled to do so, request an international judge or arbitrator to rule whether the State which committed the breach has the obligation to make reparation for the injury caused; however, it is most unlikely to seek authorization from such a judge or arbitrator to exercise its right to apply a sanction to the State concerned. The latter, for its part, might agree that a tribunal is competent to determine whether it has an obligation to make reparation, if such is the case, but not to authorize another State to apply a sanction against it. It is for these reasons that the founding treaties and statutes of international tribunals, as well as the clauses or *compromis* setting out the terms for recourse to such tribunals, often stipulate that when the tribunals are called upon to rule on the breach by a State of an international obligation, they are empowered solely to determine whether reparation is due and the extent thereof.<sup>124</sup> In adopting these texts, the parties involved did not wish to rule out the possibility that the breach of an international obligation could also have legal consequences other than the obligation to make reparation. They simply wished to rule out the possibility that the tribunal in question could pronounce an opinion on those other consequences.

85. The fact that certain decisions of the Permanent Court of International Justice, arbitral tribunals and conciliation

<sup>124</sup> In the Memorial of 30 September 1947 submitted to the International Court of Justice by the United Kingdom on 1 October 1947 concerning the *Corfu Channel* case, the action of Albania was defined as an "international delinquency" and, given the particular circumstances of the case, an "offence against humanity" which most seriously aggravated the breach of international law and the "international delinquency" committed by that State (see *I.C.J. Memorials 1949*, p. 40, para. 72 (b)). The form of responsibility which the United Kingdom was seeking to have applied to Albania was solely the obligation to "make reparation", an obligation which Albania had vis-à-vis the Government of the United Kingdom "in respect of the breach of its international obligations" (*ibid.* p. 51). However, a limitation was imposed by article 36, paragraph 2d of the Statute of the Court, which empowers the Court to determine only the extent of the reparation due. Thus, the United Kingdom could not have requested the Court to rule on the applicability of another form of responsibility, even if general international law had, in such cases, also recognized the possibility of applying such other form of responsibility.

Moreover, the United Kingdom had brought the case before the International Court of Justice after the adoption of the draft resolution which it had earlier submitted to the Security Council—and which had described the laying of mines in peace-time without notification as an "offence against humanity"—had been blocked by the veto of the Soviet Union (*ibid.* p. 369).

commissions have explicitly affirmed that the breach of any international obligation entails the obligation to make reparation<sup>125</sup> prompts similar observations. Once again, it should be emphasized that this assertion, which is fully justified, does not necessarily deny the possibility that that breach may entail other consequences arising out of international responsibility. The judges and arbitrators who rendered the decisions referred to had been expressly requested to determine, in connexion with a given case, whether or not the obligation existed to make reparation for the injury. Their reply, based on what the Permanent Court defined as "a principle of international law" as well as a "general conception of law", was that if an obligation had been breached, there also existed an "obligation to make reparation in an adequate form". However, they had by no means been asked to affirm that the obligation was, in any case, the *sole* consequence entailed by the breach complained of, and they did not intend to pronounce on that point.

36. An international arbitral tribunal did, however, express itself on the question of the lawfulness of the application by the injured State of a sanction, which in the case in question took the form of acts of reprisal.<sup>126</sup> The conclusion was that an act of this nature constitutes a legitimate reaction by the injured State to the breach of an international obligation by another State, subject to the following two conditions: that the reprisals taken are proportionate to the wrongful act and that the injured State first unsuccessfully attempted to obtain reparation for the injury sustained. It clearly follows from the awards in question: (a) that the tribunal in the first place confirmed that the State which committed an internationally wrongful act was under an obligation to make reparation; it even provided that the lawfulness of recourse to other forms of responsibility depended on compliance with that obligation having been demanded without success; but also (b) that the tribunal considered the application of a sanction entirely admissible in the event that reparation was refused. The tribunal thus did not question the existence of different forms of responsibility. However, it is not clear from the awards in question whether, in the view of the tribunal, the refusal by the guilty State to make reparation should really be considered the only situation in which the application of a sanction could be deemed legitimate.<sup>127</sup>

<sup>125</sup> See, for example, the two judgments (Jurisdiction and merits) on the *Chorzów Factory* case, that of 26 July 1927 and that of 13 December 1928 (for reference, see note 112 above), the award by the arbitrator Max Huber on the *British claims in Spanish Morocco* of 1 May 1925 (United Nations, *Reports of International Arbitral Awards*, vol. II, *op. cit.*, p. 641); and the award in the *Armstrong Cork Company* case of 22 October 1953 by the Italian-United States Conciliation Commission established under article 83 of the Treaty of Peace of 10 February 1947 (for reference, see note 23 above).

<sup>126</sup> Such was the case in the award on the *Responsibility of Germany arising out of damage caused in the Portuguese colonies of Southern Africa (Naulilaa incident)*, rendered on 31 July 1928 by the arbitral tribunal established under articles 297 and 298, para. 4, of the annex to the Treaty of Versailles, in United Nations, *Reports of International Arbitral Awards*, vol. II, (*op. cit.*) pp. 1025 *et seq.*; and in the award by the same tribunal of 30 June 1930 on the *Responsibility of Germany arising out of acts committed after 31 July 1914 and before Portugal took part in the war (Cysne case)*, *ibid.*, pp. 1056 *et seq.*

<sup>127</sup> Considering the date of the awards in question, it may be presumed that such was the tribunal's belief.

87. An analysis of the opinions delivered by international tribunals thus shows that they do not in principle deny the existence of different forms of State responsibility arising out of internationally wrongful acts; on the contrary, at times they seem to support the idea that, in certain cases at least, another form of responsibility may replace the obligation to make reparation. However, it is not possible to draw from those opinions a "contemporary" reply to the question whether, even independently of a refusal to make reparation, a form of responsibility other than reparation, and obviously more serious than reparation, would be applicable in the event of the breach of an obligation which was particularly important by reason of its content.

88. However, a clearer opinion as to a possible distinction between two different régimes of international responsibility—a distinction to be drawn by reason of the different content of the obligation breached—could emerge from international judicial decisions in another context. That opinion could crystallize around the question of which subject is entitled, in the various possible cases, to invoke the responsibility of the State committing the wrongful act. The criterion for the possible distinction would then be found, not in the form of the responsibility attributable to the offending State by the injured State—in other words, reparation or sanctions—but in the determination of the "active" subject of the responsibility relationship. It is therefore still necessary to verify whether, in certain cases, international tribunals have expressed the opinion that the breach of certain international obligations, unlike others, would also entitle subjects other than the State directly injured to invoke the responsibility entailed by the breach in question.

89. For the time being,<sup>128</sup> international judicial and arbitral bodies have acknowledged only that the State directly injured in its own "legal interests" has the right to submit a claim invoking the responsibility of the State committing an internationally wrongful act. When required to render a decision on this point, the International Court of Justice, in its judgment of 18 July 1966 on the *South West Africa* cases refused to admit that contemporary international law recognized "the equivalent of an '*actio popularis*'" or "right resident in any member of a community to take legal action in vindication of a public interest".<sup>129</sup> However, in a subsequent judgment, that of 5 February 1970, rendered in the *Barcelona Traction* case, the Court added a clarification of great importance to our problem. Referring to the determination of the subjects having a legal interest in the performance of international obligations, the Court declared:

In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *via-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also

<sup>128</sup> Except for cases where a different conclusion has been explicitly or implicitly provided for in a specific treaty.

<sup>129</sup> *South West Africa*, second phase, judgment, *I.C.J. Reports 1966*, p. 47.

from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character.<sup>130</sup>

This passage has been the subject of differing interpretations; but it seems unquestionable that, by making such affirmations, the Court sought to draw a fundamental distinction with regard to international obligations and hence with regard to acts committed in breach of those obligations. In addition, it implicitly recognized that that distinction should influence the determination of subjects entitled to invoke State responsibility. In the Court's view, there are in fact a number, albeit limited, of international obligations which, by reason of their importance to the international community as a whole, are—unlike the others—obligations in respect of which all States have a legal interest. It follows, the Court held, that the responsibility flowing from the breach of those obligations is entailed not only with regard to the State that has been the direct victim of the breach (e.g., a State which has suffered an act of aggression in its territory); it is also entailed with regard to all the other members of the international community. Every State, even if it is not immediately and directly affected by the breach, should therefore be considered justified in invoking the responsibility of the State committing the internationally wrongful act.<sup>131</sup>

90. In the judgment quoted above, the International Court of Justice seems to have implicitly recognized the need for a distinction between two categories of internationally wrongful acts of the State, depending on the obligation breached, and also seems to have recognized the logical consequences of that distinction as regards the régime of international responsibility. The position taken in the judgment on the *Barcelona Traction* case is perhaps still too isolated to permit the conclusion that a definite new trend in international judicial decisions has emerged. But there is no doubt that that position is an important factor in support of the theory which advocates two different régimes of international responsibility, depending on the content of the obligation breached.

91. As to the problem at issue, State practice has undeniably evolved during the twentieth century. Two successive phases in its evolution should be distinguished: that preceding the Second World War and that which begins after the War ended. During the first period, the dominant idea in the view of States seems to be that the content of the obligation breached has no bearing on the régime of responsibility applicable to an internationally

wrongful act—even if, as will be seen, a few examples are encountered of a trend towards a different view.

92. Once again, the official positions taken during the work on the codification of the responsibility of States for damage caused to foreigners undertaken under the auspices of the League of Nations are very revealing of the ideas to which the great majority of States subscribed. An analysis of these positions indicates, firstly, the agreement of the Governments that the breach by a State of any international obligation concerning the treatment of foreigners entailed the obligation on its part to make reparation. The view expressed in reply to the request for information addressed to each Government by the Preparatory Committee for the 1930 Codification Conference<sup>132</sup> was unanimous and was reflected in the language of article 3 adopted in first reading by the Conference.<sup>133</sup> However, it should be observed that no Government, either in its reply to the request for information or in the debates of the Conference,<sup>134</sup> felt compelled to state that in its view the obligation to make reparation was the *only* form of responsibility which the breach of the international obligations of States might entail. Nor did that type of restriction emerge from the text of the article adopted by the Conference. The fact that—although in another context and, consequently, indirectly—the Governments recognized the right of the injured State to take reprisals against the State which had breached an international obligation with regard to the treatment of foreigners<sup>135</sup>—generally on the condition that the injured State had first vainly attempted to obtain reparation—would rather suggest that they believed otherwise. There is no need here to enter into a discussion, which would be essentially nominalistic, as to the manner in which reprisals were envisaged. It is possible that, in their replies, the Governments at the time gave the term “international responsibility” a broad meaning, covering both the right to demand reparation from a State which had committed an internationally wrongful act and the right to take reprisals against that State. It is also possible, and this perhaps is more likely, that they reserved the term “responsibility” for the obligation to make reparation and that they viewed the right to take reprisals as a consequence of the internationally wrongful act which differed from the

<sup>130</sup> *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports, 1970*, p. 32.

<sup>131</sup> For the differing interpretations of this judgment, see B. Bollecker Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pédone, 1973), p. 84; J. Seidel-Hohenveldern, “*Actio popularis in Völkerrecht*”, *Istituto di Diritto internazionale e straniero dell'Università di Milano, Comunicazioni e Studi* (Milan, Giuffrè, 1975), vol. XIV, pp. 803 *et seq.*

With reference to State responsibility, Mr. Reuter, at the twenty-second session of the International Law Commission, took the view that according to the Court a special responsibility was involved (see *Yearbook . . . 1970*, vol. I, p. 187, 1076th meeting, para. 5).

<sup>132</sup> Point II of the request indicated that a State which failed to comply with its obligation incurred “responsibility and must make reparation in such form as may be appropriate”. See League of Nations, *Bases of discussion . . .* (*op. cit.*), p. 20. For the replies of Governments, see *ibid.*, pp. 20 *et seq.* and League of Nations, *Supplement to Volume III (op. cit.)*, p. 2.

<sup>133</sup> Article 3 was drafted as follows:

“The international responsibility of a State imports the duty to make reparation for the damage sustained in so far as it results from failure to comply with its international obligation”. (See League of Nations, *Acts of the Conference . . .* (*op. cit.*), p. 237; and *Yearbook . . . 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.)

<sup>134</sup> League of Nations, *Acts of the Conference . . .* (*op. cit.*), pp. 129 *et seq.*

<sup>135</sup> The “request for information” dealt with reprisals not from the standpoint of the consequences of the breach of an international obligation, but rather from that of the circumstances excluding responsibility. For the replies of Governments, see League of Nations, *Bases of discussion . . .* (*op. cit.*), pp. 128 *et seq.*, and *Supplement to Volume III (op. cit.)*, pp. 4 and 22. Basis of discussion No. 25, which was drafted in accordance with the replies of Governments, recognized the legitimacy of the exercise of reprisals in certain circumstances.

“responsibility” *per se*. In any event, what is important is that they considered that the breach by a State of an international obligation could entail different legal consequences, depending on the situation.

93. However, for the subject at hand, the important point lies elsewhere. Nothing in the replies of Governments appears to indicate that the choice among the different legal consequences entailed by an internationally wrongful act should, in the view of those Governments, be made on the basis of the content of the obligation breached. They considered that the essential consequence of the breach of an international obligation, without distinction as to the nature of the obligation,<sup>136</sup> was always—in chronological order and in order of importance—the right of the injured State to demand reparation. The right of that State to take reprisals was generally considered a secondary consequence which could be implemented, it was maintained, once the first consequence proved to have no effect. The matter constituting the subject of the obligation breached, and its more or less essential character, were not taken into consideration for the purposes of any change in the consequences of the breach and their order of succession. What is more, the Governments agreed with the text of the request for information that several forms of “reparation” existed which could be applied “according to the circumstances”.<sup>137</sup> And at no point did they imply that, in their view, the choice among these different forms of “reparation” should be made on the basis of the content of the obligation breached.<sup>138</sup> Nor was that content ever considered as having a bearing on the determination of the subject authorized to invoke the responsibility of the State which committed an internationally wrongful act.<sup>139</sup>

94. Finally, the States that participated in the work on the codification of the international responsibility of States for damage caused to foreigners did not believe that the content of the obligation breached had a bearing on the régime of responsibility attached to that breach. A distinction between two or more categories of internationally wrongful acts in terms of the content of the obligation in question was thus excluded. Of course, the objection could be raised that the limited field to which the 1930 codification work referred concerned only the consequences of the breach of international obligations with respect to the treatment of

foreigners: a matter offering perhaps less opportunity than others of singling out exceptionally important obligations some breaches of which could have very serious consequences for the international community as a whole. However, apart from the possibility that here, too, internationally wrongful acts of that category can occur, would the positions taken by Governments have really been different if the “request for information” had concerned, for example, a breach of the obligation to respect the territorial sovereignty of other States or a breach of the obligation—already provided for at that time through conventional rules—not to launch a war of aggression? It should be borne in mind that the replies of Governments were often formulated in very general terms and did not therefore refer solely to the area in which the attempt at codification was being made. It would be arbitrary to assume that, in relation to other areas, those replies would have led to different conclusions on the question under consideration.

95. In its turn, the attitude adopted by States in specific situations does not allow of the conclusion that at the time under consideration, they regarded the content of different international obligations as a factor leading to differentiation with respect to the régime of responsibility applicable to the breach of those obligations and, consequently, to the drawing of a distinction between various categories of internationally wrongful acts. Certainly, State practice shows that both sanctions and reparations were included among the possible consequences of an internationally wrongful act. But in disputes resulting from the breach of a particular international obligation, the parties concerned were often at variance on the issue of whether the State committing the breach was obliged to provide the injured State with the means of restoring the situation that had existed before the breach, or with a payment as compensation or a pecuniary penalty. Another disputed issue was whether the injured State was justified in applying a sanction against the State committing the internationally wrongful act. Lastly, the parties discussed the amount of reparation due or the limits of the sanction authorized under international law. However, to the best of our knowledge, there was never any question of relying on the content of the obligation breached in order to maintain that the choice between the different possible forms of responsibility should be made on the basis of that content. Moreover, even though third States have sometimes asserted their right to intervene to proclaim the consequences of an internationally wrongful act committed against a given State, it cannot be said that the content of the obligation breached was used as a criterion in order to draw an inference with respect to the determination of the active subject of the international responsibility relationship.

96. As has been indicated,<sup>140</sup> there were already signs of change in the period preceding the Second World War. In the period between the two World Wars, the principle prohibiting recourse to war as a means of settling international disputes was placed on a par in the legal consciousness of the members of the international community with the belief that a breach of that prohibition could not

<sup>136</sup> This refers, of course, to obligations relating to the treatment of foreigners, which were the only obligations considered in this codification effort.

<sup>137</sup> Point XIV of the “request for information” listed a series of forms of reparation, ranging from performance of the obligation the fulfilment of which had initially been refused to pecuniary and other types of reparation, including indemnities due by way of a penalty for the breach. Basis No. 29, elaborated by the Preparatory Committee on the basis of the replies of Governments, mentioned, along with the obligation to make good the damage suffered as a result of failure to comply with the obligation, that of affording “satisfaction to the State which has been injured in the person of its national, in the shape of an apology (given with the appropriate solemnity) and (in proper cases) the punishment of the guilty persons”. (League of Nations, *Bases of discussion . . . (op. cit.)*, p. 151).

<sup>138</sup> The same may be said for the choice of different possible forms of reprisals.

<sup>139</sup> See the replies to point XIII of the “request for information” (League of Nations, *Bases of discussion . . . (op. cit.)*, pp. 140 *et seq.*; and *Supplement to Volume III*, pp. 4, 23 *et seq.*)

<sup>140</sup> See above, para. 90 *in fine*.

be treated as an offence "like any other". K. Yokota<sup>141</sup> recalled, in that connexion, that in the draft "Treaty of Mutual Assistance" prepared in 1923 by the League of Nations, a war of aggression was characterized as an "international crime".<sup>142</sup> The same writer notes that the preamble to the 1924 Geneva Protocol for the settlement of international disputes defined a war of aggression as a violation of the solidarity of the members of the international community and as "an international crime";<sup>143</sup> that the resolution adopted on 24 September 1927 by the League of Nations also confirmed that definition;<sup>144</sup> and finally that the resolution adopted on 18 February 1928 by the Sixth Pan American Conference declared that a war of aggression constituted "an international crime against the human species".<sup>145</sup> It will be noted that in these instruments nothing is said about the régime of responsibility to be applied in the event of a breach of the prohibition of acts of aggression. However, it is unthinkable that States could have believed that such a breach unhesitatingly qualified as a "crime", would entail only the consequences which normally followed from internationally wrongful acts that were much less serious, namely the right of the injured party to require the offender to make reparation for the damage sustained. It should be borne in mind, besides, that the Covenant of the League of Nations already provided for a special régime of responsibility for any breach of the obligation, included in the Covenant, not to resort to force for the settlement of international disputes until the available procedures for peaceful settlement had been utilized. Articles 16 and 17 provide for a régime of responsibility consisting of subjecting the "aggressor" to "sanctions" which all Member States were in duty bound to apply.<sup>146</sup>

97. The need to distinguish, in the general category of internationally wrongful acts of States, a separate category including exceptionally serious wrongful acts has, in any case, become more and more obvious since the end of the Second World War. Several factors have no doubt contributed to this more marked development. The terrible memory of the unprecedented ravages of the Second World

War, the frightful cost of that war in human lives, in property and in wealth of every kind, the fear of a possible recurrence of the suffering endured earlier and even of the disappearance of large portions of mankind and of all traces of civilization, as the result of a new conflict in which the entire arsenal of weapons of mass destruction would be used, are all factors which have established in the consciousness of peoples a conviction of the paramount importance of prohibiting the use of force as a means of settling international disputes. The feeling of horror left by the systematic massacres of millions of human beings perpetrated by certain political régimes, the still-present memory of the deportation of entire populations, the outrage felt at the most brutal assaults on the human personality have all pointed to the need to take steps to ensure that not only the internal law of States but, above all, the law of the international community itself should set forth imperative rules for the protection and respect of the essential rights of the human person; all of this has prompted the most vigorous affirmation of the prohibition of crimes such as genocide, *apartheid* and other inhuman practices. The solidarity of broad strata of the world's population in the liberation struggle carried on by the peoples subjected to colonial domination, the firmness with which those peoples have resolved to defend the supreme treasure of liberty which they have now acquired, are the decisive elements which have led to the emphatic recognition of the right of every people to establish itself as an independent political entity and the prohibition in general of any action which challenges the independence of another State. Thus, some new rules of international law have appeared, others in the process of formation have been definitively secured, and still others, already in existence, have taken on a new vigour and a more marked significance; these rules impose on states obligations whose fulfilment represents an increased collective interest on the part of the entire international community. Furthermore, there has gradually arisen a conviction that any breach of the obligations imposed by rules of this kind cannot be regarded and dealt with as a breach "like any other", that it necessarily represents an internationally wrongful act which is far more serious, an infraction which must be differently described and must therefore be subject to a different régime of responsibility.

98. As direct or indirect evidence of this conviction, three facts seem, in our view, to be of considerable significance: (a) the distinction, recently established in the rules of international law, of a special category of rules known as "imperative" rules, or rules of *jus cogens*; (b) the establishment of the principle that an individual-organ who has, by his conduct, breached international obligations of a given content must himself be regarded, even though he acted as an organ of the State, as being personally punishable, and, what is more, punishable under some particularly severe rules of internal penal law; and (c) the fact that the Charter of the United Nations attaches some specially determined consequences to the breach of certain international obligations.

99. With regard to the first point, it is hardly necessary here to review the entire process that has led to the formal distinction, among the general rules of international law, of

<sup>141</sup> K. Yokota, "War as an international crime", *Grundprobleme des internationalen Rechts: Festschrift für Jean Spiropoulos* (Bonn, Schimmbusch, 1957), pp. 455 *et seq.*; see also I. Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963), pp. 68 *et seq.*

<sup>142</sup> See League of Nations, *Official Journal*, Fourth Year, No. 12 (December 1923), p. 1521. It was only because of the difficulty of reaching agreement on the meaning of the term "aggression" that the draft was not adopted. However, the Contracting Parties were in agreement in regarding a war of aggression as an "international crime".

<sup>143</sup> See League of Nations, *Official Journal, Special Supplement No. 21*, p. 21. The Protocol was adopted unanimously by the 48 States Members of the League of Nations. Signed by 19 States, it unfortunately obtained only one ratification.

<sup>144</sup> See League of Nations, *Official Journal, Special Supplement No. 53*, p. 22. The resolution was adopted unanimously.

<sup>145</sup> The resolution was adopted unanimously by the 21 States present at the Conference. For the text, see Carnegie Endowment for International Peace, *The International Conferences of American States, 1889-1928* (New York, Oxford University Press, 1931), p. 441.

<sup>146</sup> More than one case could have given rise to the application of these "sanctions" to a State guilty of "aggression". However, the only effective use of this procedure was in the case of Italy's war against Abyssinia.

the particular category of rules of *jus cogens*.<sup>147</sup> It is important to emphasize that the appearance of such rules, at the international as well as the internal level, proves that in the legal consciousness of the members of the international community the content of the obligations imposed upon States by the law of nations is taken into consideration for the purpose of making a "normative" differentiation between two kinds of rules and, hence, of legal obligations. The content of the rules of international *jus cogens*<sup>148</sup> is so important to the community of States that derogation from those rules through a particular convention between two or more members of that community has in fact been prohibited. Of course, the prohibition of any derogation from certain rules does not necessarily and automatically imply that the breach of the obligations arising therefrom should be subject to a régime of responsibility different from that associated with the breach of the obligations created by the other rules. But it would be hard to believe that the evolution of the legal consciousness of States with regard to the idea of the inadmissibility of any derogation from certain rules has not been accompanied by a parallel evolution in the domain of State responsibility. Indeed, it would seem contradictory if the same consequences continued to be applied to the breach of obligations arising out of the rules defined as "imperative" and the breach of obligations arising out of rules from which derogation through particular agreements is permitted. Similarly, it would seem contradictory if in the case of the breach of a rule so important to the entire international community that it is described as "imperative", the relationship of responsibility were still established solely between the State which committed the breach and the State directly injured thereby.

100. The second point seems no less significant for the purposes considered here. It is known that today international law imposes upon States the obligation to punish crimes known as "crimes under international law"; this unique category includes crimes against peace, crimes against humanity and war crimes in the strict sense. The system provided by international law since the Second World War for the punishment of such "crimes" is characterized by two features: (a) it regards as "punishable" individuals who have committed actions in their capacity as organs of the

<sup>147</sup> Reference should be made in this connexion to the data furnished by R. Ago, "Introduction au droit des traités à la lumière de la Convention de Vienne", *Recueil des cours de l'Académie de droit international de La Haye, 1971-III* (Leiden, Sijthoff, 1972), vol. 134, pp. 320 *et seq.* The same work also contains a bibliography on the subject, which has aroused great interest among international jurists during the past decade.

<sup>148</sup> In connexion with this content, again see R. Ago, *loc. cit.*, p. 324, note 37:

"If one examines carefully the opinions expressed in the International Law Commission and, more generally, in the writings of jurists, one becomes aware that a certain unity of views exists with regard to the determination of the rules which the consciousness of the world regards today as rules of *jus cogens*. These include the fundamental rules concerning the safeguarding of peace, in particular those which prohibit any recourse to the use or threat of force, fundamental rules of a humanitarian nature (prohibition of genocide, slavery and racial discrimination, protection of essential rights of the human person in time of peace and of war), the rules prohibiting any infringement of the independence and sovereign equality of States, the rules which ensure to all the members of the international community the enjoyment of certain common resources (the high seas, outer space, etc.)." [Translation from French.]

State; (b) it holds that tribunals of States other than that to which the organs in question belong have the right—which is also a duty—to try and punish such actions.<sup>149</sup> The derogations from the usual criteria of international law that this implies are obvious. Moreover, "principles of international co-operation" have been proclaimed for the detection, arrest and extradition of "persons guilty of war crimes and crimes against humanity even if they acted as State organs".<sup>150</sup> The principles also exclude the possibility of granting territorial asylum "to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity";<sup>151</sup> they also exclude the possibility of refusing to extradite such persons by invoking the "political" nature of the crimes committed by them.<sup>152</sup> Lastly, States have subscribed to the obligation to regard the crimes involved as not subject to statutory limitations.<sup>153</sup>

<sup>149</sup> The right and duty to punish the perpetrators of these crimes is generally recognized as resting with the State in whose territory the said crimes were committed, whether or not that State is identified with the State whose organs the individuals are. Thus, in resolution 3 (I) on the extradition and punishment of war criminals, adopted on 13 February 1946, the General Assembly of the United Nations recommends that Member States "forthwith take all the necessary measures to cause the arrest of those war criminals . . . and to cause them to be sent back to the countries in which their abominable deeds were done, in order that they may be judged and punished according to the laws of those countries". The Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide<sup>2</sup> establishes in article VI that: "Persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory in which the act was committed . . .". Paragraph 5 of General Assembly resolution 3074 (XXVIII), adopted on 3 December 1973, enunciating the "Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity", reads as follows:

"Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes . . ."

Sometimes the jurisdiction of the State in whose territory the crimes were committed is supplemented by that of an international criminal court that may be established (see article VI of the 1948 Convention on Genocide). Lastly, it is not excluded that in certain cases the perpetrators of international crimes may be punished by any State having jurisdiction over them under its own internal law. Article V of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, adopted by the General Assembly by resolution 3068 (XXVIII) of 30 November 1973, provides that the

"Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction."

<sup>2</sup> United Nations *Treaty Series*, vol. 78, p. 277.

<sup>150</sup> See paras. 2, 4, 5, 6, 8 and 9 of General Assembly resolution 3074 (XXVIII) of 3 December 1973.

<sup>151</sup> See para. 7 of General Assembly resolution 3074 (XXVIII). Article 1, para. 2, of the Declaration on Territorial Asylum, adopted by the General Assembly on 14 December 1967 (resolution 2312 (XXII)), had already stated that "The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity."

<sup>152</sup> See, for example, article VII of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and article XI of the 1973 Convention on the Suppression and Punishment of the Crime of *Apartheid*.

<sup>153</sup> See the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by the General Assembly by resolution 2391 (XXIII) of 26 November 1968.



101. Having said that, we hasten to add that, in our view, it would be a mistake to assimilate the right or duty accorded to certain States to punish individuals who have committed such crimes to the "special form" of international responsibility applicable to the State in such cases<sup>154</sup> Personal punishment of individuals-organs guilty of crimes against the peace or against humanity and other crimes does not estop prosecution for the international responsibility incumbent upon the State for internationally wrongful acts which are attributed to it in such cases by reason of the conduct of its organs. Punishment of those in charge of the State machinery who have unleashed a war of aggression or organized an act of genocide does not *per se* release the State itself from its own international responsibility for such acts. Conversely, it is not maintained, with regard to the State, that any "crime under international law" committed by one of its organs, for which the perpetrator is held personally liable to punishment despite his capacity as a State organ, must automatically be considered not only as an internationally wrongful act of the State concerned but also as an act entailing a "special form" of responsibility for that State. If, in the present context, we deem it necessary to point out that if State organs which have committed certain acts have been regarded as liable to personal punishment, it is primarily for another reason: this fact in itself unquestionably testifies to the exceptional importance attached by the international community to respect for certain obligations. It is, moreover, no accident that the obligations whose breach entails, as already indicated, the personal punishment of the perpetrators correspond largely to those imposed by the rules of *jus cogens*.<sup>155</sup> The specially important content of certain international obligations and the fact that respect for them in fact determines the conditions of the life of international society are factors which, at least in many cases, have precluded any possibility of derogation from the rules imposing such obligations by virtue of special agreements. These are also the factors which render a breach of these obligations more serious than failure to comply with other obligations. The need to prevent the breach of such essential

<sup>154</sup> Logically we also exclude the possibility of deducing any kind of "criminal" international responsibility of the State from the existence of this right or duty to punish an individual-organ who has committed certain "crimes". Without going into an essentially theoretical dispute, it seems clear to us that it would not be justifiable in any case to refer to a "criminal" responsibility of the State with regard to the applicability of penalties to certain State organs, whether in one country or another. The assertion of the existence of a "criminal" international responsibility of the State might possibly be justified in cases in which the form of international responsibility applicable to the State itself would result in "punitive" action for purely punitive purposes. Even in such cases, however, some are of the view that "criminal" international responsibility of the State is precluded, since the concept of criminal international responsibility is for them necessarily linked to the existence of an international criminal jurisdiction, an idea which they refuse even to consider. Be that as it may, we see no point in extending to international law the specific legal categories of internal law. For the purposes contemplated here, we are interested not so much in determining whether the responsibility incurred by a State by reason of the breach of specific obligations does or does not entail "criminal" international responsibility as in determining whether such responsibility is or is not "different" from that deriving from the breach of other international obligations of the State.

<sup>155</sup> See above, para. 99, note 148.

obligations would indeed appear to warrant:

(a) That the individual-organ committing such a breach should be held personally liable to punishment by States other than the State to which the organ in question belongs; and

(b) Concurrently, the State to which the organ concerned belongs should be subject to a special régime of responsibility, special in the sense that the régime may concern both the consequences entailed by the internationally wrongful act and the determination of the subject empowered to invoke those consequences.

102. The bearing of the third point, referred to above,<sup>156</sup> on the question at issue is obvious. It derives from the fact that, in formulating the "primary" obligation which must be considered today as the most essential one—or as comprising the most essential obligations—under international law, the Charter of the United Nations combines this formulation with an explicit indication of the consequences attendant upon any breach.

103. Article 2, paragraph 3, of the Charter provides that the Members of the United Nations "shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered".<sup>157</sup> This principle is supplemented by another of the utmost importance which is laid down in Article 2, paragraph 4, and which reads as follows:

All Members shall refrain in their international relations from the threat or 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.

104. To ensure respect for this obligation by Member States and even by non-member States,<sup>158</sup> Chapter VII of the Charter provides for the possibility of "preventive or enforcement measures" against a threatened breach of the peace to "restore international peace and security" where a breach has been committed.<sup>159</sup> The power to determine "the existence of any threat to the peace, breach of the peace or act of aggression" is attributed by Article 39 to the Security Council which, after making such a determination, "shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security". As regards these measures, whose eminently "collective" nature is stressed in several provisions,<sup>160</sup>

<sup>156</sup> See para. 98 (c) above.

<sup>157</sup> This provision is bound up with the set of provisions set forth in Chapter VI (Pacific Settlement of Disputes, articles 33–38).

<sup>158</sup> Article 2, para. 6, provides that "The Organization shall ensure that States which are not Members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security."

<sup>159</sup> These two terms are used in article 5.

<sup>160</sup> Article 2, para. 5, provides in general that

"All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action."

Going into greater detail, Articles 43 and 45 require all Members to participate in the constitution, on a preventive basis, of forces which may be used by the Security Council; Articles 48, 49 and 50 provide for the participation of Members in the implementation of measures decided upon by the Security Council, as well as collective action and mutual

(Continued on next page.)

Article 41 enumerates measures not involving the use of armed force,<sup>161</sup> and Article 42 enumerates measures involving the use of force which may be undertaken if the measures provided for in Article 41 prove to be inadequate.<sup>162</sup> Moreover, until such time as the Security Council is able to take the necessary steps to organize and implement such collective enforcement action, article 51 envisages the possibility of immediate enforcement action, whether "individual or collective", in the exercise of the right of "self-defence", thereby making a temporary exception to the general prohibition of the use of force. This exception relates to a Member State which is the victim of an armed attack, as well as to other Members which likewise consider themselves threatened by the acts of the aggressor or are merely associated with the victim of aggression by collective security agreements, especially by one of the regional arrangements referred to in chapter VIII (Articles 52-54) of the Charter.<sup>163</sup> Articles 5 and 6 round out the Charter provisions concerning the consequences of a breach of one of the legal obligations specified by the Charter with respect to the pursuit of the institutional purposes of the United Nations.<sup>164</sup> Article 5 envisages the possibility of suspending a Member "against which preventive or enforcement action has been taken by the Security Council" from "the exercise of the rights and privileges of membership". Article 6 envisages the possibility of expelling

from the Organization a Member which has "persistently violated" the principles contained in the Charter.

105. Of course, it is not for us to examine in detail the system provided for in chapter VII of the Charter to permit specific action by the Security Council, or to recapitulate the history of the circumstances which have prevented the establishment of that system. Nor is it for us to consider to what extent the Security Council's *de facto* inability to take action by means of decisions which are binding on Members has been partially remedied by making use of the Council's power to take action by means of recommendations,<sup>165</sup> or that of the General Assembly to make recommendations instead of the Security Council<sup>166</sup> and so forth. Similarly, we do not believe that there is any need at the present stage to embark upon a theoretical analysis of the various measures which might be taken within the United Nations system, or to make distinctions among them and classify them systematically. When we take up the various forms of international responsibility *ex professo*, these questions will be examined in detail. We shall then indicate whether, and within what limits, such measures can be juridically characterized as "sanctions",<sup>167</sup> which of them are of a "punitive" nature and purpose<sup>168</sup> and which may be described more aptly as a means of constraint to enforce performance of the obligation which has not been complied with. Thus it will be possible to establish the limits of the right to resort to force in cases of self-defence and what measures other than the use of armed force in the strict sense of the term may also fall under the heading of self-defence.

106. For the time being our purpose is to determine the legal obligations for which the Charter intends specifically to ensure respect and whose breach entails the application of special punitive measures, and how these legal obligations are defined. The answer to these questions is found in the text of Article 2, paragraph 4, which we have already referred to as crucial to this subject, whereby Member States<sup>169</sup> are bound to "refrain in their international relations from the threat or 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". The Purposes of the United Nations are listed in Article 1 of the Charter. Paragraph 1 of that Article gives first place to the purpose of "prevention and removal

(Foot note 160 continued)

assistance among Members in carrying out such measures. It could not be stated more clearly that participation in such "collective" measures is by no means limited only to those States directly or indirectly affected by the breach complained of in a given case.

<sup>161</sup> These may include "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations".

<sup>162</sup> The action which the Security Council is empowered to take "may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations".

<sup>163</sup> These arrangements and, in general, the entire system of safeguards provided for in Article 51 have acquired increased importance as a result of the impossibility of concluding the other agreements which should have come into force in pursuance of article 43 and even of implementing the transitional security arrangements provided for in article 106 (chap. XVII). On this subject see the recent work by L. Forlati-Picchio, *La sanzione nel diritto internazionale* (Padua, CEDAM, 1974), pp. 249 *et seq.* and 255.

<sup>164</sup> At first sight, Article 94, para. 2, would appear indirectly to extend to all international legal obligations the safeguards specifically established with respect to respect for obligations imposed on Member States in connexion with the pursuit of the institutional purposes of the Organization. In fact, however, there is only one obligation which, under this provision, is safeguarded by the possibility of Security Council action, namely the obligation incumbent upon Members pursuant to article 94, para. 1, "to comply with the decision of the International Court of Justice in any case to which it is a party". Should a Member State fail to perform "the obligations incumbent upon it under a judgment rendered by the Court", the Security Council has a twofold power, i.e. to "make recommendations", or "decide upon measures to be taken to give effect to the judgment". The order in which these two powers are mentioned would appear to indicate that the possibility of deciding upon "measures to be taken" is provided only as a last resort; indeed, one would expect resort to such measures only if the recalcitrant State, in addition to its failure to comply with the judgment of the Court, also refused subsequently to comply with the recommendations of the Security Council. The right conferred in Article 94, para. 2, upon the State concerned to call for action by the Security Council is to some extent the counterpart in the United Nations legal system of what under traditional general international law used to be the right of taking measures of reprisal against a State which refused to comply with its obligation to make reparation for an internationally wrongful act.

<sup>165</sup> Making use, where necessary, of contingents of armed forces assembled under *ad hoc* arrangements.

<sup>166</sup> In particular, under General Assembly resolution 377 (V)—the "Uniting for Peace" resolution—of 3 November 1950.

<sup>167</sup> However, it will be necessary to avoid as much as possible entering into a purely terminological debate on the meaning of the term "sanction". The divergent views which exist on this subject both in the legal literature of Western countries and in that of the socialist countries are set forth by L. Forlati Picchio, *op. cit.*, pp. 9 *et seq.* and by B. Gräfrath "Rechtsfolgen der völkerrechtlichen Verantwortlichkeit als Kodifikations Kriterium", *Wissenschaftliche Zeitschrift der Humboldt-Universität zu Berlin, Gesellschafts- und Sprachwissenschaftliche Reihe*, Berlin, vol. XXII, No. 6 (1973), p. 453, note 16.

<sup>168</sup> Comparable to the usual nature and purpose of reprisals under traditional general international law.

<sup>169</sup> It is, moreover, the *communis opinio* that the obligation or set of obligations prescribed in Article 2, para. 4, have become a part of international customary law and that they are binding upon all States whether or not they are Members of the United Nations.



of threats to the peace, and . . . the suppression of acts of aggression or other breaches of the peace . . .". Among the other purposes, paragraph 2 lays down the "principle of equal rights and self-determination of peoples", and paragraph 3 refers to "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion". However, Chapter VII, in its title and in the text of article 39, specifies the conditions under which enforcement action may be taken upon the decision of the Security Council; it does so in wording reminiscent of that used in Article 1, paragraph 1, by referring to "the existence of any threat to the peace, breach of the peace, or act of aggression". The possibility of taking against a State enforcement action initiated and organized by the United Nations itself is thus strictly linked to the pursuit of the first purpose of the Organization, which the framers of the Charter unquestionably considered as most essential for the life and survival of international society. The internationally wrongful acts for the prevention and suppression of which this exceptional possibility of resorting to collective enforcement action was envisaged are thus covered by the three terms "threat to the peace", "breach of the peace" and "act of aggression".

107. In the first place, this conclusion explains the strenuous efforts made within the United Nations to arrive at a definition of that most important and most controversial of concepts, the concept of aggression. After many vain attempts, a first step forward was taken with the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations", adopted by the General Assembly in resolution 2625 (XXV) of 24 October 1970, which defines "a war of aggression" as "a crime against the peace", for which there is responsibility under international law. That Declaration enumerated a series of acts<sup>170</sup> which might be said to represent a preliminary draft definition of the crime in question. However, more recently, a true "Definition of Aggression" was established in resolution 3314 (XXIX) of 14 December 1974. This resolution describes aggression as "the most serious and dangerous form of the illegal use of force" and enumerates a long list of acts, any of which "qualify as an act of aggression", specifying that the acts enumerated are not exhaustive and that the Security Council may determine that other acts constitute aggression, inasmuch as "the question whether an act of aggression has been committed must be considered in the light of all the circumstances of each particular case". Like resolution 2625 (XXV) it defines "war of aggression" as "a crime against . . . peace" and it specifies that aggression "gives rise to international responsibility".

108. However, the link established by the Charter between the possibility of taking collective enforcement action under the auspices of the Organization and the condition that a threat to the peace, a breach of the peace or an act of aggression must exist also explains other developments which have taken place within the United

Nations. This link is at the origin of the efforts made by many States to secure acceptance for the view that the above-mentioned condition is fulfilled even in cases in which the acts complained of do not strictly speaking fit in with the traditional concept of the threat or use of force in international relations. The acts taken into consideration for this purpose are primarily that of forcibly maintaining a régime of *apartheid* or of absolute racial discrimination within a State and that of forcibly maintaining colonial rule.<sup>171</sup> In this connexion, we should first point out, that from a general standpoint, article 1 of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly by resolution 1904 (XVIII) of 20 November 1963, affirms that:

Discrimination between human beings on the ground of race, colour or ethnic origin . . . shall be condemned . . . as a fact *capable of disturbing peace and security among peoples*.\*

The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations echoes article 1, paragraph 2, of the Charter by referring, as an application of the *principle that States shall refrain in their international relations from the threat or use of force*, to the duty of every State:

. . . to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their *right to self-determination and freedom and independence*.\*

The same Declaration affirms, as an application of the *principle of equal rights and self-determination of peoples*, that it is the duty of every State:

. . . to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their *right to self-determination and freedom and independence*.\*

The Declaration adds that:

In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

109. Referring specifically to *apartheid* and to racial discrimination in countries mentioned by name, the

<sup>171</sup> The argument which the representatives of these countries put forward in various organs of the United Nations is that, on the basis of Article 1, paras. 2 and 3 of the Charter, the use of force by a State to maintain a people, either in its own territory or in a territory administered by it, under a régime of *apartheid* or of colonial domination can be described as a use of force which is "inconsistent with the Purposes of the United Nations". It follows that they consider such use of force as prohibited under the terms of the final phase of Article 2, para. 4. One obstacle nevertheless remains; that paragraph prohibits the threat or use of force by Members "in their international relations". Consequently, these countries sometimes maintain that the peoples subjected to the régimes in question should be regarded as separate subjects of international law before they emerge as independent States and even before they attain international status as insurgents. Without going so far, they feel that there is justification for the view that the use of force by a State to maintain an *apartheid* régime within a country or to keep a colonial territory under its domination must be regarded as an act capable of having dangerous consequences in international relations, in the true sense of the term, and, hence, as an act covered by the general notion of a "threat to the peace". This view opens the way for the use in such cases of the enforcement measures envisaged in Chapter VII of the Charter.

<sup>170</sup> Including the violation of "the existing international boundaries of another State" or the violation of "international lines of demarcation, such as armistice lines".

General Assembly and the Security Council, from 1960 onwards, adopted resolutions in which the situation in South Africa was described as "endangering" or "seriously disturbing" international peace and security.<sup>172</sup> From 1965 onwards, the General Assembly regularly draw the attention of the Security Council to the fact that the situation in South Africa constituted a "threat" and even a "grave threat" to international peace and security and that economic and other measures of the kind envisaged in Chapter VII were essential in order to solve the problem of *apartheid*.<sup>173</sup> At the same time, the General Assembly appealed directly to Member States, first, in order to invite them to adopt measures designed to induce South Africa to abandon its policy of *apartheid* and urge them to terminate diplomatic, consular, economic, political and military relations with that country,<sup>174</sup> and, later, in order to request them to adopt such enforcement measures as the blockading of ports and the boycotting of goods. Finally, the General Assembly recognized the legitimacy of the struggle of the people oppressed by *apartheid*<sup>175</sup> and made increasingly urgent appeals to Member States to provide political, moral and material support to those struggling against *apartheid*. An indirect allusion to the sanction provided for in Article 6 of the Charter is also to be found in these resolutions.<sup>176</sup> The Security Council, however, employs more cautious language. It acknowledges successively that the situation in South Africa "might endanger international peace and security", "is seriously disturbing international peace and security" and "constitutes a potential threat to international peace and security". It does not have direct recourse to the measures provided for under Article 42 of the Charter but nevertheless invites Members to declare an embargo on supplies of arms, ammunition and military vehicles to South Africa.<sup>177</sup>

<sup>172</sup> For the Security Council, see resolutions 134 (1960), 181 and 182 (1963) and 191 (1964); for the General Assembly, see resolutions 1598 (XV) of 1961, 1663 (XVI) of 1961, 1761 (XVII) of 1962, 1881 (XVIII) of 1963, 2054 (XX) of 1965.

<sup>173</sup> See General Assembly resolutions 2054 (XX) [1965] 2202 A (XXI) [1966], 2307 (XXII) [1967], 2396 (XXIII) [1968], 2505 (XXIV) [1969], 2671 F (XXV) [1970], 2775 F (XXVI) [1971], 2923 E (XXVII) [1972], 3151 G (XXVIII) [1973], 3324 E (XXIX) [1974] and 3411 G (XXX) [1975].

<sup>174</sup> See resolution 2646 (XXV) of 1970, in which the recommendation also covers the "other racist régimes in southern Africa".

<sup>175</sup> At first the General Assembly assigned to this struggle the aim of safeguarding the human rights and fundamental freedoms of the South African people as a whole irrespective of race, colour or creed (Charter, Article 1, para. 3), and later that of exercising its inalienable right to self-determination (article 1, para. 2). From 1970 onwards, the resolutions recognized the legitimacy of the struggle of the people of South Africa using *all means at their disposal*. In this connexion, see also resolutions 2646 (XXV) of 1970 and 3377 (XXX) of 1975, dealing in general with "the struggle of oppressed peoples to liberate themselves from racism, racial discrimination, *apartheid*, colonialism and alien domination". The Security Council, in far more moderate terms, also recognized the legitimacy of the struggle of the South African people "in pursuance of their human and political rights" (resolutions 282 (1970) and 311 (1972)).

<sup>176</sup> See also resolution 2646 (XXV), which declares that "any State whose official policy or practice is based on racial discrimination, such as *apartheid*, contravenes the purposes and principles of the Charter of the United Nations and should therefore have no place in the United Nations".

<sup>177</sup> See Council resolutions 134 (1960), 181 (1963), 191 (1964), 282 (1970) and 311 (1972).

110. With regard to the maintenance of colonial domination by force, the General Assembly, referring to the Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by resolution 1514 (XV) of 14 December 1960, has over a 10-year period adopted a series of resolutions whose tenor is more or less the same. Parallel with what it does with regard to *apartheid*, it states that the continuation of colonial rule "threatens international peace and security" or represents a "serious impediment" to the maintenance of international peace and security.<sup>178</sup> After 1970, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations enters the picture. It contains, with regard to the right of peoples to self-determination, the provisions quoted above.<sup>179</sup> The language used in the Assembly resolutions therefore becomes stronger. Thereafter they define the "colonial wars to suppress national liberation movements in southern Africa" as being "incompatible with the Charter of the United Nations" and as posing a genuine "threat to international peace and security".<sup>180</sup> Here also, as in the resolutions on *apartheid*, the General Assembly invites Member States directly in increasingly insistent terms to "provide . . . moral and material assistance . . . to the national liberation movements".<sup>181</sup> Here too, the General Assembly recognizes the "legitimacy" of the struggle of the colonial peoples to exercise "their right to self-determination and independence".<sup>182</sup> When they refer to specific cases, the General Assembly resolutions go beyond mere appeals for assistance to peoples struggling for their liberation from colonial domination.

In the case of the *Territories under Portuguese administration*, for example, the Assembly<sup>183</sup> makes the further recommendation that States Members should break off diplomatic relations with the metropolis, close ports, boycott goods, refrain from giving the Portuguese Government any assistance, prohibit the sale or supply of arms, and so on.<sup>184</sup>

<sup>178</sup> See General Assembly resolutions 2105 (XX) [1965], 2189 (XXI) [1966], 2326 (XXII) [1967], 2465 (XXIII) [1968], 2548 (XXIV) [1969] and 2621 (XXV) [1970].

<sup>179</sup> See para. 108 above.

<sup>180</sup> See resolution 2878 (XXVI) of 20 December 1971. This resolution concerns "the continuation of colonialism in all its forms and manifestations", including racism, *apartheid* and also economic colonialism. Resolutions 2908 (XXVII) of 1972, 3163 (XXVIII) of 1973 and 3328 (XXIX) of 1974 have the same tenor.

<sup>181</sup> Other resolutions, including resolution 2708 (XXV) of 14 December 1970, address the same invitation to the specialized agencies and other organizations within the United Nations system.

<sup>182</sup> Beginning in 1970, as was the case for *apartheid*, the resolutions recognize the legitimacy of the struggle waged by the colonial peoples "by all the necessary means at their disposal".\*

<sup>183</sup> For the recognition of the legitimacy of the struggle waged "by the peoples of the Territories under Portuguese domination" or waged by them "by all the necessary means at their disposal", see, *inter alia*, resolutions 2107 (XX) of 1965, 2707 (XXV) of 1970 and 3113 (XXVIII) of 1973. All these resolutions explicitly condemn the armed repression then carried out by the Lisbon Government and demand that the colonial wars should be ended. Resolution 3113 (XXVIII) of 1973 is the last adopted with regard to Portugal, since the change in the régime and the policies with regard to the colonial Territories took place soon afterwards.

<sup>184</sup> See, in particular, resolution 2107 (XX), already referred to, (Continued on next page.)

In the case of *Namibia (South West Africa)*, after the termination of South Africa's Mandate over the Territory, the General Assembly called upon that State to withdraw from the Territory all its military and police forces and its administration, etc. The Assembly considered the continued South African presence to be a flagrant violation of the territorial integrity of Namibia.<sup>185</sup> In addition to recognizing the legitimacy of the struggle *by all means* of the people of Namibia against the "illegal occupation of their country" and inviting States and international organizations to assist the Namibian people in its struggle, the General Assembly notes that the situation in the Territory "constitutes a threat to international peace and security".<sup>186</sup> It therefore invites the Security Council to take the measures provided for under Chapter VII of the Charter.<sup>187</sup> Both the Assembly and the Council call upon Member States to take a series of measures to obtain the withdrawal of the South African Administration from the Territory.

Finally, the most advanced statements of position are inspired by the case of Southern Rhodesia. The Security Council, in considering the question, does not hesitate to recognize that the Rhodesian situation represents a "threat to international peace and security" and therefore decides to apply certain measures on the basis of Chapter VII, Article 41, of the Charter.<sup>188</sup> Like the Assembly, the Council requests Member States to take measures against the Rhodesian régime; the General Assembly reiterates, in particular, its customary request that material, moral, political and humanitarian assistance should be extended to the people of Zimbabwe in their "legitimate" struggle for freedom and independence.<sup>189</sup>

111. Is it possible to draw any absolutely firm conclusions on the basis of the foregoing data? The question is difficult to answer. In our opinion, an objective examination of the data should enable us to conclude that the maintenance by a State of a coercive policy of *apartheid* or absolute racial discrimination or of colonial domination over another people by force is henceforth considered within the United Nations system—and probably in general international law as well—as breaches of an established international obligation whereby countries should abstain from or put an end to such practices. It should also be possible to conclude that such breaches, especially if they continue, are considered particularly serious and liable to entail legal consequences more severe than those attached to less serious internationally wrongful acts. On the other hand, it would probably be premature to conclude that most States consider that such breaches should lead to the application of each one of the enforcement measures provided for in the

Charter for the prevention and suppression of threats to the peace, breaches of the peace and acts of aggression.

112. It should be noted that in making such an observation, we have no intention of opening a theoretical debate on the scope and the effect on Members of resolutions of United Nations organs. In our opinion, it is concrete facts that count; it is concrete facts which demand caution during attempts to determine, as in this case, to what extent States agree upon the legitimacy of resorting, in certain circumstances, to a "given action". The texts referred to in the preceding paragraphs were adopted on the initiative of a clear majority of States. We think that the judgment expressed in those texts on the policies and practices of certain States now meets with almost unanimous approval by the Members of the United Nations and the members of the international community in general. However, it remains to be seen whether the same can be said about assessments of certain important legal points related to the interpretation of key provisions of the Charter and of beliefs as to the legitimacy of resorting to given actions in given cases.

113. For example, the idea that the Charter legitimizes the application, by third States, of enforcement measures involving the use of force against States practising *apartheid* or maintaining colonial domination over other countries is seriously questioned by a considerable number of States. The same is true of the idea that the Charter legitimizes the provision of armed aid by a third State to a people struggling for liberation from alien domination. Some Governments doubt whether the General Assembly—or even the Security Council—has the power to remove by recommendations alone the prohibition of the use of force established by the Charter in all cases, with the exception of self-defence and participation in action undertaken, on its own "decision", by the Security Council. Nor do the States in question subscribe to the idea of including in the legal definition of "self-defence", as the term is used in Article 51 of the Charter,<sup>190</sup> armed action undertaken by a people to free itself from *apartheid* or colonial domination. Accordingly, they cannot agree that a possible intervention in the combat by another State be presented as participation in "collective self-defence", again as the term is used in Article 51. Lastly, these States have great difficulty in agreeing—with all the attendant consequences—to regard the relations between a State and a people under its colonial domination as "international relations", in the sense in which the term is used in Article 2, paragraph 4, at least until that people has acquired the limited international legal capacity which international law attributes under certain conditions to insurrectional movements.

114. It is clearly not for us to take sides in these differences of opinion which divide States on delicate legal points. At this stage, our task is limited to examining the objective conclusions which may be drawn from attitudes adopted by States, particularly within the framework of the United Nations. The differing views described above do not seem to invalidate the main conclusion, namely that the international community as a whole now seems to recognize

(Foot note 184 continued)

resolution 2795 (XXVI) of 1971 and resolution 3113 (XXVIII), already referred to. The Security Council also called for certain sanctions to be applied against Portugal.

<sup>185</sup> Resolution 2325 (XXII) [1967].

<sup>186</sup> Resolution 3399 (XXX) [1975]. See also resolution 2678 (XXV) [1970].

<sup>187</sup> Resolution 2678 (XXV).

<sup>188</sup> See resolutions 232 (1966), 253 (1968), 277 (1970), 320 (1972), 328 (1973) and 333 (1973).

<sup>189</sup> See, *inter alia*, General Assembly resolutions 2022 (XX) [1965], 2652 (XXV) [1970] and 3396 (XXX) [1975].

<sup>190</sup> This point of view is quite independent of the political and moral sympathy which these States and their peoples may feel for the "legitimate" cause of a people struggling for its freedom.

that acts such as the maintenance by force of *apartheid* and colonial domination constitute internationally wrongful acts and particularly serious wrongful acts. On the other hand, these differences of opinion make it impossible to conclude that there exists a similar agreement on the part of all essential sectors of the international community as to the type of "action" or "measures" which may legitimately be taken to meet those situations. It must also be recognized that the point of view of the group of States experiencing the difficulties mentioned in the previous paragraph has considerable weight in the Security Council. This explains the caution with which the Security Council has proceeded in the matter and also the fact that, despite repeated appeals by the General Assembly, in only one case—that of Southern Rhodesia—has the Council decided to apply enforcement measures in accordance with Chapter VII of the Charter, and then only measures which did not involve the use of armed force. Furthermore, it must be said that, in this field, the General Assembly itself has never gone beyond identifying any of the situations concerned as cases of a "threat to the peace". In such cases it is no doubt harder to contemplate the application of enforcement measures involving the use of armed force. Cases of "a breach of the peace" or "an act of aggression" thus apparently belong to a category apart, even in the view of those States which have advocated the adoption of the most advanced resolutions by the General Assembly.

115. In order to evaluate precisely the scope of United Nations practice relating to the matters under discussion, it might be useful to examine certain conventions. The Convention on the Prevention and Punishment of the Crime of Genocide, which the General Assembly adopted unanimously on 9 December 1948 (resolution 260 (III)), will be examined first.<sup>191</sup> There can be no doubt that genocide is now regarded by world opinion as an international crime and it will be recalled that article I of the Convention clearly reflects that conviction. Article VIII stipulates that:

Any Contracting Party may call upon the competent organs of the United Nations to take *such action* under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide . . .\*

The language is notable for its lack of precision.<sup>192</sup> Determining the type of measures to be taken in each particular case is left entirely to the "competent organs" of the United Nations, and the Contracting Parties have not entered into any special commitment concerning co-operation with regard to such measures. Furthermore, no explicit mention is made of any action specifically reserved to the Security Council, nor of the application of the measures provided for in Chapter VII of the Charter. Everything therefore leads to the conclusion that, despite the horror aroused by such a crime and by the memory of its perpetration, as regards the consequences it would entail, States did not really wish to place it on the same level as a proper act of aggression.

<sup>191</sup> The Convention came into effect in 1951.

<sup>192</sup> This is due also, at least in part, to the fact that the same Convention provides both for the prevention and suppression of genocide as an international crime of the State, and for the punishment of persons having committed acts of genocide or having participated in such acts in any way whatsoever.

116. The text of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*<sup>193</sup>—a phenomenon which, in General Assembly resolutions, is closely linked with that of the maintenance by force of colonial domination—would seem at first sight to justify different conclusions. In article I, the States Parties declare that *apartheid* is a "crime against humanity" and specify that inhuman acts resulting from the policies of *apartheid* and other similar policies "are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.\*" Article VIII is based on the corresponding article of the Convention on Genocide. In article VI, however,

"The States Parties . . . undertake to accept and carry out in accordance with the Charter of the United Nations the decisions taken by the Security Council\* aimed at the prevention, suppression and punishment of the crime of *apartheid*, and to co-operate in the implementation of decisions adopted by other competent organs of the United Nations\* with a view to achieving the purposes of the Convention.

The provisions of this Convention therefore differ noticeably from those of the Convention on Genocide. They are very similar to those contained in chapter VII of the Charter concerning action to be taken in cases of threats to international peace and security. However, it is precisely because of this similarity that the Convention in question could not be adopted unanimously. It obtained 91 votes to 4, but there were 26 abstentions. Furthermore, to date there have been only 34 signatures and 18 ratifications. Thus, it cannot be said that its provisions received the same broad and unconditional unanimous support as the Convention on Genocide. This is certainly not because *apartheid* is less widely condemned than genocide, but because States differ as to the type of action to be taken to suppress this condemned practice, and because of the similarity, considered excessive by some States, between the treatment provided for under the new Convention for the crime of *apartheid* and that provided for in the Charter for the crime of aggression. In fact, therefore, an examination of conventions drawn up to prevent and suppress certain "international crimes" seems to reaffirm rather than invalidate the conclusions outlined above.<sup>194</sup>

117. To sum up, it seems permissible to say that, despite differing attitudes among different groups of States within collective United Nations organs, a certain trend is nevertheless emerging with respect to the subject under consideration. The persistent lack of agreement among States on specific points cannot prevent the emergence and gradual development of a common view on certain basic aspects. As already noted, it seems undeniable that today's unanimous and prompt condemnation of any direct attack on international peace and security is now also paralleled by almost universal disapproval of other activities. Furthermore, well before the law, history condemned certain States for imposing internal régimes based on discrimination and the most absolute racial segregation, or for subjecting other

<sup>193</sup> Adopted by the General Assembly on 30 December 1973 (resolution 3068 (XXVIII), annex).

<sup>194</sup> See para. 114 above.

peoples to colonial domination. But it seems undeniable that today, for the international community as a whole,<sup>195</sup> such acts violate principles formally embodied in the Charter, and even if the Charter is not taken into account, principles which are now so deeply embedded in the consciousness of mankind that they have become particularly important rules of general international law. It also seems undeniable that world opinion regards the acts in question as genuine "crimes", i.e., wrongful acts which are more serious than others, and that they must therefore entail more serious legal consequences—but without necessarily attaining the degree of seriousness of the supreme international crime, namely the war of aggression, and without necessarily involving all the legal consequences of the latter. All this seems to represent a sufficiently well-based conclusion and one which is also perfectly adequate to our present needs, since, in this section, we are seeking only to determine whether there are grounds for recognizing the existence of a distinction between two fundamentally different categories of internationally wrongful acts on the basis of the content of the obligation breached.<sup>196</sup> The current response of States to this question seems quite definitely affirmative.

118. The summary records of the debates in the Sixth Committee of the General Assembly during its examination of the reports of the International Law Commission on its work concerning international responsibility also confirm this conclusion. In discussions which took place in the early 1960s<sup>197</sup> on new approaches to the codification of State responsibility, a large majority of the representatives in the Sixth Committee approved the idea of extending the work of codification to the field of the international responsibility of States as a whole, and at the same time limiting it strictly to that field by breaking its ties, which had been maintained until then, with the question of the treatment of foreigners. These discussions gave rise to the idea of making a distinction between different régimes of responsibility, each of which would be applicable to the breach of different types of international obligations; the distinction would be based on the content of the obligations in question. The representatives of some Governments emphasized what seemed to them the particularly serious and important nature of the breach of certain obligations. In this connexion, they explicitly mentioned breaches involving a threat to the peace, a breach of the peace or an act of aggression, and also breaches involving genocide, the pursuit of *apartheid* policies or the maintenance by force of colonial domination, and so forth.<sup>198</sup> At that time, it was already being maintained that, after general rules on State responsibility had been formulated, it would be necessary to define special rules of responsibility to be applied to the particularly

serious internationally wrongful acts mentioned.<sup>199</sup> This recommendation clearly implied the belief that a special régime of responsibility was applicable to the acts in question and that a distinction must therefore be made between two different categories of wrongful acts.

119. These positions were subsequently defined more clearly during the debate in the Sixth Committee after the submission of the articles on State responsibility which had been approved on first reading by the International Law Commission. The statement made by the representative of Iraq at the twenty-eighth session was particularly important. He said:

One question to be considered in particular was that of the establishment of categories of offences whose seriousness would be determined by reference to the importance of the neglected obligation: thus, offences against the security or territorial integrity of States could constitute the category of international crimes. Further, in the event of the violation of an obligation to the international community as a whole, the concept of collective responsibility might be invoked: the violation of such an obligation created a nexus not only with the State directly injured but also with the whole international community.<sup>200</sup>

At the twenty-ninth session (1974), the representative of the German Democratic Republic said:

His delegation considered it to be essential from both a political and a legal point of view to ... distinguish clearly between different categories of breaches of international obligation. Thus, aggression as a crime against international peace, as well as colonialism and genocide, should, for example, not be regarded as ordinary violations of treaties. That was in keeping with existing laws and was of great practical importance for the legal consequences resulting from breaches of international obligations.<sup>201</sup>

At the thirtieth session (1975) referring to the report of the International Law Commission on its twenty-seventh session, the representative of the USSR said:

His delegation fully supported the idea reflected in paragraph 49 of the report that it was necessary to distinguish those categories of particularly dangerous internationally wrongful acts which should be described as international crimes. The need for such a distinction derived from many important instruments relating to the struggle against aggression, *apartheid* and racism which had been adopted over the years by the United Nations.<sup>202</sup>

<sup>199</sup> A recommendation along these lines was made by the representative of the USSR (*ibid.*, *Seventeenth Session, Sixth Committee*, 738th meeting, para. 9; and *ibid.*, *Eighteenth Session, Sixth Committee*, 787th meeting, para. 17), and by the representative of Romania (*ibid.*, *Seventeenth Session, Sixth Committee*, 742nd meeting, para. 22).

<sup>200</sup> *Ibid.*, *Twenty-eighth Session, Sixth Committee*, 1397th meeting, para. 7. The language used shows the influence of the observations made by the International Court of Justice in its judgment on the case concerning the Barcelona Traction, Light and Power Company Limited, which had been rendered in the intervening period.

<sup>201</sup> *Ibid.*, *Twenty-ninth Session, Sixth Committee*, 1486th meeting, para. 57. The representative of the German Democratic Republic made similar statements at the twenty-eighth session (*ibid.*, *Twenty-eighth Session, Sixth Committee*, 1399th meeting, para. 21) and at the thirtieth session (*ibid.*, *Thirtieth Session, Sixth Committee*, 1539th meeting, para. 2).

<sup>202</sup> *Ibid.*, 1544th meeting, para. 9. A similar position had been adopted by the representative of the USSR at the twenty-eighth session (*ibid.*, *Twenty-eighth Session, Sixth Committee*, 1406th meeting, para. 13) and the twenty-ninth session (*ibid.*, *Twenty-ninth Session, Sixth Committee*, 1489th meeting, para. 35).

<sup>195</sup> And not only for certain sections of this community to the exclusion of others.

<sup>196</sup> The action to be taken against different wrongful international acts within the same category is not at issue here.

<sup>197</sup> From the fifteenth session (1960) to the eighteenth session (1963).

<sup>198</sup> See in particular the opinions expressed by some representatives in the Sixth Committee (*Official Records of the General Assembly, Fifteenth Session, Sixth Committee*, 653rd meeting, paras. 10 and 18; *ibid.*, *Sixteenth Session, Sixth Committee*, 726th meeting, para. 22 and 729th meeting, para. 1; *ibid.*, *Seventeenth Session, Sixth Committee*, 745th meeting, para. 49; and *ibid.*, *Eighteenth Session, Sixth Committee*, 784th meeting, para. 14).

Lastly, at the same session, the representative of Cyprus emphasized that;

One of the essential questions that would arise in further work by the Commission on the latter topic was whether it would be necessary to recognize the existence of a distinction based on the importance to the international community of the obligation breached and, accordingly, whether international law should acknowledge a separate and more serious category of internationally wrongful acts which could be described as international crimes. Noting the significant distinction between "primary" and "secondary" rules on which ILC had based its work, he said his delegation agreed with the view that the study of the objective element of the internationally wrongful act would render plainly apparent the need to take into consideration the content, nature and scope of the obligations laid on the State by the "primary" rules of international law and to distinguish on that basis between different categories of international obligations. In order to be able to assess the gravity of the internationally wrongful act and determine the consequences attributable to that act, it would be necessary to take into consideration the fact that the importance attached by the international community to respect for some obligations—for example, those concerned with peace-keeping—would be of a completely different order from that attached to respect for other obligations.<sup>203</sup>

During the same debates, other representatives made similar statements.<sup>204</sup> In these statements, aggression, genocide, *apartheid* and colonialism were also quoted as examples of offences to be included in the category of the most serious internationally wrongful acts. Moreover, the fact that other representatives remained silent on this point does not necessarily mean that they had reservations. Paragraph 49 of the introduction to the report of the International Law Commission on its 1975 session<sup>205</sup> gave rise to no objections, and the fact that several representatives made no comment in that connexion indicates, in our opinion, that the articles which were discussed concerned different questions altogether. With respect to the matter under discussion here, the International Law Commission confined itself to formulating an idea to be developed in its future work.

120. The opinions of authors of scientific works are, generally speaking, no easier to interpret than the practice of States. Some of these authors frankly consider certain

<sup>203</sup> *Ibid.*, Thirtieth Session, Sixth Committee, 1550th meeting, para. 12.

<sup>204</sup> See the statements made by the representatives of India (*ibid.*, Twenty-eighth Session, Sixth Committee, 1404th meeting, para. 2), Czechoslovakia (*ibid.*, Twenty-ninth Session, Sixth Committee, 1488th meeting, para. 17; and *ibid.*, Thirtieth Session, Sixth Committee, 1546th meeting, para. 3), the Byelorussian SSR (*ibid.*, Twenty-eighth Session, Sixth Committee, 1398th meeting, paras. 26–27; *ibid.*, Twenty-ninth Session, Sixth Committee, 1491st meeting, para. 9; *ibid.*, Thirtieth Session, Sixth Committee, para. 31), the Ukrainian representative (*ibid.*, Twenty-eighth Session, Sixth Committee, 1400th meeting, para. 11; *ibid.*, Thirtieth Session, Sixth Committee, 1542nd meeting, para. 1), Romania (*ibid.*, Twenty-eighth Session, Sixth Committee, 1405th meeting, paras. 16–17), the Syrian Arab Republic (*ibid.*, Thirtieth Session, Sixth Committee, 1548th meeting, para. 53), Bulgaria (*ibid.*, 1549th meeting, para. 8) and Hungary (*ibid.*, 1547th meeting, para. 41).

<sup>205</sup> See *Yearbook* ... 1975, vol. II, p. 59, document A/10010/Rev.1, para. 49, which contains the following passage:

"Next to be examined will be the various problems relating to the determination of different categories of breaches of international obligations. An essential question which will arise in this context is whether it is now necessary to recognize the existence of a distinction based, as was indicated above, on the importance of the obligation breached to the international community, and, accordingly, whether contemporary international law should acknowledge a separate and more serious category of internationally wrongful acts which might perhaps be described as international crimes".

international obligations more important than others, and consequently view any breach as a more serious wrongful act. But since they do not draw any "normative" conclusions therefrom, namely in determining the régime of responsibility to be applied in the two cases, their opinion can obviously not be quoted in support of the distinction envisaged in this section of the report. Furthermore, the views of some writers do not coincide with the view clearly expressed by the International Law Commission in its report on its twenty-fifth session, to the effect that the term "international [State] responsibility" covers:

every kind of new relations which may arise, in international law, from the internationally wrongful act of a State, whether such relations ... are centred on the duty of the guilty State to restore the injured State in its rights and repair the damage caused, or whether they also give the injured State itself or other subjects of international law the right to impose on the offending State a sanction admitted by international law.<sup>206</sup>

There are still many differences of opinion regarding the acceptability of the term "international responsibility". One writer may be in favour of making a distinction between two categories of internationally wrongful acts, in terms of the content of the obligations breached, without necessarily making any differentiation in the régime of responsibility to be applied. According to some writers, the obligation to make reparation<sup>207</sup> incumbent on the State committing the wrongful act is not a form of responsibility. Conversely, other writers may consider that the power of an injured State or of others to impose on the guilty State punitive sanctions such as reprisals or other individual or collective enforcement measures, does not enter into the concept of responsibility. Two writers may thus agree in recognizing that different rights or powers may arise for a State as a result of the breach by another State of two international obligations having a different content. They may, however, disagree about the inclusion of these different effects in the concept of international responsibility, and one will recognize the existence of a differentiated régime of responsibility, while the other will deny it.

121. These remarks have been made only to avoid attributing to the opinions of certain writers any bearing on the problem under discussion that they may not actually have. It should also be noted that in analysing doctrinal opinions, it may be useful to go further back in time than was done in the case of jurisprudence and State practice. The examination of the development of scientific opinions will therefore deal with three successive periods, the first ranging more or less from the middle of the nineteenth century<sup>208</sup> to the outbreak of the First World War, the second covering the period between the two World Wars, and the third going from the end of the Second World War to the present day.

122. During the first period, very little scientific interest

<sup>206</sup> See *Yearbook* ... 1973, vol. II, p. 174, document A/9010/Rev. 1, chap II, sect. B, para. 10 of the Commentary to article 1.

<sup>207</sup> The term "reparation" includes here delayed execution, *restitutio in pristinum*, satisfaction, compensation, payment of a pecuniary penalty to the injured party, etc.

<sup>208</sup> We may take as the starting-point the publication, in 1844, of Heffter's manual (see note 210 below), where, for the first time, the problem of international State responsibility is systematically considered as a problem of *ex delicto* international obligations.



was taken in the determination of the legal consequences of the internationally wrongful act of a State. At all events the works examined do not show that their authors particularly considered whether the diversity of content of the breached obligation could be the criterion for a differentiation in the régime of responsibility applicable to the State guilty of a breach. Moreover, some writers implicitly excluded all differentiation of this kind by regarding reparation as the sole consequence of a breach of an international obligation.<sup>209</sup> Those who have paid particular attention to the various forms of reparation mention restitution, redress for material and moral damage, satisfaction and sometimes also the adoption of appropriate measures to prevent a recurrence of the breach.<sup>210</sup> However, the choice between these various forms is not in any way related to the content of the obligation that has been breached. The view generally held would seem to be that the State which is the victim of an internationally wrongful act may claim each of the various forms of reparation indicated. However, it is pointed out by some that satisfaction can be due only in the case of a grave breach;<sup>211</sup> but the gravity of the breach does not correspond to the content of the obligation breached.

123. The writers of this period also do not generally speak of a differentiation between internationally wrongful acts hinging on the difference in content of the obligation breached that would serve as a basis for determining the measures which the injured State is authorized to take by way of "sanctions". The question of repressive or, in general, coercive measures to be applied against a State that has committed an internationally wrongful act is treated only in a fragmentary manner. It is brought up in the context of studies dealing specifically with reprisals, embargoes, pacific blockade, intervention or war itself.<sup>212</sup> Most authors recognize the right of the injured State to

conduct itself towards the guilty State in a manner that would itself be wrongful, if the guilty State had not first committed a breach. The lawfulness of recourse to the measures envisaged is usually made dependent on an unsuccessful prior attempt to obtain reparation. On the other hand, the fact that the breached obligation had a specific content is not mentioned as a pre-condition for the lawfulness of the application of a penalty. The choice between the different measures is left to the injured State: it is merely stated that the reaction must be proportionate to the breach and to the aim that may lawfully be pursued. But there again the gravity of the breach is not specifically related to the content of the breached obligation.

124. There is, however, one exception that stands out against this seemingly negative background, which shows that the notion of a distinction between different régimes of responsibility in terms of the content of the breached obligation is not entirely absent from the doctrine of that period. In the second half of the nineteenth century, the lone but highly authoritative voice of Bluntschli called attention to the need for a distinction of that kind. According to this Swiss expert in international law, when a State has simply failed to fulfil its obligation towards another State, the latter may either: (a) require the first State to honour its obligation, albeit belatedly, or to redress the injury it has caused, or (b) terminate the treaty whose provisions have not been complied with. By way of exception, in cases where the honour or dignity of a State is concerned, the State may also demand adequate satisfaction.<sup>213</sup> If the breach is a more serious one and consists in an actual encroachment on the legal domain of another State or in undue interference in that State's enjoyment of its property, the mere elimination of the wrongful situation and the restoration of the *de jure* situation, or compensation, no longer suffice. The injured State may in addition demand satisfaction, reparation and, depending on the circumstances, further safeguards against a repetition of the breach.<sup>214</sup> Finally, if the breach is of an even more serious nature and leads to a breach of the peace by force, the right of the injured State may extend to the punishment of the aggressor.<sup>215</sup> These views have been faithfully reported, for it is interesting to note that a century ago someone was already putting forward, on the subject we are considering, the most advanced ideas of the authors of today.

125. Bluntschli's opinion is also interesting from another

<sup>209</sup> D. Anzilotti, (*Teoria generale della responsabilità dello stato nel diritto internazionale* (1902), reprinted in *Scritti di diritto internazionale pubblico*, Padua, CEDAM, 1956, vol. I, p. 62), defines a breach of international law as a "cause of legal relations for the purpose of reparation for a breach of rights". In his view the action of the injured State is limited to securing the reparation due.

<sup>210</sup> See A. W. Heffter, *Le droit international public de l'Europe*, 3rd ed., trans. by J. Bergson (Berlin, Schroeder, 1857), p. 204; F. de Martens, *Traité de droit international*, trans. by A. Léo (Paris, Marescq aîné, 1883), vol. I, p. 562; P. Pradier-Fodère, *Traité de droit international public européen et américain, suivant les progrès de la science et de la pratique* (Paris, Durand, 1885), vol. I, pp. 330 et seq., vol. II, pp. 28 et seq.; L. Oppenheim, *op. cit.*, p. 205; E. von Ullmann, *Völkerrecht*, (Tübingen, Mohr, 1908), p. 150; F. von Liszt, *Le droit international*, 9th ed., (1913), trans., by G. Gidel (Paris, Pédone, 1927), pp. 202–203.

<sup>211</sup> For example, von Liszt, *op. cit.*, p. 203.

<sup>212</sup> See, among general works, A. W. Heffter, *op. cit.*, pp. 204 and 215 et seq.; H. W. Halleck, *International Law or Rules regulating Intercourse of States in Peace and War* (San Francisco, Bancroft, 1861), p. 297 et seq.; H. Wheaton, *Elements of International Law*, 8th ed., Boston, Little Brown, 1866, p. 309 et seq.; P. Pradier-Fodère, *op. cit.*, vol. I, pp. 546 et seq.; *ibid.*, vol. VI (1896) pp. 455 et seq.; P. Fiore, *Trattato di diritto internazionale pubblico*, 3rd edition, Turin, UTET, 1888, vol. II, p. 596 et seq.; C. Calvo, *Le droit international théorique et pratique*, 4th ed., vol. I (Paris, Guillaumin, 1887), pp. 266 et seq.; *ibid.*, vol. III (1888), pp. 518 et seq.; P. Heilborn, *Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen* (Berlin, Springer, 1896) pp. 351 et seq.; E. von Ullmann, *op. cit.*, pp. 456 et seq.; F. von Liszt, *op. cit.*, pp. 296 et seq. Among works dealing with special questions P. Lafargue's *Les représailles en temps de paix* (Paris, Rousseau, 1898) and J. Dumas's *Les sanctions de l'arbitrage international* (Paris, Pédone, 1905) deserve special attention.

<sup>213</sup> "Wenn ein Staat seine völkerrechtliche Verbindlichkeit gegen einen andern Staat lediglich nicht erfüllt, so hat der berechnigte Staat die Wahl, entweder die Erfüllung, beziehungsweise Schadenersatz wegen Nichterfüllung zu verlangen, oder von dem Vertragsverhältnis zurück zutreten, dessen Bestimmungen nicht erfüllt worden sind" . . . "Wird die Ehre eines andern Staats verletzt oder seine Würde missachtet, so ist der beleidigte Staat berechnigt, entsprechende Genugthuung zu fordern". (J. C. Bluntschli, *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt*, Nördlingen, Beck, 1872, p. 259.)

<sup>214</sup> "Besteht die Verletzung in dem tatsächlichen Eingriff in das Rechtsgebiet (Rechtsbruch) oder in widerrechtlicher Besitzstörung eines andern Staates, so ist der verletzte Staat berechnigt, nicht bloss Aufhebung des Unrechts und Wiederherstellung des gestörten Rechts oder Besitzstandes beziehungsweise Schadenersatz zu begehren, sondern überdem Genugthuung und Sühne und je nach Umständen weitere Garantien gegen Erneuerung des Rechtsbruchs zu fordern." (*Ibid.*, p. 260.)

<sup>215</sup> Wird der Rechtsbruch bis zu gewaltsamen Friedensbruch gesteigert, so wird auch das Recht des verletzten Staates auf Züchtigung des Friedebrechers erweitert." (*Ibid.*)

angle: the determination of the subject or subjects of international law entitled to invoke the responsibility of the State guilty of an international breach. In a manner consistent with his premises, he maintains that when a breach constitutes a danger to the community, not only the injured State, but all the other States which have the necessary power to safeguard international law, are entitled to take action to restore and safeguard the legal order.<sup>216</sup> Other authors of the same period express similar views on this point. Some enunciate the principle while remaining somewhat vague as to details,<sup>217</sup> others, such as Heffter and Bluntschli himself, endeavour to go into details and to draw up lists of breaches which all States would be justified in punishing.<sup>218</sup> But the difficulty of such a task, the arbitrary nature of the enumeration, the omissions that are inevitably remarked in these lists and the confusion existing between acts attributable to the State and other acts committed by private individuals, or between breaches of law and breaches of ethics, are all conducive to general mistrust of the basic idea underlying the compilation of the lists in question. Most authors, following Anzilotti, therefore maintain that in the case of a breach of an international obligation, whatever its content, the injured State alone has the right to react against the State responsible for the breach.<sup>219</sup>

126. During the period between 1915<sup>220</sup> and 1939 great advances were made in studies on State responsibility. The papers on this subject in general, and the contributions

<sup>216</sup> "Wenn die Verletzung des Völkerrechts gemeingefährlich ist, so ist nicht allein der verletzte Staat, sondern es sind die übrigen Staaten, welche das Völkerrecht zu schützen die Macht haben, veranlasst, dagegen zu wirken und für Herstellung und Sicherung der Rechtsordnung einzustehen." (*Ibid.*, p. 264.)

<sup>217</sup> According to W. E. Hall (*A Treatise on International Law*, 2nd ed. (Oxford, Clarendon Press, 1884), p. 54), "When a State grossly and patently violates international law in a matter of serious importance, it is competent to any State or to the body of States, to hinder the wrongdoing from being accomplished, or to punish the wrong-doer". According to E. von Ullman, (*op. cit.*, p. 463), collective intervention by the principal Powers is justified when the conduct of a State implies the negation of fundamental principles of the international order and international law. See also F. von Holtzendorff, "Grundrechte und Grundpflichten", *Handbuch des Völkerrechts* (Hamburg, Richter, 1870), vol. II, p. 70.

<sup>218</sup> A. W. Heffter (*op. cit.*, p. 204) notes first of all that in principle "with the exception of several acts which are equally incompatible with the general rights of nations and of such a nature that they should be suppressed by all, the injured party or its successors have normally the sole right to demand reparation for the offence". Further on (p. 207), he adds that "Any real and absolute denial of the rights of man and of nations and any general or special infringement of those rights . . . constitute a breach of international law and an offence against all States obeying the same moral laws, which should be suppressed by the joint efforts of those States." [Translation from French.] A list of those breaches follows.

<sup>219</sup> It should be noted that Anzilotti does not rule out the lawfulness of an action, taken by States not directly injured by a breach of an international obligation, for the purpose of safeguarding international law. Nevertheless, he justifies such action as "intervention" and not as the determination of "responsibility". According to this author, intervention is always legitimate if the conduct of the State against which intervention is directed is considered a serious threat to the international community. See D. Anzilotti, *Teoria generale . . . (op. cit.)*, pp. 68 *et seq.*, pp. 72 *et seq.* According to other opinions of the same period, intervention should definitely be prohibited, or, conversely, it is considered legitimate regardless of whether certain obligations are breached rather than others.

<sup>220</sup> Publication date of the classic work by E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (Reprint, New York, Banks Law Publishing, 1928).

made on particular aspects, are innumerable. It must be noted, however, that in none of these works, which vary in scope and value, is the idea of making a distinction between two or more categories of internationally wrongful acts, on the basis of the criteria we are concerned with here, developed *ex professo*.

127. First, it should be noted that in the writings of this period no mention is generally made of the possibility of referring to the diversity of content of the international obligations breached and to the relative importance of this content to the international community with a view to establishing a criterion for differentiating between the types of action which may be required of the State committing the offences, as *ex delicto* obligations. In the opinion of those who, like Kelsen, *a priori* rule out the possibility that general international law should recognize obligations of this kind, and who maintain that an "obligation" to perform specific acts as reparation for damage or the like can only derive from an agreement between the State committing the breach and the injured State,<sup>221</sup> the problem does not even arise. But this observation also applies to the great majority of authors, who maintain that general international law precisely imposes on the State committing any internationally wrongful act an *ex delicto* obligation to provide the injured State with reparation *lato sensu* for the wrongful act in question.<sup>222</sup> The authors holding this view scarcely envisage the possibility of making the content of the breached obligation the criterion for determining with regard to each individual case, what particular action the guilty State is required to take and for deciding when other, more exceptional forms of "reparation" should be required in addition to the ordinary forms. All the international lawyers of this school mention, as ordinary forms of reparation—forms which in their view constitute reparation in the narrowest and most appropriate sense of the word—*restitutio in pristinum*, reparation by equivalent, and material compensation.<sup>223</sup> Most of them, however, also recognize the right of the injured State to demand satisfaction on occasion. The notion of "satisfaction" is taken to include a variety of acts such as the adoption by the guilty State of measures to prevent a repetition of the breach, apologies, punishment of the individuals responsible, saluting the flag, payment of a symbolic sum of money, and so forth. Some authors describe such measures as a form of redress for "moral damage", whereas others go so far as to attribute penal qualities to them. This, however, is not the

<sup>221</sup> See H. Kelsen, "Unrecht und Unrechtsfolge im Völkerrecht", *Zeitschrift für öffentliches Recht* (Vienna) vol. XII, No. 4 (October 1932), pp. 545 *et seq.*

<sup>222</sup> The opinion of most of these authors on this point is implicit. Some of them, such as Reitzer, *op. cit.*, p. 147, express this opinion explicitly.

<sup>223</sup> On this point, see: E. M. Borchard, *op. cit.*, pp. 413 *et seq.*; P. Schoen, "Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen", *Zeitschrift für Völkerrecht* (Breslau) Supplement 2 to vol. X, (1917), pp. 21 *et seq.*, pp. 122 *et seq.*; K. Strupp, *loc. cit.*, pp. 209 *et seq.*; Ch. de Visscher, *loc. cit.*, pp. 118–119; A. Decencière-Ferrandière, *La responsabilité internationale des Etats à raison des dommages subis par des étrangers* (Paris, Rousseau, 1925), pp. 245 *et seq.*; C. Eagleton, *op. cit.*, pp. 182 *et seq.*; A. Roth, *Schadenersatz für Verletzungen Privater bei völkerrechtlichen Delikten* (Berlin, Heymann, 1934), pp. 97 *et seq.*; S. Arató, *Die völkerrechtliche Haftung*, (Pécs, Nyomatott Taizs József, 1937), pp. 51 *et seq.*; M. Whiteman, *Damages in International Law*, (Washington, D.C., U.S. Government Printing Office, 1937 (vols. I–II), 1943 (vol. III)); L. Reitzer, *op. cit.*; J. Personnaz, *op. cit.*



most important consideration. In order to determine in which cases these "supplementary" measures should be required of the State committing the breach, the specific circumstances in which the breach was committed are taken as a criterion—such as the fact that these circumstances indicate that the honour and dignity of the injured State were impugned—rather than the content of the obligation breached. Even as regards the possible obligation—which, in the view of some authors, should in certain cases be a supplementary obligation<sup>224</sup>—to pay, in addition to the amount paid as compensation, a sum of money as "exemplary", "punitive" or "penal damages"—this consequence is viewed in terms of specific aspects of the particular case, and not in terms of the fact that the State has breached obligations having one content rather than another.

128. One might next consider whether the writers of this period took the content of the breached obligation as a basis for making distinctions, not with regard to the forms of reparation which the injured State is entitled to demand of the State committing the internationally wrongful act, but with regard to the coercive or other "measures" that the injured State itself or other subjects can legitimately take as sanctions against the State guilty of wrongfulness. In this regard, too, it is clear that those who believe, like H. Kelsen, that the power to take coercive measures as "sanctions" is the sole consequence attached by general international law to the internationally wrongful act of a State, must be convinced that this consequence follows any breach of an international obligation, whatever its content.<sup>225</sup> But even those authors—and they are in the majority—who believe that general international law requires a State committing a wrongful act to make reparation, recognize the legitimacy, at least in certain cases, of recourse by the injured State to measures which would otherwise be wrongful, as sanctions in response to an internationally wrongful act committed by another party.<sup>226</sup> The problem is to ascertain how these authors view the relationship between these two different forms of consequences of the wrongful act,<sup>227</sup> and whether

<sup>224</sup> On this point, see: D. Anzilotti, "Le questioni di diritto sollevate dagli incidenti del 'Carthage' et del 'Manouba'", *Rivista di diritto internazionale* (Rome) VIIIth year, 2nd series, vol. II, fasc. IV (1913) pp. 512 et seq.; E. M. Borchard, *op. cit.*, p. 419; K. Strupp, *op. cit.*, p. 213, foot-note 9; A. Decencière-Ferrandière, *op. cit.*, pp. 269 et seq.; J. K. Ralston, *The Law and Procedure of International Tribunals* (Stanford (Calif.), Stanford University Press, 1926), pp. 267 et seq.; C. Eagleton, *op. cit.*, pp. 89 et seq.; and "Measures of Damages in International Law", *Yale Law Journal*, (New Haven, Conn.) vol. XXXIX, No. 1 (November 1929), pp. 61 et seq.; A. Roth, *op. cit.*, pp. 166 et seq.; M. Whiteman, *op. cit.*, pp. 716 et seq., 1610, 1611 and 1874; H. W. Briggs, "The punitive nature of damages in international law and State responsibility for failure to apprehend, prosecute or punish", in J. M. Mathews and J. Hart, eds., *Essays in Political Science in Honour of W. W. Willoughby* (Oxford, Hopkins, 1937), pp. 339 et seq.; H. Lauterpacht, "Règles générales du droit de la paix", *Recueil des cours . . . 1937-IV* (Paris, Sirey, 1938), vol. 62, pp. 354 et seq.

<sup>225</sup> H. Kelsen, *loc. cit.*, pp. 548 et seq., 568 et seq.

<sup>226</sup> Among the authors already mentioned, see: E. M. Borchard, *op. cit.*, pp. 446 et seq.; P. Schoen, *loc. cit.*, pp. 141 et seq.; K. Strupp, *loc. cit.*, pp. 179 et seq., and 222; Ch. de Visscher, *op. cit.*, pp. 107 et seq., 117 and 118; C. Eagleton, *The Responsibility . . .* (*op. cit.*), pp. 218–219, 224 et seq.; L. Reitzer, *op. cit.*, pp. 25 et seq. See also R. Ago, *loc. cit.*, pp. 524 et seq.

<sup>227</sup> This does not necessarily mean considering whether or not they regard legitimate recourse to these measures as a form of "responsibility". Opinions vary on this subject.

they consider these two forms as cumulative or alternative. If they favour the latter course, the question arises as to whether they believe the injured State is free to choose between demanding reparation and applying a sanction or, whatever the case, that it can only resort to sanctions after having met with refusal on the part of the State committing the wrongful act to make reparation, or still further, whether the answer to this question should vary according to the content of the obligation breached.

129. The author who, at the time, devoted most attention to the relationship between reparation and sanctions was Reitzer. After careful research on jurisprudence and State practice, he concluded that in principle the injured State could only resort to sanctions after it had demanded reparation, and after finding that the State committing the wrongful act refused to fulfil its obligation.<sup>228</sup> Most of the authors of the period shared this opinion.<sup>229</sup> But does that necessarily mean that they all held it to be a rule to which there was no exception? In his lecture at the Academy of International Law in 1939, the writer of the present report raised this same question, that is, whether international law recognized "types of wrongful act to which it only attaches the obligation of reparation without any possibility of punitive action, or vice versa".<sup>230</sup> The mere fact that he considered the question shows that this writer thought the answer should also be in the affirmative. Reitzer considered that there should be two explicit exceptions to the general rule he formulated, and of the two, we are concerned here with the second one. According to that author, a State which was the victim of aggression was entitled to take immediate steps in self-defence. Unlike a State which was the victim of an internationally wrongful act of a different kind, it was not required to seek reparation beforehand.<sup>231</sup> Of course, this is not necessarily tantamount to affirming the existence of this exception or going so far as to contemplate the applicability of a different régime of responsibility for cases where the wrongful act consists in an act of aggression. Recourse by the victim of aggression to the measures required to resist the aggressor can be considered as lawful,<sup>232</sup> without such recourse necessarily being

<sup>228</sup> L. Reitzer, *op. cit.*, pp. 31 et seq., and 213.

<sup>229</sup> In this connexion, see the report of M. N. Politis to the Institute of International Law, "Le régime des représailles en temps de paix", *Annuaire de l'Institut de droit international*, 1934 (Brussels), pp. 28 et seq., and the resolution adopted by the Institute, article 6 (*ibid.*, p. 710). See also P. Schoen, *loc. cit.*, pp. 141 et seq.; K. Strupp, *loc. cit.*, pp. 194 and 222; Y. de La Brière, "Évolution de la doctrine et de la pratique en matière de représailles", *Recueil des cours . . . 1928-II* (Paris, Hachette, 1929), vol. 22, p. 275. The writings of E. M. Borchard (*op. cit.*, p. 178) and of Ch. de Visscher (*loc. cit.*, p. 116) reveal some uncertainties, particularly with regard to reprisals entailing the use of force.

<sup>230</sup> R. Ago, *loc. cit.*, pp. 530 et seq. The author was thinking mainly of the impossibility of making the right to resort to sanctions contingent upon a prior attempt to obtain reparation in cases where it is materially unthinkable—in the case of war, for example—that the State committing the breach would agree to make reparation.

<sup>231</sup> See L. Reitzer, *op. cit.*, pp. 91 et seq.

<sup>232</sup> This opinion is, in fact, widely shared by those who dealt with self-defence at the time. See, for instance, Ch. de Visscher, *loc. cit.*, pp. 107 et seq.; A. Verdross, "Règles générales du droit international de la paix", *Recueil des cours . . . 1929-V* (Paris, Hachette, 1931), vol. 30, pp. 481 et seq. and 491; E. Giraud, "La théorie de la légitime défense", *Recueil des cours . . . 1934-III*, (Paris, Sirey, 1934), vol. 49, pp. 691 et seq. On the other hand, there are no other authors who, like Reitzer, deal with the

regarded as a means of enforcing the "responsibility" of the aggressor; and there is nothing to prove that Reitzer himself took that view. But what is certain is that he did not regard aggression as an internationally wrongful act like any other, since he allowed that in the event of aggression, and in that event only, an exception could be made to the rule which normally applied to the reaction of a State injured by a wrongful act committed by another State.

130. In conclusion, it may be noted that no author explicitly put forward the idea that a distinction should be made between breaches of particular international obligations or that that distinction should govern the applicability of a given "measure" as a "sanction". However, an implicit distinction began to emerge between aggression and other internationally wrongful acts. In calling attention to the gradual affirmation of the principle of prohibiting recourse to war, various international lawyers of the period extended this prohibition to the use of force as a "sanction" against an internationally wrongful act. But they always made an exception for cases where the wrongful act was an act of aggression.<sup>233</sup>

131. However, we are also concerned—perhaps even more so—with the views of the authors of that period concerning the other aspect of the consequences of an internationally wrongful act, namely, the question of determining which subject of international law is authorized to invoke the responsibility of the State which has committed such an act. Some open-minded writers were in fact fully aware of the need to make a distinction here on the basis of the content of the obligation that has been breached, and it is not surprising that this requirement should have arisen in the doctrine of the United States, given the state of mind created by the outbreak of the First World War. E. Root, in 1915, and A. J. Peaslee, in 1916, strongly maintained that international law must evolve along the same lines as municipal law and arrive at a distinction between two kinds of breaches: those affecting only the injured State and those which, instead, affect the community of nations. With regard to this second kind of internationally wrongful act, Root considered that any State should be authorized and indeed required to punish it.<sup>234</sup> Peaslee suggested that the organs of the community, which he recommended should be established after the end of the war, should be responsible

(Foot-note 232 continued)

question whether there should be exceptions to the rule that recourse to sanctions against the State which commits an internationally wrongful act is lawful only if a prior attempt has been made to obtain reparation.

<sup>233</sup> See in this connexion, *inter alia*, the report by M. N. Politis, *loc. cit.*, p. 48, and the resolution adopted by the Institute of International Law, articles 2, para. 4, and 4, *Annuaire de l'Institut ... (op. cit.)*, pp. 708–709.

<sup>234</sup> After recalling the distinction made in municipal law, this author states that:

"Up to this time, breaches of international law have been treated as we treat wrongs under civil procedure, as if they concerned nobody except the particular nation upon which the injury was inflicted and the nation inflicting it . . . If the law of nations is to be binding [*sic*] . . . there must be a change in theory, and violations of the law of such a character as to threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilized nation to have the law maintained and a legal injury to every nation." (E. Root, "The outlook for international law", *American Journal of International Law* (Washington, D.C.), vol. 10, No. 1 (January, 1916), pp. 7–9.)

for the punishment of such acts.<sup>235</sup> His idea was thus in line with the proposals generally inclining towards the institutionalization of the international community. Root's idea, on the other hand, was feasible within the framework of a non-institutionalized society.

132. However, during the period between the two wars, authors dealing with the subject did not take up these ideas, at least as regards general international law. When speaking of reparation they logically mentioned only the injured State as entitled to demand it. But even where recourse to reprisals, embargo and peaceful blockade was concerned, they still referred only to the injured State. We should not conclude from this that it was the general view that the adoption of sanctions by subjects other than the injured State was unlawful in general international law. As in the earlier period, there were authors who recognized the right of other States to intervene in order to put an end to a wrongful act or situation.<sup>236</sup> And in stating this, these authors were obviously thinking of fairly serious wrongful acts. However, they cannot be said to have established a real connexion between the legitimacy of intervention by third States and the content of the obligation breached by the State which committed the wrongful act.

133. Apart from the two United States authors referred to,<sup>237</sup> the specialists in international law proper who have been mentioned in this report so far have not on the whole really been aware of the importance of clearly differentiating between two different categories of internationally wrongful acts. On the other hand, there was a whole group of writers whose theories were more directly related to penal law than to international law, and who clearly opted for

<sup>235</sup> The author recalls, first of all, that in the evolution of societies, certain acts, originally regarded as "torts affecting only single individuals", were later defined and treated as "crimes against the entire state". After which he continues:

"In international law, so strong is the theory that the dignity of national sovereignty should be upheld, and that the law of nations is a law 'between, not above sovereign States', that it is doubtful that the now termed 'delinquencies' of nations will soon, if ever, be stigmatized with the term 'international crimes' . . . Nevertheless, it seems probable from present indications and the natural necessities of the situation that international law will ultimately provide for some method of central control over acts of nations of a quasi-criminal nature, and that individual nations will find it to their mutual interest to surrender some of what are at present deemed their sovereign rights, in the interest of the welfare and order of the community of nations.

"International law does therefore at the present time have 'sanction'. That sanction rests almost wholly on the ultimate force of 'self-help'. The tendency will be to delegate the duties both of enforcing civil rights and of controlling quasi-criminal acts to authorized officials and to preserve 'self-help' so far and only as it proves an orderly auxiliary.

"In the law's evolution, the conception of the collective rights of the community of nations will enlarge. National acts and rights will fall naturally into two classes, one comprising those of a civil and the other those of a quasi-criminal nature." (A. J. Peaslee, "The sanction of international law", *ibid.*, vol. 10, No. 2 (April 1916), pp. 335–336.)

<sup>236</sup> For example, according to C. Eagleton (*The Responsibility ... (op. cit.)*, pp. 224–225),

"There can be no doubt that joint action for the support of international rights and for the enforcement of international duties is quite legal, even on the part of States not themselves directly injured. Such action is, however, entirely voluntary with states. International law says 'may', not 'must', with regard to the share of states in enforcing it."

For a similar opinion, see P. Schoen, *loc. cit.*, pp. 136–137.

<sup>237</sup> See para. 131 above.

such a differentiation. They were the proponents of a theory which enjoyed a certain vogue precisely between the two world wars: the theory known as the criminal responsibility of the State. It would, however, be a mistake to establish too close a connexion between this theory and the idea of differentiating between the internationally wrongful acts of the State: this does not mean to say that such a distinction is necessarily ruled out by those who do not endorse the principles of this theory, or vice versa, for that matter. For, in addition, the term "criminal responsibility of the State" is given very different meanings by different authors. There is actually only a small group of authors whose opinion is worth mentioning, in that they openly advocated the adoption of the distinction we are concerned with. This is the school of thought that includes V. Pella, Q. Saldaña, H. Donnedieu de Vabres and others, who urged the adoption of a code listing the most serious breaches of international law and specifying the sanctions attaching to them. These sanctions range from punitive damages to the occupation of territory and, as a last resort, the loss of independence. All the authors in question made the implementation of their principles contingent upon the establishment of an international criminal court, responsible for applying these sanctions.<sup>238</sup> This is probably the reason why broader acceptance of the principles themselves has not been possible. Without entering into this discussion, we may merely note the essential point, namely, the emergence of a doctrinal trend openly advocating the establishment of a distinction between internationally wrongful acts of States, the least serious of which would be governed by the traditional régime of responsibility, and the most serious—those internationally wrongful acts designated as criminal—by a far stricter régime of penal sanctions.

134. To sum up, the scientific works of the years between the wars show that the doctrine of the time, although not fundamentally focused on the search for a solution to the problem we are concerned with, did not necessarily overlook it, and sometimes even made a useful contribution in the matter. A study of these works shows us above all that the authors who were fully aware of the development needs of the international community understood that an answer had to be found outside the traditional framework of an exclusively "civil law" view of international responsibility. Confusedly perhaps, an idea took shape: the idea that there was not only one single type of internationally wrongful act and that therefore there could not be only one kind of responsibility. From time to time, voices were raised to point out that the breach of certain international

<sup>238</sup> See Q. Saldaña, "La justice pénale internationale", *Recueil des cours* ... 1925-V (Paris, Hachette, 1927), vol. 10, pp. 227 *et seq.*, and particularly pp. 296 *et seq.*; V. V. Pella, *La criminalité collective des Etats et le droit pénal de l'avenir*, 2nd ed. (Bucharest, Imprimerie de l'Etat, 1926); H. Donnedieu de Vabres, *Les principes modernes du droit pénal international* (Paris, Sirey, 1928), pp. 418 *et seq.* See also the proceedings of the International Law Association concerning the establishment of an international criminal court, at the 1922, 1924 and 1926 sessions; those of the Inter-Parliamentary Union concerning wars of aggression at the 1925 session; those of the 1926 International Congress of Penal Law concerning the establishment of a Permanent Court of International Justice, and the drafts drawn up on those occasions (*Historical survey of the question of international criminal jurisdiction—Memorandum submitted by the Secretary-General* (United Nations publication, Sales No. 1949.V.8)).

obligations was a far more serious cause of disturbance of the international legal order than that of some others and that accordingly, in such cases, the consequences could not be the same. It has been shown that some authors have made helpful suggestions on the subject, either as regards the "measures" to be taken against the guilty State or as regards the determination of the subject or subjects of international law authorized to determine the responsibility of the State concerned.

135. During the period following the Second World War, the interest of scientific circles in the problem under discussion grew in both intensity and scope. Studies on the subject sometimes led to the adoption of very strong expressions of opinion. It is therefore important to follow the development of scientific thought in the decades that followed.

136. Immediately after the end of hostilities, at a time when the thought of all the horrors that mankind had just passed through were still painfully fresh in all minds, two authors were conspicuous for the similar positions they adopted—at the same time, but independently of each other: H. Lauterpacht in the United Kingdom and D. B. Levin in the Soviet Union.<sup>239</sup> Both raised the same question: should international law distinguish between two different categories of internationally wrongful acts of the State, according to the gravity of the act in question? The coincidence is significant. According to Lauterpacht, the reply is in the affirmative.

The comprehensive notion of an international delinquency ranges from ordinary breaches of treaty obligations, involving no more than pecuniary compensation, to violations of International Law amounting to a criminal act in the generally accepted meaning of the term.<sup>240</sup>

The author then goes on to state that the consequence of an "ordinary" internationally wrongful act consists in the obligation to make reparation for the moral and material wrong, such reparation possibly including punitive damages. Only if the State committing the wrongful act refused to make reparation could the injured State take the necessary measures to enforce the obligation to make reparation. On the other hand, Lauterpacht goes on to say, the consequences are different in the case of breaches which, "by reason of their gravity, their ruthlessness, and their contempt of human life place them within the category of criminal acts as generally understood in the law of civilized countries".<sup>241</sup> The author gives the example of mass massacre, on the orders of a Government, of aliens residing in the territory of a State, and preparations for and the outbreak of a war of aggression.<sup>242</sup> In such cases, he concludes, State responsibility is not confined to the obligation to make reparation, but also includes the applic-

<sup>239</sup> H. Lauterpacht propounded his hypothesis on the differentiation between two categories of internationally wrongful acts for the first time in the sixth edition of the treatise by L. Oppenheim, revised by him in 1945–1946 (L. Oppenheim, *op. cit.*, 6th ed. [Lauterpacht] (London, Longmans, Green, 1947). The study by D. B. Levin, "Problema otvetstvennosti v nauke mezhdunarodnogo prava", *Izvestia Akademii Nauk SSSR*, No. 2, was published in 1946.

<sup>240</sup> L. Oppenheim, *op. cit.*, vol. I, p. 307.

<sup>241</sup> *Ibid.*, p. 321.

<sup>242</sup> *Ibid.*

ability of coercive measures, such as war or reprisals under traditional international law, or the sanctions provided for in article 16 of the Covenant of the League of Nations or in Chapter VII of the Charter of the United Nations.<sup>243</sup> Levin, for his part, stresses the need to distinguish between simple breaches of international law (“*narusheniya*”) and international “crimes” (“*prestupleniya*”), which undermine the very foundations and essential principles of the legal order of international society.<sup>244</sup> It should also be recalled that, at that same time, the eminent United States international law specialist, P. Jessup, revived the question raised by Root in 1916 of the need to treat offences endangering the peace and order of the international community as a “violation of the right of every nation”. According to Jessup, such actions infringe the right which exists for the protection of all States; therefore, all States are affected by the breaching or weakening of such a right.<sup>245</sup>

137. At the beginning of the 1950s, we find a resurgence of this “penal law” school of thought, in which there was a certain amount of interest between the two wars and which we have already outlined.<sup>246</sup> This school certainly considers it necessary to single out, in the over-all context of the internationally wrongful acts of the State, real international “crimes”, which should be more severely punished than others.<sup>247</sup> But, as we have seen, the authors belonging to this group make the idea of the recognition of more serious international responsibility for such offences subject to the somewhat unrealistic condition that such responsibility should be established in each specific case by an international criminal court. Besides, more generally speaking, they seem not to realize how arbitrary it is to equate international conditions with domestic conditions in too facile a way. The idea of drawing a parallel between the treatment to be accorded to offences by a State—which is a subject of international law—and that meted out by State law in the case of offences committed by individuals, encounters opposition, at the theoretical level, from the vast majority of international law specialists and, at the practical level, from States at large. The proposals of this school have therefore never been put into effect, and the concern to avoid any confusion with the theories advocated by the supporters of this school of thought somewhat discourages the other

<sup>243</sup> *Ibid.*, p. 322.

<sup>244</sup> D. B. Levin, *loc. cit.*, p. 105. The distinction advocated by this author is, however, more in the nature of a proposal *de jure condendo* than a description of the law in force.

<sup>245</sup> P. Jessup's idea (*A Modern Law of Nations: An Introduction* (New York, Macmillan, 1948), pp. 11 *et seq.*) is also *de jure condendo*, since he says that if the “new” principle that the community has an interest in preventing breaches of international law were to gain acceptance, that law should evolve “in the direction of more extended governmental functions of an organized international community”.

<sup>246</sup> See para. 133 above.

<sup>247</sup> In 1950, V. Pella submitted to the International Law Commission a memorandum concerning a draft Code of offences against the peace and security of mankind (see *Yearbook ... 1950*, vol. II, p. 278, document A/CN.4/39, and in particular pp. 315 *et seq.*). The author had already put forward his proposals in 1946, in his work entitled *La guerre crime et les criminels de guerre* (reprinted Neuchâtel, Editions de la Baconnière, 1964). It is not altogether clear whether, in putting forward his ideas, he had in mind a reform of international law or simply the application of principles already accepted by existing international law. There is also evidence in his draft of some confusion between the idea of applying punitive measures against States and the idea of punishing individuals held personally responsible for certain decisions and certain misdeeds.

writers from paying special attention to the problem we are dealing with. One possible exception is D. H. N. Johnson. This writer forcefully points out that it is inconsistent to continue to treat an act of aggression as a mere “illegal” act involving no more than the obligation to provide compensation, in view of the existence of the complex machinery provided for in the Charter for dealing with acts of aggression and of the General Assembly's definition of aggression as the gravest of all crimes against peace and security<sup>248</sup> [General Assembly resolution 380 (V)].

138. Otherwise, the legal literature of the 1950s shows a special interest in what we might call the classical aspects of the theory of State responsibility, an interest which in fact, is still to be found in more recent literature. This research work sometimes makes a valuable contribution to the detailed study of the various aspects of the problem of the consequences of internationally wrongful acts, but on the whole it does not seem to relate the possible diversity of these consequences to the breach of certain obligations rather than others. The writers confirm, in contrast to a divergent and now isolated theory, that the creation of an obligation on the part of a State committing an internationally wrongful act to make reparation is the consequence attached directly to that act by general international law and that it represents, so to speak, the absolutely constant element of international responsibility.<sup>249</sup> They stress that

<sup>248</sup> D. H. N. Johnson, “The draft code of offences against the peace and security of mankind”, *International and Comparative Law Quarterly* (London), vol. 4, No. 3, (July, 1955) pp. 461–462. The author also acutely observes that “it would be a somewhat illogical result if an act of aggression, when committed by an individual—who can normally only commit the act by obtaining control of the agencies of a State—were to be regarded as a crime, and yet the same act, as between one State and another, were to be treated as an illegal act, for which compensation is payable in damages, and possibly not even that”. See also another author of the same period: K. Yokota, *loc. cit.*, pp. 453 *et seq.*

An author who deserves special mention in view of the role he played in the International Law Commission between 1954 and 1961 is F. V. Garcia Amador. He also made a distinction between merely “unlawful” acts involving only the “civil” responsibility of States and “punishable” acts involving “criminal” responsibility. The transformation of some acts of the State which were previously regarded as merely wrongful or unlawful into punishable acts is, in his view, a result of the transformation which took place after the Second World War. It would seem, however, that in his opinion the “criminal” responsibility of the State is reflected only in the obligation to punish individuals-organs which have engaged in conduct incompatible with certain international obligations of the State. On this point Garcia Amador's opinion seems to differ from Johnson's. It may be noted, on the one hand, that the existence of an obligation to punish the material authors of a particular act is no novelty vis-à-vis the provisions of traditional international law. On the other hand, the punishment of guilty individuals has nothing to do with a sanction applied to the State itself for a breach of certain obligations having a particularly important content. It is therefore hard to regard this punishment, whoever imposes it, as a special form of “State responsibility”. For the views of this writer, see *Yearbook ... 1954*, vol. II, p. 24, document A/CN.4/80; “State Responsibility in the light of the new trends of international law”, *American Journal of International Law* (Washington, D.C.) vol. 49, No. 3 (July 1955), p. 345; “State Responsibility—Some new problems”, *Recueil des cours ... 1958-II* (Leiden, Sijthoff, 1959), vol. 94, pp. 295 *et seq.* See also his first report on State responsibility in the *Yearbook ... 1956*, vol. II, document A/CN.4/296, in particular pp. 180 *et seq.* and 192 *et seq.*

<sup>249</sup> Even the supporters of Kelsen's views, to the effect that subjection to coercive measures is the only form of international responsibility, acknowledge that a breach by a State of a “primary” international

(Continued on next page.)

the power of the injured State to adopt sanctions against the State committing the wrongful act is in principle subject to the refusal of that State to provide compensation.<sup>250</sup> They describe the various forms of compensation without relating the particular forms to different cases of internationally wrongful action;<sup>251</sup> and the same is done as regards satisfaction and its various forms,<sup>252</sup> and "punitive damages".<sup>253</sup>

139. It would be wrong, however, to draw hasty conclusions from the fact that the writers of the 1950s seem to concentrate on the questions just mentioned. It is true that in their writings they do not generally make a theoretical distinction between two separate types of internationally wrongful acts, on the basis of the content of the obligations breached and entailing the application of different régimes of responsibility.<sup>254</sup> None the less a distinction of this kind

[Foot note 249 continued]

obligation involves a "secondary" obligation of that State to make reparation. See P. A. Zannas, *La responsabilità internazionale des Etats pour les actes de négligence* (Montreux, Ganguin et Laubscher, 1952), pp. 21, *et seq.*; P. Guggenheim (*op. cit.*, vol. II (1954), pp. 65 *et seq.*), does not include the obligation to make reparation among the consequences of an internationally wrongful act, but also recognizes that the injured State can apply a sanction against the State committing the offence only after seeking compensation and meeting with a refusal.

<sup>250</sup> In earlier periods as well, many authors upheld the principle that the injured State must have tried, without success, to obtain reparation before being empowered to apply punitive measures. But it was only after the Second World War that this principle was unanimously accepted by the doctrine. See, for example, P. A. Zannas, *op. cit.*, pp. 21 *et seq.*; P. A. Bissonnette, *La satisfaction comme mode de réparation en droit international* (Annemasse, Grandchamp, 1952); P. Guggenheim, *op. cit.*, p. 65; G. Dahm, *Völkerrecht* (Stuttgart, Kohlhammer, 1958), vol. I, pp. 265 *et seq.*; A. P. Sereni, *op. cit.*, pp. 1557 *et seq.*; I. Brownlie, *International Law and the Use of Force . . .* (*op. cit.*) p. 219; L. Rinaudo, "Rappresaglia (diritto internazionale)", *Novissimo Digesto Italiano* (Turin), vol. XIV (1968), p. 793; H.-J. Schlochauer, "Die Entwicklung des völkerrechtlichen Deliktsrecht", *Archiv des Völkerrechts*, (Tübingen), vol. 16, No. 3 (1975), p. 274.

<sup>251</sup> With regard to the different forms of reparation see, *inter alia*, Bissonnette, *op. cit.*; B. Cheng, *op. cit.*, pp. 233 *et seq.*; P. Reuter, *loc. cit.*, pp. 189 *et seq.*; G. Schwarzenberger, *op. cit.*, pp. 653 *et seq.*; G. Morelli, *op. cit.*, pp. 536 *et seq.*; H. Accioly, *loc. cit.* p. 413; A. Schüle, *op. cit.*, pp. 338–339; G. Dahm, *op. cit.*, pp. 232 *et seq.*

In more recent literature see, on the same subject, A. P. Sereni, *op. cit.*, pp. 1544 *et seq.*; E. Jiménez de Aréchaga, *loc. cit.*, pp. 564 *et seq.*; G. Cansacchi, "Riparazione internazionale", *Novissimo Digesto Italiano* (Turin), vol. XV (1968), pp. 1189 *et seq.*; G. Ténékidès, *loc. cit.*, pp. 789 *et seq.*; D. W. Greig, *International Law*, (London, Butterworth, 1970), pp. 458 *et seq.*; D. P. O'Connell, *International Law* (London, Stevens, 1970) vol. II, pp. 114 *et seq.*; L. Cavare, *Le droit international public positif*, 3rd ed., rev. by J.-P. Quéneudec, (Paris, Pédone) vol. II, pp. 558 *et seq.*; B. Bollecker-Stern, *op. cit.*, H.-J. Schlochauer, *op. cit.*, pp. 265 *et seq.*

<sup>252</sup> Concerning satisfaction and the circumstances requiring it, see Sperduti, "Introduzione allo studio delle funzioni della necessità nel diritto internazionale", *Rivista di diritto internazionale*, Padua, CEDAM, vol. 35 (1943), pp. 27 *et seq.* This author recognizes the existence of "criminal" responsibility of States in international law, but does not seem to consider in this connexion that the content of the obligation breached has any effect (*ibid.*, p. 34). See also, on this subject, the authors mentioned in the previous foot-note.

<sup>253</sup> Concerning the possibility of claiming punitive damages in international law, see, in the legal literature of the 1950s, L. Oppenheim, *op. cit.*, 6th ed. [Lauterpacht], vol. I, pp. 320 *et seq.*; B. Cheng, *op. cit.*, pp. 234 *et seq.* Among the authors of more recent works, see G. Schwarzenberger, "The problem of an international criminal law", in G. O. W. Mueller and E. M. Wise, eds., *International Criminal Law* (South Hackensack, N.J., Rothman, 1965), pp. 13 *et seq.*; D. W. Greig, *op. cit.*, pp. 464 *et seq.*

<sup>254</sup> An outline of a distinction in principle is, perhaps, to be found in the work published by the State Institute of Law of the Soviet Academy

does emerge from their works, in which a specific breach of the obligation not to resort to the use of force is treated as a wrongful act quite distinct from other such acts. According to these writers, the restrictions usually placed on the power to retaliate against the State guilty of an internationally wrongful act cease to apply in cases of aggression, and the régime of responsibility becomes much more strict. This difference in régime takes three forms: (a) a State that is the victim of aggression is considered empowered to take, against the aggressor State, measures infringing the rights of that State,<sup>255</sup> and, in exceptional cases, this power is not made subject to the general obligation to make a prior attempt to obtain reparation for the injury suffered;<sup>256</sup> (b) it is recognized that the measures to which a State that is the victim of an act of aggression can have immediate recourse extend to the use of armed force for purposes of self-defence, although the use of armed force is not allowed in other cases of reaction to an internationally wrongful act by another party, even when due reparation has been refused;<sup>257</sup> (c) it is acknowledged, lastly, that, contrary to

of Sciences, *Mezhdunarodnoe pravo* (Moscow, Gosudarstvennoe izdatelstvo yuridicheskoi literatury, 1957) where it is stated that "State responsibility depends on the nature of the wrongfulness and its consequences" (p. 126). As to those consequences, the work distinguishes between "political" responsibility (involving, for example, limitations of the State's sovereignty), material responsibility (reparation) and moral responsibility (satisfaction). Viewed in the light of this distinction "the most serious international crime, planning and carrying out an act of aggression", gives rise to "political" as well as to "material" responsibility (p. 127).

<sup>255</sup> These writers are thinking of measures which do not involve the use of armed force, but which would still be unlawful if their application was not warranted by the fact of being a reaction to the wrongful conduct of another party. The applicability of such measures is considered to come under the concept of responsibility by writers of the Kelsen school (P. A. Zannas, *op. cit.*, pp. 15 *et seq.*; P. Guggenheim, *op. cit.*, vol. II, pp. 82 *et seq.*), and also by writers who, like R. Ago, *loc. cit.*, pp. 426 *et seq.*, consider that the "responsibility" of the State guilty of a wrongful act includes the obligation to make reparation as well as liability to a sanction that may be imposed by the injured State (G. Morelli, *op. cit.*, pp. 361 *et seq.*; A. P. Sereni, *op. cit.*, pp. 1554 *et seq.*). Writers who, like Cheng (*op. cit.*, p. 99), Jiménez de Aréchaga (*loc. cit.*, pp. 541–542) and Ténékidès (*op. cit.*, pp. 785–786), apply the term "responsibility" exclusively to the obligation to make reparation none the less consider that it is lawful for the injured State to resort to punitive measures, precisely by way of reaction to an internationally wrongful act by another party.

<sup>256</sup> The writers of the 1950s who deal with this problem recognize that reaction to the unlawful use of force by another party can be immediate, although this is not the case with any other internationally wrongful act. See, for example, D. W. Bowett, *Self-defence in International Law* (Manchester, University Press, 1958).

<sup>257</sup> In the case of the United Nations system—and, in the opinion of many writers also, in the case of customary international law—the prevailing view is that the injured State should not be allowed to resort to the use of force, even in response to an internationally wrongful act, except in the case of armed aggression. See for example, S. Calogeropoulos Stratis, "La Souveraineté des Etats et les limitations au droit de guerre", *Revue hellénique de droit international* (Athens), vol. 2 (1949), pp. 163 *et seq.*; H. Wehberg, "L'interdiction du recours à la force—le principe et les problèmes qui se posent", *Recueil des cours . . . 1951-I* (Leiden, Sijthoff, 1952), vol. 78, pp. 70 *et seq.*; H. Kelsen, *Principles of International Law* (New York, Rhinehart, 1952), pp. 16, 45, 60–61; G. Arangio-Ruiz, "Difesa legittima (diritto internazionale)", *Novissimo Digesto Italiano* (Turin), vol. V (1960), p. 633; for the theory (whose proponents are in a clear minority), that the use of force by the injured State may be admitted where it is a reaction against other, also illicit, acts, see B. Colbert Speyer, *Retaliation in International Law* (New York, King's Crown Press, 1948), p. 203; J. Stone, *Aggression and World Order—A Critique of United Nations Theories of Aggression*

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what happens in all other cases of internationally wrongful action,<sup>258</sup> a third State may assist a State that is the victim of an act of aggression, and in doing so may resort to the use of armed force.<sup>259</sup> In writings of this period the authors do not normally envisage any other consequences of aggression to be suffered by the guilty State after the aggression has ceased.<sup>260</sup> Nor do they envisage the existence of other obligations, the breach of which would entail the applicability of a special régime of responsibility.<sup>261</sup>

140. During the 1960s and 1970s the idea of distinguishing among different kinds of internationally wrongful acts according to the importance of the content of the obligation breached took shape and the theory was formulated in the writings of internationalists. On this subject, mention may be made first of the position taken by a number of Soviet authors. G. Tunkin, in a 1962 study devoted to consideration of the consequences of the internationally wrongful act of the State, supported by an analysis of international jurisprudence, arrived at the conclusion that since the Second World War international law has distinguished between two categories of breaches of the law, each entailing distinct types of responsibility. In the first category, he included offences which represent a danger to the peace, while the second covered all other breaches of international obligations.<sup>262</sup> In 1966, D. B. Levin published

(Foot-note 257 continued)

(London, Stevens, 1958), pp. 94 *et seq.* Some authors, among them D. Bowett, take an intermediate position: in their opinion States can use force in self-defence, even in response to wrongful acts which do not involve the use of force, but only in very few cases. D. Bowett, for instance, refers to serious violations of the "essential rights" of States, e.g., certain cases of economic or ideological aggression (*op. cit.*, pp. 11 *et seq.*, 24, 47 *et seq.*, 109 *et seq.*).

<sup>258</sup> The theory that any State, even if not directly injured, is entitled to intervene to punish the breach of an international obligation, regardless of the content of the international obligation breached, has been abandoned by almost all writers since 1945. R. Quadri (*Diritto internazionale pubblico* (Palermo, Priulla, 1949), pp. 187 *et seq.*), is an exception.

<sup>259</sup> See, with specific reference to the United Nations system, J. L. Kunz, "individual and collective self-defence in article 51 of the Charter of the United Nations", *American Journal of International Law* (Washington, D.C.), vol. 41, No. 4, (October 1947) pp. 872 *et seq.*; H. Kelsen, "Collective security and collective self-defence under the Charter of the United Nations", *ibid.*, vol. 42, No. 4 (October 1948), pp. 783 *et seq.*, L. M. Goodrich and E. Hambro, *Charter of the United Nations: Commentary and Documents*, 2nd ed. (London, Stevens, 1949), p. 302. *Contra* see D. W. Bowett, "Collective self-defence under the Charter of the United Nations", *The British Year Book of International Law*, 1955-56 (London), vol. XXXII (1957), p. 130 *et seq.*

<sup>260</sup> We have seen, however (note 254 above), that in *Mezhdunarodnoe pravo* (Moscow, 1957), mention is made of the possibility of imposing restrictions on the sovereignty of that State.

<sup>261</sup> As we remarked in note 257 above, D. W. Bowett (*Self-defence ...*, *op. cit.*, p. 24), considers recourse to force in self-defence, in the event of a violation of "essential rights" of the State, to be legitimate.

<sup>262</sup> The study is included in G. Tunkin's work *Voprosy teoriimezhdunarodnogo prava*, Moscow, Gossiurizdat, 1962. The same paper was published in Italian with the title "Alcuni nuovi problemi della responsabilità dello stato nel diritto internazionale" (see note 116 above). The régime of responsibility in respect of the breach of obligations essential to the maintenance of peace is considered as comprising all forms of responsibility, from the obligation to make reparations to the application of the most severe sanctions permissible under international law. On the other hand, the responsibility attendant upon the breach of other international obligations is considered as more limited. Moreover, offences of the former type are said to give rise to a legal relationship not only between the State at fault and the State directly injured but also between the State at fault and all other States, and even international organiza-

a short monograph on State responsibility in which he adopts and further develops, using practically the same language, the distinction established by Tunkin between international crimes and simple breaches. He also echoes Tunkin's ideas with regard to the consequences of that distinction for the régime of responsibility.<sup>263</sup> The distinction between "international crimes" and "simple breaches of international law" has thus become, over the years, one of the central points of Soviet doctrine on the international responsibility of States. Among the many writings devoted to this subject which have appeared in recent years, the most interesting for our purposes is the chapter on State responsibility in *Kurs mezhdunarodnogo prava*, published in 1969 by The State Institute of Law of the Academy of Sciences of the Soviet Union. In defining the internationally wrongful act ("delikt") as a breach ("narushenie") of international law, the authors of this textbook distinguish between two categories of breaches: those affecting the rights and interests of a particular State and those more serious breaches which "are assaults upon the fundamental principles of international relations and thus encroach upon the rights and interests of all States". The latter category comprises assaults upon the peace between peoples and upon the freedom of peoples. For these authors, the distinction between simple offences and "international crimes" entails consequences in respect of the subjects of the legal relations arising by reason of responsibility: besides the State directly injured, in the case of an "international crime" other States may "require compliance with the rules of international law". This distinction also entails consequences with regard to the forms of responsibility, inasmuch as the transgressor is liable to the immediate application of sanctions, including measures of military coercion, there being no need to wait until the transgressor has refused to meet the obligation to make reparations.<sup>264</sup> It must be pointed out that these concepts, which are systematically set out in the form of principles, are in fact not far removed from those which, in the preceding paragraph, were derived implicitly from the positions taken in the legal literature of other countries. Reference may also be made to a monograph by P. Kuris published in 1973<sup>265</sup> and articles by L. A. Modzhorian,<sup>266</sup> by Y. V. Petrovsky<sup>267</sup> and

tions. That effect is said to extend also to the breach of other obligations, such as those guaranteeing the freedom of the high seas, the conservation of the living resources of the sea, etc.

<sup>263</sup> D. B. Levin, *Otvetsvennost gosudarstv ...*, (*op. cit.*), pp. 19 *et seq.*, 44 *et seq.*, 112 *et seq.*, 129 *et seq.* According to this author, the category of international crimes also covers acts constituting a threat to the freedom of peoples. He states that in the case of international crimes the faculty of applying sanctions against States which have committed such crimes arises immediately after the perpetration of the crime, whereas in the case of other offences, sanctions cannot be imposed on the perpetrator unless he has failed to meet his obligation to make reparations. Sanctions themselves are considered as being of different types in the two cases.

<sup>264</sup> State Institute of Law of the Academy of Sciences of the Soviet Union, *op. cit.*, p. 420 *et seq.*, 430 *et seq.*, 434 *et seq.*

<sup>265</sup> P. M. Kuris, *op. cit.*

<sup>266</sup> "Otvetsvennost v sovremennom mezhdunarodnom prave", *Soviet Yearbook of International Law*, 1970 (Moscow, Nauka, 1972), p. 143 *et seq.*, 152 *et seq.*

<sup>267</sup> "O politicheskoy otvetstvennosti gosudarstv", *ibid.*, p. 157 *et seq.*, 159 *et seq.*, 165 *et seq.*



by P. M. Kuris and E. I. Skakunov.<sup>268</sup> Their ideas are developed within the framework of the principles formulated by Tunkin. Similar viewpoints are stated in the legal literature of other socialist countries, in particular in the works of certain East German authors, including J. Kirsten, B. Gräfrath and P. A. Steiniger. The first-mentioned of these has closely followed the theories of Tunkin and Levin;<sup>269</sup> the other two take a more elaborate and personal position, proposing a division of internationally wrongful acts into three groups based on the content of the obligation breached.<sup>270</sup>

141. During the same period, the legal literature of the "Western" countries has continued to advance under its earlier momentum and develop the ideas already put forward in previous years. Thus, it has highlighted the principle that a breach of the prohibition of any resort to force is an internationally wrongful act which, because of its exceptional seriousness, must entail the application of a régime of responsibility much more severe than that attendant upon a breach of other international obligations. It also confirms that this difference of régime has the threefold aspect we have outlined.<sup>271, 272</sup> Some authors, however, differ from the group in openly advocating the adoption, on a systematic basis, of the distinction between a

<sup>268</sup> "K teorii otvetstvennosti gosudarstv v mezhdunarodnom prave", *Pravovedenie* (Leningrad), 1973, No. 2 (March-April), pp. 83 *et seq.* and 85 *et seq.*

<sup>269</sup> J. Kirsten, "Die völkerrechtliche Verantwortlichkeit", *Völkerrecht: Lehrbuch* (Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1973), p. 325 *et seq.*, 337 *et seq.*

<sup>270</sup> The first category comprises the most serious offences, namely, breaches of the peace, which include armed aggression and the maintenance by force of a racist régime or colonial domination, according to the authors. Where one of these conditions obtains, the State or the people against which aggression has been committed may respond in self-defence, and other States are obliged to assist it in accordance with Article 51 of the Charter. The Security Council may take the measures provided for in Chapter VII. Moreover, the aggressor may be expelled from the United Nations and must in any event make amends for the damage caused. Treaties concluded with the aggressor become null and void or are suspended. Last, the aggressor may be required to provide guarantees against any repetition of the aggression. The second category includes, in the view of these authors, "violations of State sovereignty". This category comprises breaches of all the fundamental principles of international law, from non-intervention to freedom of navigation on the high seas. The injured State may take all necessary measures of self-defence, except for military measures outside its own territory. Reprisals proportionate to the wrongful act are legitimate so long as the wrongful situation persists. Guarantees against repetition of the offence may be required. The United Nations may make recommendations with a view to terminating the wrongful act; and, if there is a threat to the peace, the Security Council may take measures pursuant to Chapter VII. In any event, reparation for damages is required. The third category covers all other breaches. The injured State may, first of all, demand compliance with the obligation that has not been observed; in the event of a breach of multilateral treaties, all States parties may demand such compliance. Denunciation or suspension of the breached treaty is legitimate; reprisals proportionate to the wrongful act are permissible. The State which has committed the breach is required to perform *restitutio in pristinum* or to make equivalent reparation. B. Gräfrath and P. A. Steiniger, *loc. cit.*, pp. 225 *et seq.* (with a draft convention on the subject); P. A. Steiniger, "Die allgemeinen Voraussetzungen der völkerrechtlichen Verantwortlichkeit der Staaten", *Wissenschaftliche Zeitschrift der Humboldt-Universität zu Berlin* (Gesellschafts- und Sprachwissenschaftlichen Reihe, Berlin), vol. XXII, No. 6 (1973) pp. 441 *et seq.*; B. Gräfrath, "Rechtsfolgen der völkerrechtlichen Verantwortlichkeit . . .", *loc. cit.*, pp. 451 *et seq.*

<sup>271</sup> See para. 139 above.

<sup>272</sup> On the faculty of the State which has been the victim of aggression to take measures infringing upon the rights of the aggressor State without

"delinquency" (wrong, delict) and an international "crime". For J. H. W. Verzijl, for example, an international crime should be distinguished from a delinquency in that it not only creates an obligation on the part of the offending State to restore the previously existing situation or to indemnify the victim of the offence but also entails the application of sanctions by the international community. In this connexion, the author refers to the growing conviction that certain internationally wrongful acts of a "criminal" character call for a collective response by inter-State society. He states that the term "international crime", first used to describe a war of aggression, was subsequently extended to cover grave breaches of the laws of war, crimes against humanity and similar misdemeanors.<sup>273</sup> Various authors extend the category of international crimes to other cases, but they do so only in order to recognize that the faculty of repressing them is also possessed by States other than the State directly injured. D. Schindler, in an interim report to the Institute of International Law on the principle of non-intervention in civil wars, proposed that the perpetuation of a colonial régime or a régime of racial discrimination should

having to wait for the rejection of a demand for reparation (*supra*, note 256), see P. Lamberti Zanardi, *La legittima difesa nel diritto internazionale* (Milan, Giuffrè, 1972), p. 135.

On the prohibition of the resort to force by States in response to an internationally wrongful act (other than armed attack) (*supra* note 257), see *inter alia* I. Brownlie, *International Law . . . (op. cit.)*, pp. 251 *et seq.* and 281 *et seq.*; R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford, The University Press, 1963), pp. 199 *et seq.* and 217 *et seq.*; J. Delivanis, *La légitime défense en droit international public moderne—Le droit international face à ses limites* (Paris, Librairie générale de droit et de jurisprudence, 1971), pp. 54 *et seq.*; P. Lamberti Zanardi, *op. cit.*, pp. 123 *et seq.* and 179 *et seq.*; M. L. Forlati-Picchio, *op. cit.*, pp. 64, 118 *et seq.*, 249 *et seq.*, 265 *et seq.* and 417 *et seq.*

On the minority view according to which the Charter of the United Nations does not prohibit the use of force by a State whose rights have been violated, see H.-G. Frankze, "Die militärische Abwehr von Angriffen auf Staatsangehörige in Ausland—insbesondere ihre Zulässigkeit nach der Satzung der Vereinten Nationen", *Oesterreichische Zeitschrift für öffentliches Recht* (Vienna), vol. XVI, Nos. 1–2, (1966), pp. 149–150. D. W. Bowett ("Reprisals involving Resort to Armed Force", *American Journal of International Law* (Washington, D.C.), vol. 66, No. 1 (January 1972), pp. 1 *et seq.*) and R. W. Tucker, ("Reprisals and Self-Defence: The Customary Law", *ibid.*, vol. 66, No. 3 (July 1972), pp. 586 *et seq.*), mark a return in the practice of States to the use of force in response to wrongful acts which cannot be described as armed aggression, but they also point out that the Security Council has never explicitly approved resort to armed reprisals and has in fact formally condemned it.

On the faculty of third States to provide assistance, even armed assistance, to a State which has been the victim of aggression, (note 259 above), see I. Brownlie, *International Law . . . (op. cit.)*, pp. 329 *et seq.*; J. Delivanis, *op. cit.*, pp. 149 *et seq.*; P. Lamberti Zanardi, *op. cit.*, pp. 276 *et seq.*; M.-L. Forlati Picchio, *op. cit.*, pp. 250 *et seq.* and 267. With regard to reprisals, W. Wengler (*Völkerrecht* (Berlin, Springer, 1964), vol. I, pp. 580–581) affirms that all States, even if they are not directly concerned, are legitimately entitled to take reprisals against the author of an internationally wrongful act which is prejudicial to a general interest of the international community, and he quotes as an example the obligation to refrain from committing acts of aggression. In a recent study, M. Akehurst also thinks that it is possible to observe the development of a customary rule authorizing third States to resort to reprisals in cases of infringement of the rules prohibiting the use of force ("Reprisals by third States", *The British Year Book of International Law*, 1970 (London), vol. 44 (1971) pp. 15 *et seq.*).

<sup>273</sup> J. H. W. Verzijl, *op. cit.*, pp. 741 *et seq.* The sanctions of the international community against an "international crime, perpetrated by a State" are of a "punitive nature" and form the object of an embryonic and still very incomplete "international penal law".

be regarded as an internationally wrongful act *erga omnes* and, as such, justifying non-military intervention by third States.<sup>274</sup> In his definitive report on the same subject, D. Schindler reduced the scope of the principle but affirmed that in the case of an "international crime" the third State might have recourse to reprisals against the perpetrator of the crime and against those who had assisted the perpetrator.<sup>275</sup> I. Brownlie would have the category of international crimes include the breach of any obligation resulting from a rule of *jus cogens*. Among the "most probable" rules in that category he mentions those which prohibit wars of aggression, the slave trade, piracy and other crimes against humanity and the rules which sanction the self-determination of peoples.<sup>276</sup> Following the same reasoning, some authors have put the question whether, in the event of the breach of particularly important obligations, it might not be necessary to envisage the possibility of an *actio popularis*.<sup>277</sup>

142. In conclusion, the necessarily broad-based and detailed analysis we have been obliged to adopt, owing to the delicate and complex nature of the subject, has shown that in the internationalist literature of various countries and of various legal systems, ideas have moved substantially ahead. The positions which in older doctrine represented the isolated voices of certain especially forward-looking thinkers have become more and more frequent and increasingly firm, to the point where in modern works they represent a solidly established viewpoint and significantly, one which is not contested. Many men of science have had

<sup>274</sup> According to Schindler, all means of intervention should be considered lawful, provided that the principle of proportionality is observed, with the exception of the use of force prohibited under article 2, para. 4 of the Charter. See "Le principe de non-intervention dans les guerres civiles", interim report, *Annuaire de l'Institut de droit international* 1973, vol. 55 (Basle), p. 483. He proposed that the principle should be formulated as follows: "where the established Government maintains a régime contrary to fundamental principles of the Charter of the United Nations or of general international law, in particular a colonial régime or a régime of racial discrimination, non-military assistance to the party opposing that Government is lawful" (*ibid.*, p. 508). [Translation from French.]

<sup>275</sup> "In a similar instance (unlawful assistance against the political independence of a State), as well as in the case in which a Government commits crimes against international law, in particular the crime of genocide, it is possible to affirm the legality of reprisals by third States against the established Government and, when necessary, against States providing assistance to it. Such reprisals must not, however, imply resort to force unless the conditions for the exercise of the right of self-defence within the meaning of Article 51 of the Charter are met". (*ibid.*, pp. 562 *et seq.*) [Translation from French.]

<sup>276</sup> *Principles of Public International Law*, (*op. cit.*), p. 415 *et seq.* Brownlie speaks of *delicta juris gentium* as opposed to "torts as reparation obligations between tortfeasor and claimant".

<sup>277</sup> As early as 1966, I. Brownlie noted an evolution in international law towards recognizing that States other than the State directly injured have a legal interest in the observance of certain obligations (*ibid.*, pp. 389–390). After the judgment of the International Court of Justice in the Barcelona Traction Case, such authors as B. Bollecker-Stern (*op. cit.*, pp. 83 *et seq.*), E. Rulobca Santana ("Consideraciones sobre el concepto y elementos del acto ilícito en derecho internacional", *Temis* (Saragossa), Nos. 33–36 (1973–1974), pp. 392 *et seq.*); A. Favre (*Principes du droit des gens* (Paris, Librairie du droit et de jurisprudence, 1974), p. 629) and N. Ronzitti (*Le guerre di liberazione nazionale e il diritto internazionale* (Pisa, Pacini, 1974), pp. 98–99), expressed support for the admissibility of an *actio popularis* in cases involving a breach of the obligations *erga omnes* specified by the Court. The last-named writer adds the case of the maintenance by force of a colonial or *apartheid* régime.

to follow in their writings a development similar to that observable on a parallel plane in the attitude of various Governments and their representatives, and they have even helped to establish and consolidate the views of the latter. Thus, a basic unity of viewpoint is seen in the development of practice and theory on the matter. Willy-nilly, the idea has progressively forced itself upon the general awareness that one must distinguish between two different types within the over-all category of internationally wrongful acts. This is a substantive distinction, related to the difference in the content of international obligations and to the fact that, while all of them are important and while respect for all of them must be ensured, some of them are recognized today as being of more fundamental value than others for inter-State society as a whole, and observance of these must therefore be guaranteed by laying a heavier responsibility on those infringing them.

143. In view of the relatively new aspects of the problem under consideration, examination of all the codification drafts is not particularly likely to help us to find a solution. Most of the drafts were prepared before the Second World War and are generally confined to the specific subject of responsibility for damage caused to foreigners. They therefore concentrate on defining the obligation to make reparation for that damage.<sup>278</sup> The only draft which is both recent and general in scope is that prepared in 1973 by B. Gräfrath and P. A. Steiniger. Of course, this draft reflects precisely the ideas of its authors, which we have already mentioned. The draft states (article 6) that in principle "The form and content of international responsibility are established according to the character of the breach of international law". Provision is then made for special régimes of responsibility applicable to various cases of internationally wrongful acts, which are differentiated according to the division into three groups recommended by the authors.<sup>279</sup>

144. On the other hand, it may be more profitable to review briefly the positions taken by the members of the International Law Commission on the topic of State responsibility. For our purposes, it suffices to consider two specific periods in the work of the Commission. First, the years 1961–1963, when the Commission became aware of the need to embark on a new course in its work on the topic under consideration and took a decision to that effect. At the thirteenth session

<sup>278</sup> See article 4 of the draft prepared by the Kokusaiho Gakkwai (*Yearbook of the International Law Commission*, 1969, vol. II, p. 141, document A/CN.4/217 and Add.1, annex II); rule X of the draft prepared by the Institute of International Law (*Yearbook ... 1956*, vol. II, p. 228, document A/CN.4/96, annex 8; articles 1 and 7 of the draft prepared by K. Strupp (*Yearbook ... 1969*, vol. II, p. 151, document A/CN.4/217 and Add.1, annex IX); article I of the draft prepared by Harvard Law School in 1929 (*Yearbook ... 1956*, vol. II, p. 229, document A/CN.4/96, annex 9); article 8 of the draft prepared by the Deutsche Gesellschaft für Völkerrecht (*Yearbook ... 1969*, vol. II, p. 150, document A/CN.4/217 and Add.1, annex VIII); articles I to 8 of the draft prepared by A. Roth (*ibid.*, p. 152, annex X); article 1 of the draft prepared by the Harvard Law School in 1961 (*ibid.*, p. 143, annex VII) and paras. 164 and 168 of the Restatement of the American Law Institute (*Yearbook ... 1971*, vol. II (Part One), pp. 193 and 194, document A/CN.4/217/Add. 2).

<sup>279</sup> Article 7 concerns the régime of responsibility applicable to acts of aggression; article 8 concerns the maintenance by force of a racist or colonial régime; article 9 deals with other violations of the sovereignty of States and article 10 establishes the régime applicable to other breaches. See B. Gräfrath and P. A. Steiniger, *loc. cit.*, pp. 227 *et seq.*



(1961) we may note the statements made by J. Žourek and G. I. Tunkin, which were still rather vague and placed particular emphasis on the effect on international responsibility of the changes which had taken place with the establishment of the principles of non-aggression and prohibition of the threat or use of force.<sup>280</sup> At the fourteenth session, (1962), another member of the Commission, the author of this report, expressed the view

that a clearer distinction would have to be drawn today between acts which called for reparation and torts which called for sanctions. The distinction might be in relation to the nature of the rule violated. There were probably rules whose breach would call only for reparation, but there were others whose breach called not only for reparation but also for sanctions.<sup>281</sup>

At the same session G. I. Tunkin stressed the importance of studying responsibility for acts which endangered the peace or impeded the struggle of colonial peoples for independence and specified that in those fields "the problem of sanctions and other consequences of breaches of the rules of international law became more prominent".<sup>282</sup> At the fifteenth session, (1963), the debate on responsibility took place in the Sub-Committee set up to study this topic. At that time the author of the present report confirmed the principle enunciated at the preceding session.<sup>283</sup> It should be noted that the outline adopted by the Sub-Committee at the end of its work enumerating the points to be dealt with by the future Special Rapporteur included a second point, paragraph 1 of which referred to a "possible distinction between international wrongful acts involving merely a duty to make reparation and those involving the application of sanctions".<sup>284</sup>

145. The second period to which we may refer is that following the submission of the first four reports on State responsibility. Commenting on his second report at the twenty-first session (1969), the Special Rapporteur observed:

A twofold distinction then had to be made, relating first, to the importance of the obligation violated and, secondly, to the gravity of the violation. The consequences of a wrongful act certainly depended on the nature of the obligation violated . . . The violation of some obligations entailed only the duty to make reparation, whereas the violation of others also entailed a sanction.

He added:

Relations involving responsibility were established solely between the State committing the infringement and the State suffering the injury; but, even so, the infringement might be so serious as to concern the international community as a whole and to lead to the imposition of collective sanctions applied through international organizations, or to what had

<sup>280</sup> *Yearbook . . . 1961*, vol. I, pp. 216–217, 615th meeting, para. 59; pp. 221–222, 616th meeting, para. 35.

<sup>281</sup> *Yearbook . . . 1962*, vol. I, p. 35, 634th meeting, para. 17. See also p. 28, 653rd meeting, para. 8.

<sup>282</sup> *Ibid.*, p. 37, 634th meeting, para. 52. See also p. 16, 631st meeting, para. 14; p. 29, 633rd meeting, para. 17.

<sup>283</sup> He observed: "If it were admitted that international responsibility could produce consequences of that kind [i.e. 'sanctions'], the further question would arise whether that was true of breaches of all international obligations or only of some of them. Another question to be determined was whether there was to be a choice between reparations and sanctions, and if so, who would be called upon to make that choice." (*Yearbook . . . 1963* vol. II, p. 234, document A/5509, annex I, appendix I.).

<sup>284</sup> *Ibid.*, p. 228, document A/5509, annex I, para. 6.

been called *actio publica*, which was action instituted by a State other than the injured State with a view to the adoption of measures against the infringement.<sup>285</sup>

At the same session, N. Ushakov, referring to a work by Tunkin, observed:

. . . it had formerly been held that violations of international law concerned only the State in breach and the injured State, whereas nowadays violations which constituted a breach or threat of a breach of the peace affected the rights of all States. Hence, States other than the State directly injured might act in such cases to compel the offending State to abide by international law.<sup>286</sup>

C. Th. Eustathiades referred to the need to consider "grave violations" in connexion with the application of responsibility.<sup>287</sup> During the debate at succeeding sessions, positions frankly favourable to the idea of making a distinction between two sorts of internationally wrongful acts were taken in the statements by E. Ustor,<sup>288</sup> J. Sette Camara,<sup>289</sup> T. O. Elias,<sup>290</sup> and J. Castañeda, who, at the twenty-fifth session (1973), agreed:

that there were certain international obligations of States which constituted obligations *erga omnes*; the violation of any such obligation, for example, by genocide, constituted an international crime.<sup>291</sup>

An attitude generally favourable to the distinction in question is also reflected in the statements by M. Bartoš,<sup>292</sup> M. K. Yasseen,<sup>293</sup> A. J. P. Tammes<sup>294</sup> and E. Hambro.<sup>295</sup> P. Reuter acknowledged the existence of special régimes of responsibility as well as a general régime which did not allow for the application of punitive sanctions nor the institution of action by a third State concerning

<sup>285</sup> *Yearbook . . . 1969* vol. I, p. 241, 1036th meeting, paras. 20–21. The Special Rapporteur adopted similar positions at the twenty-second session (*Yearbook . . . 1970*, vol. I, p. 177, 1074th meeting, para. 13), and at the twenty-fifth session (*Yearbook . . . 1973*, vol. I, pp. 5–6, 1202nd meeting, para. 9). In these two statements he expressly recommended the use of the term "international crimes" to designate the most serious wrongful acts.

<sup>286</sup> *Ibid.*, p. 112, 1012th meeting, para. 38. N. Ushakov added that the forms of international responsibility could be classified "according to the nature of the violation of international law".

<sup>287</sup> *Ibid.*, p. 115, 1013th meeting, paras. 12 *et seq.*

<sup>288</sup> *Yearbook . . . 1970*, vol. I, p. 210, 1079th meeting, para. 10. Mr. Ustor said he was in favour of "the idea of reference to the international community of States in cases of very grave violation of international law".

<sup>289</sup> *Ibid.*, p. 184, 1075th meeting, para. 30. For this jurist, "acts such as the repeated rejection by Rhodesia and South Africa of indisputable obligations incumbent on all Members of the United Nations had justified and prompted the application of sanctions, and . . . the community of States, as legally organized by the United Nations Charter, had acted as a person injured by such acts".

<sup>290</sup> *Ibid.*, p. 222, 1080th meeting, para. 81. Mr. Elias said he was in favour of the concept of an "international crime".

<sup>291</sup> *Yearbook . . . 1973*, vol. I, p. 11, 1203rd meeting, paras. 26–27. Mr. Castañeda referred also to the definition by the General Assembly of a war of aggression as a "crime against the peace".

<sup>292</sup> *Ibid.*, p. 7, 1202nd meeting, para. 27.

<sup>293</sup> *Yearbook . . . 1969*, vol. I, p. 107, 1011th meeting, para. 31, Mr. Yasseen referred explicitly to breaches of the peace.

<sup>294</sup> *Ibid.*, p. 110, 1012th meeting, para. 13. Mr. Tammes referred to the distinction between more serious and less serious wrongful acts and to the possibility of *actio publica*.

<sup>295</sup> *Yearbook . . . 1973*, vol. I, p. 7, 1202nd meeting, para. 31. Mr. Hambro mentioned that it might become necessary "to deal with different qualities of responsibility according to the acts involved, such as international criminal acts".

responsibility.<sup>296</sup> In conclusion, it may be added that the question of drawing a distinction between internationally wrongful acts according to the content of the obligation breached was expressly mentioned in the reports of the Commission to the General Assembly in 1969, 1973, 1974 and 1975. No member of the Commission expressed any disagreement on that point. All those factors have encouraged the Special Rapporteur to pursue the course chosen and to give definitive form to his ideas in the present report.

146. The Commission now has the information necessary to enable it to take a definitive position on the important matter under consideration. To that end, it may be useful to recall the limits of our task at this precise point in the overall work of codifying State responsibility. We are now required to decide whether there is justification for drawing a distinction between different categories of internationally wrongful acts according to the content of the obligation breached by a State. We must determine whether, from this specific standpoint, certain wrongful acts are to be described as more serious than others and hence, whether they should be characterized differently. On the other hand, the time has not yet come to specify which régime of responsibility should be applicable to the various types of internationally wrongful acts distinguished. We shall have to take a position on the latter question when we deal with the problem of the content and forms of responsibility. Of course, we should already be aware that in making a distinction between internationally wrongful acts on the basis of the degree of importance of the content of the obligation breached we shall necessarily be obliged subsequently to draw a distinction also between the régimes of responsibility to be applied. We have already emphasized that the distinction in question is a "normative" distinction: it has no place in our draft unless it leads to a difference in the consequences entailed respectively by certain more serious offences and by other breaches of international obligations. From the standpoint of the scheme of our draft, however, the two tasks must, of course, be performed separately.

147. The operation that must now be undertaken inevitably leads us to take into consideration the content of the "primary obligations" of international law. In its report, the International Law Commission made clear the need for this, which has also been recognized by the Sixth Committee of the General Assembly.<sup>297</sup> It could not be otherwise, since it is on the basis of the content of those obligations that the different categories of offences are to be established. In this respect too, however, we must carefully avoid falling into the error that brought to grief the attempts at codification of

<sup>296</sup> *Yearbook . . . 1970*, vol. I, pp. 187–188, 1076th meeting, paras. 3–6; *Yearbook . . . 1973*, vol. I, p. 23, 1205th meeting, paras. 51–52.

<sup>297</sup> See the reports of the International Law Commission on the work of its twenty-fifth session (*Yearbook . . . 1973*, vol. II, p. 170, document A/9010/Rev.1, para. 41), its twenty-sixth session (*Yearbook . . . 1974*, vol. II (Part One), pp. 273–274, doc. A/9610/Rev. 1, para. 112) and its twenty-seventh session (*Yearbook . . . 1975*, vol. II, p. 55, document A/10010/Rev.1, para. 36). See also the report of the Sixth Committee of the General Assembly on the report of the International Law Commission on the work of its twenty-fifth session (*Official Records of the General Assembly, Twenty-eighth Session, Annexes*, agenda item 89, document A/9334, para. 28).

State responsibility for damage caused to foreigners. We should not ourselves define the "primary" rules that are to govern inter-State relations in specific domains. We should simply take cognizance of the existence of those rules and accept them as they have been defined in other instruments, to the extent that this has been done. Moreover, for our purposes we should refer to sets of rules concerning certain subjects rather than to specifically selected rules; in other words, it would be preferable to refer to the entire body of international obligations concerning the pursuit of a particular purpose rather than to any one obligation enunciated in precise terms. It would be dangerous to forget that the work of codification should be carried out with an eye to the future. As time passes, new rules will be added to the rules already existing in a particular domain, and tomorrow their violation will be considered fully as grave as a breach of the rules currently in force is considered today.

148. There remains to be solved the very delicate problem of the concrete determination of the domains to which reference must be made in order to establish the desired distinction. To do this, we believe, we must be very prudent and confine ourselves to the most reliable indications among those furnished by the analysis of State practice and the opinions of authors. We also believe that it is especially important to bear in mind the substantive reasons for the evolution observed in the positions adopted by Governments and in the ideas of theoreticians. Those reasons are directly related to the changes occurring in the factors that condition the life of modern society and, consequently, in certain requirements of today's international community which it could not do without. The ancient phenomenon of war has taken on completely new dimensions following the appearance of present-day means of destruction and the currently widespread conviction that peace is indivisible. An armed attack by one State against another can no longer be regarded as an event that concerns only those two countries, since it gives rise to a situation of danger to the entire international community. The maintenance of one country's colonial domination over another appears intolerable today not only to the people that is the victim of that domination but to the totality of an inter-State society actively aware of the equality of all peoples and of their right, equally possessed by all, to organize their political and social life in a completely independent manner. The organized destruction of certain human groups in a State for religious, racial or other reasons, the aberrant discriminatory practices adopted by certain Governments within their country no longer appear, in the eyes of an international community that is rediscovering the essential value of the human person and affirming its over-riding interest in the safeguarding of human rights and dignity, to be purely internal matters of no concern to international law. Actions which endanger the conservation and the free utilization by everyone of certain resources common to all mankind constitute a danger far greater than in the past to a community of States that is aware, in every aspect, of the essential value of those resources to its relations, its development and even its survival.

149. Such profound changes at the level of real events have naturally been reflected at the level of international law by the formation and affirmation of certain new rules or, in

some cases, the re-evaluation of rules that had existed since far earlier times. Moreover, the formulation in the Charter of the purposes and principles of the United Nations—a formulation which we intend to use as a basis for drafting the text of the article to be adopted—has had a decisive influence on the evolution of general international law itself. The same has been true concerning the adoption, within the Organization, of certain solemn acts and certain fundamental instruments. Needless to say, the rules of international law to which we refer are precisely the ones which have today become more important than others to the international community as a whole. It is in the interest of all States that these rules should be respected by all States. The juridical system of the community of States cannot tolerate free derogation from these rules through particular agreements; it has made many of these rules into rules of *jus cogens*. It is improbable that this juridical system can tolerate a situation in which a breach of the obligations imposed on States by at least some of these rules is regarded as a wrongful act no different from the rest and is treated accordingly.

150. Thus, it is by reference to the rules discussed in the preceding paragraph and to the obligations imposed by those rules upon States that we must determine the infringements we are trying to distinguish, infringements which are to be defined by a term which characterizes them and differentiates them from other internationally wrongful acts. Later it will be our task to define the special régime of responsibility applicable to such infringements. This does not mean that the régime should be the same for all the violations covered by the over-all definition we shall adopt. As we have found from our examination of the positions taken by Governments, recourse to certain extreme measures of coercion and sanction has in fact been envisaged only as a reaction to infringements of essential obligations relating to the maintenance of peace. For the breach of other international obligations which, as has been seen, are today of the utmost concern to a large group of States, it has also been recognized that recourse to “measures” is legitimate, and it has even been asserted that such recourse is obligatory, but obviously within much narrower limits. All crimes are not of equal gravity, and they do not all justify equal punishment. At the same time, we believe that infringements of such other obligations should not be included in the category of the internationally wrongful acts which are more severely treated unless the infringement is characterized by a certain degree of gravity. An act of aggression is always an international crime. On the other hand, a discriminatory practice or an assault on the free utilization of a resource common to mankind could not be regarded as a true international crime unless the circumstance was of particular gravity, since it is possible to imagine a broad range of hypotheses of differing importance.

151. There is more to be said. The recognition in our draft that a distinction should be made between some internationally wrongful acts which are more serious and others which are less serious is comparable in importance to the recognition, in the Convention on the Law of Treaties, of the distinction to be made between “peremptory” norms of international law and those norms from which derogation

through particular agreements is possible. The acceptance of the last-mentioned distinction gave rise to difficulties which are generally known. In order to respect certain legitimate concerns, an important specification was inserted in the text of the article itself: to be considered peremptory and have the prescribed effects on the validity of a treaty, a norm of general international law must be accepted as such by the international community of States as a whole. By analogy, therefore, it might be useful to specify in the present draft that—apart from the indisputable case of the obligation to refrain from resorting to force in international relations—the breach of an international obligation relating to a given domain cannot be considered an international crime unless the norm out of which the obligation in question arises is a norm of general international law accepted and recognized as essential by the international community of States as a whole, that is to say, by all those which are today fundamental components of that community.

152. At the United Nations Conference on the Law of Treaties, several Governments made their acceptance of article 53 subject to the condition that the definition of a norm as being one of *jus cogens* would be reserved to an impartial judicial instance. Even if, in the article we now propose to adopt, we were to specify individually the categories of international obligations whose breach is an international crime, there would nevertheless remain a considerable margin of uncertainty concerning the question whether an act of a State should be categorized as an “international crime”. In view of the gravity of the consequences implied by such a categorization, it is to be expected that many Governments, if they accept the distinction between two different categories of internationally wrongful acts, will again do so subject to the condition that the finding of the existence of an “international crime” should be made, in a specific case, by an international instance, whether that instance be the Security Council or the International Court of Justice. It would, of course, be possible to insert a clause to that effect in the body of the article. However, it seems to us that the article which we shall subsequently devote to the determination of the forms of responsibility applicable to international crimes would be more appropriate for the inclusion of such a clause. Another possible solution would obviously be to include the clause in question, and possibly some others as well, in a final section of the draft, as was done in the case of the Convention on the Law of Treaties.

153. It has no doubt been noted by everyone that in practice the use of a certain terminology has already become established. We have pointed out that the expression “international crime”, applied to wars of aggression in the draft Mutual Assistance Treaty prepared in 1923 by the League of Nations and in the 1924 Geneva Protocol for the Pacific Settlement of International Disputes,<sup>298</sup> has also been used in important acts of the General Assembly, such as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted in 1970, and the Definition of Aggression, adopted in 1975.

<sup>298</sup> See para. 96 above.

We have seen that in the debates of the United Nations and in the works of contemporary authors, this terminology has come into common use.<sup>299</sup> There is therefore no reason for us to deviate from this practice.<sup>300</sup> As for the term to be used for denoting what are sometimes vaguely called "other" internationally wrongful acts, or "ordinary" or "simple" breaches of an international obligation, we believe that the classical term "delict"<sup>301</sup> is especially appropriate. This term was commonly used in works on international law as a synonym for "internationally wrongful act" at a time when the introduction of a special category of "international crimes" was not yet envisaged;<sup>302</sup> it has the advantage of being customarily used, in the various legal systems, to denote wrongful acts less serious than those referred to by the word "crime".

<sup>299</sup> The term "crime", which is identical in French and English, and the terms with the same Latin etymology in Spanish and Italian are generally translated by the term "prestuplenie" in Soviet literature on international law.

<sup>300</sup> The only precaution required in the use of this terminology is to draw attention to the need of avoiding any confusion with similar expressions ("crimes under international law", "war crimes", "crimes against peace", "crimes against humanity") used in a series of conventions and international acts to designate certain individual misdeeds which are condemned by the conscience of the world and for which these international instruments require States to impose severe punishment in accordance with the rules of their internal law.

It must also be emphasized, even if that has been done, that the attribution to a State of an internationally wrongful act described as an "international crime" is not the same thing as the indictment of certain individuals-organs for actions linked to the perpetration of such an "international crime" by the State. We must also avoid giving the impression that the obligation to punish such individual actions is the special form of international responsibility—and particularly, that it is the *sole* form of responsibility—incumbent upon the State that commits an "international crime".

<sup>301</sup> There are terms which exactly correspond to the English word "delict" in French ("délit"), in Spanish ("delito"), in Russian ("delikt"), in Italian ("delitto") and in German ("Delikt").

<sup>302</sup> See, for example, in literature published in French, G. Scelle, *Précis de droit des gens—Principes et systématique* (Paris, Sirey, 1934), part II, p. 61, and R. Ago, *loc. cit.*, pp. 415 *et seq.* In literature published in English, see H. Kelsen, *Principles . . . (op. cit.)*, p. 6. In literature published in Spanish, see L. M. Moreno Quintana and C. M. Bollini Shaw, *Derecho internacional público—Sistema nacional del derecho y política internacional* (Buenos Aires, Librería del Colegio, 1950), p. 166. In literature published in Russian, the term "delikt" was originally also used as a concise synonym for "internationally wrongful act", while less serious actions were referred to as "prostye pravonarushenia" (simple breaches of the law). E. I. Skakunov, however, has recently adopted for international law the classical distinction between "crimes" ("prestuplenia") and "delicts" ("delikta"). Concerning these questions of terminology, see Kuris, *Mezhdunarodnye pravonarushenia . . . (op. cit.)*, p. 110 *et seq.*

154. In conclusion, the article to be formulated should, first of all, enunciate the general principle that the breach of an international obligation is an internationally wrongful act, regardless of the content of the obligation breached. The enunciation of this principle is, in our view, indispensable, and not only as an introduction to what will follow. The introduction of a differentiation among internationally wrongful acts and, consequently, the definition of a separate category of wrongful acts considered more serious than others, must not be allowed to give rise to a false idea. The breaches included in the broader category of "less serious" infringements should by no means be regarded in future as acts which are of little importance in the life of inter-State society. These wrongful acts do not in any way cease to be acts incompatible with law, and they continue to give rise to full responsibility of the State that has committed them. The article will have to specify thereafter the categories of international obligations whose breach, at least in certain conditions, constitutes an "international crime". The article will end with the indication that breaches of other international obligations constitute "international delicts".

155. In the light of the foregoing, the Special Rapporteur proposes the following text for adoption by the Commission:

*Article 18. Content of the international obligation breached*

1. The breach by a State of an existing international obligation incumbent upon it is an internationally wrongful act, regardless of the content of the obligation breached.

2. The breach by a State of an international obligation established for the purpose of maintaining international peace and security, and in particular the breach by a State of the prohibition of any resort to the threat or use of force against the territorial integrity or political independence of another State, is an "international crime".

3. The serious breach by a State of an international obligation established by a norm of general international law accepted and recognized as essential by the international community as a whole and having as its purpose:

(a) respect for the principle of the equal rights of all peoples and of their right of self-determination; or

(b) respect for human rights and fundamental freedoms for all, without distinction based on race, sex, language or religion; or

(c) the conservation and the free enjoyment for everyone of a resource common to all mankind

is also an "international crime".

4. The breach by a State of any other international obligation is an "international delict".

# SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

[Agenda item 3]

DOCUMENT A/CN.4/292

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

*Draft articles on succession to State property with commentaries (continued)*

[Original: French]  
[8 April 1976]

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## ABBREVIATIONS

<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
IMF	International Monetary Fund

## 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.

## CHAPTER I

## Draft Articles on succession of States in respect of matters other than treaties

NOTE: The articles whose numbers are followed by the symbol<sup>(a)</sup> were adopted by the International Law Commission at previous sessions.

## PART I

## SUCCESSION TO STATE PROPERTY

## SECTION 1. GENERAL PROVISIONS

## INTRODUCTION

*Article 1.<sup>(a)</sup> Scope of the present articles*

The present articles apply to the effects of succession of States in respect of matters other than treaties.

*Article 2.<sup>(a)</sup> Cases of succession of States covered by the present articles*

The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

*Article 3.<sup>(a)</sup> Use of terms*

For the purposes of the present articles:

- (a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;
- (b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;
- (c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;
- (d) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;
- (e) "third State" means any State other than the predecessor State or successor State.

*Article 4.<sup>(a)</sup> Scope of the articles in the present Part*

The articles in the present Part apply to the effects of succession of States in respect of State property.

*Article 5.<sup>(a)</sup> State property*

For the purposes of the articles in the present Part, "State property" means property, rights and interests which, on the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

*Article 6.<sup>(a)</sup> Rights of the successor State to State property passing to it*

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State property as passes to the successor State in accordance with the provisions of the present articles.

*Article 7.<sup>(a)</sup> Date of the passing of State property*

Unless otherwise agreed or decided, the date of the passing of State property is that of the succession of States.

*Article 8.<sup>(a)</sup> Passing of State property without compensation*

Without prejudice to the rights of third parties, the passing of State property from the predecessor State to the successor State in accordance

with the provisions of the present articles shall take place without compensation unless otherwise agreed or decided.

*Article 9.<sup>(a)</sup> General principle of the passing of State property*

Subject to the provisions of the articles of the present Part and unless otherwise agreed or decided, State property which, on the date of the succession of States, is situated in the territory to which the succession of States relates shall pass to the successor State.

*[Article 11.<sup>(a)</sup> Passing of debts owed to the State*

Subject to the provisions of the articles of the present Part and unless otherwise agreed or decided, debts owed (*créances dues*) to the predecessor State by virtue of its sovereignty over, or its activity in, the territory to which the succession of States relates shall pass to the successor State.<sup>1</sup>

*Article X.<sup>(a)</sup> Absence of effect of a succession of States on third State property*

A succession of States shall not as such affect property, rights and interests which, on the date of the succession of States, are situated in the territory [of the predecessor State or] of the successor State and which, at that date, are owned by a third State according to the internal law of the predecessor State [or the successor State as the case may be].

\*  
\* \* \*

SECTION 2. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

SUB-SECTION 1. SUCCESSION IN RESPECT OF PART OF TERRITORY

*Article 12. Succession in respect of part of territory as regards State property situated in the territory concerned*

When territory under the sovereignty or administration of a State becomes part of another State:<sup>2</sup>

(a) the ownership of immovable property of the predecessor State situated in the territory to which the succession of States relates shall, unless otherwise agreed or decided, pass to the successor State;

(b) the ownership of movable property of the predecessor State which, on the date of the succession of States, is situated in the territory to which the succession of States relates shall also pass to the successor State:

(i) if the two States so agree, or

(ii) if there exists a direct and necessary link between the property and the territory to which the succession of States relates.

*Article 13. Succession in respect of part of territory as regards State property situated outside the territory concerned*

When territory under the sovereignty or administration of a State becomes part of another State,<sup>3</sup> [movable or immovable] property of the

<sup>1</sup> See below, foot-note 8.

<sup>2</sup> Variant: "When part of the territory of a State, or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State . . .".

<sup>3</sup> Variant: "When part of the territory of a State, or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State . . .".

predecessor State situated outside the territory to which the succession of States relates shall, unless otherwise agreed or decided:

(a) remain the property of the predecessor State;

(b) pass to the successor State if it is established that the property in question has a direct and necessary link with the territory to which the succession of States relates; or

(c) be apportioned equitably between the predecessor State and the successor State if it is established that the territory to which the succession of States relates contributed to the creation of such property.

*Article 14. Succession to State property situated in newly independent States*

1. Unless otherwise agreed or decided, the newly independent State shall exercise a right of ownership of immovable property which, in the territory which has become independent, was owned on the date of the succession of States by the predecessor State.

2. Movable property of the predecessor State situated, on the date of the succession of States, in the territory which has become independent shall pass to the successor State unless:

(a) the two States otherwise agree;

(b) such property has no direct and necessary link with the territory, and the predecessor State has claimed ownership thereof within a reasonable period.

3. Nothing in the foregoing provisions shall affect the permanent sovereignty of the newly independent State over its wealth, its natural resources and its economic activities.

*Article 15. Succession to State property situated outside the territory of the newly independent State*

Property of the predecessor State which is situated outside the territory of the newly independent State shall remain the property of the predecessor State, unless:

(a) the two States otherwise agree; or

(b) it is established that the territory which has become independent contributed to the creation of such property, in which case it shall succeed thereto in the proportion determined by its contribution; or

(c) in the case of movable property, it is established that its being situated outside the territory of the newly independent State is fortuitous or temporary and that it has in fact a direct and necessary link with that territory.

*Article 16. Uniting of States*

1. On the uniting of two or more States in one State, movable and immovable property situated in the territory of the State thus formed shall remain the property of each constituent State unless:

(a) the constituent States have otherwise agreed; or

(b) the uniting of States has given rise to a unitary State; or

(c) in the case of a union, the property in question has a direct and necessary link with the powers devolving upon the union and it thus appears from the constituent acts or instruments of the union or is otherwise established that retention by each constituent State of the right of ownership of such property would be incompatible with the creation of the union.

2. Movable and immovable property situated outside the territory of the State formed by the uniting of two or more States and belonging to the constituent States shall, unless otherwise agreed or decided, become the property of the successor State.

*Article 17. Succession to State property in cases of separation of parts of a State*

When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

1. its immovable property shall, except where otherwise specified in treaty provisions, be attributed to the State in whose territory the property is situated;



2. its movable property shall:

(a) be attributed to the State with whose territory it has a direct and necessary link, or

(b) be apportioned in accordance with the principle of equity among

successor States so formed, or among them and the predecessor State if it continues to exist;

3. Movable and immovable property of the predecessor State situated outside the territory of that State shall be apportioned equitably among the successor States and the predecessor State if the latter continues to exist, or otherwise among the successor States only.

## CHAPTER II

### Introduction to the eighth report

#### A. Methodological choices

1. The first question which arises in connexion with the present report is one of methodology. In studying succession of States in respect of State property, there are a number of possible approaches, based on the consideration of a number of "reference keys" and perhaps on a combination of them. One can approach the question from the standpoint of the *type of succession* and formulate draft articles containing rules appropriate to each type. It is also possible to consider the *specific nature of the property* in question (currency, archives, Treasury and public funds, etc.) and devote a special rule to each of these types of property. Again, a distinction might be made on the basis of the *category of property* under consideration, such as movable property and immovable property, which would be covered by separate draft articles. Finally, State property can be considered in terms of *where it is situated* and be given different treatment, according as the property is situated in the territory to which the succession of States relates or outside it. By combining these various "keys" it is possible to arrive at quite an extensive range of possible approaches.

2. It will be recalled that, in the five reports which he devoted to succession to public property,<sup>4</sup> the Special Rapporteur tried successively a number of approaches. In the first three of those reports—the third, fourth and fifth—he attempted to formulate rules in general terms so that they could be applied to any type of State succession. Thus, general articles applicable to all types of property and all types of succession were drafted. They were supplemented by a number of special articles relating to individual types of property, such as currency, Treasury and State funds or archives. In the other two reports—the sixth and seventh—the Special Rapporteur introduced distinctions between types of State succession. Thus, special provisions for each of these types were drafted, being further subdivided, first, according as the property in question is or is not situated in the territory to which the succession of States relates, and, secondly, to cover specific types of property such as currency, archives, and so on. In this way, both the vertical and the horizontal divisions established in respect of State property were utilized and combined.

<sup>4</sup> *Yearbook ... 1970*, vol. II, p. 131, document A/CN.4/226 (third report); *Yearbook ... 1971*, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1 (fourth report); *Yearbook ... 1972*, vol. II, p. 61, document A/CN.4/259 (fifth report); *Yearbook ... 1973*, vol. II, p. 3, document A/CN.3/267 (sixth report); *Yearbook ... 1974*, vol. II (Part One), p. 91, document A/CN.4/282 (seventh report).

3. In the present document, the Special Rapporteur now refers to three "reference keys", which he combines. They are (a) *type of succession*, (b) the distinction between *movable property* and *immovable property* and (c) the distinction between *property situated in the territory concerned* and *property situated outside that territory*. In the new formulation of his articles, the Special Rapporteur no longer refers to individual types of property considered *in concreto*, such as currency, archives, State funds, and so on. As a result, he has this time avoided involving the International Law Commission in excessive financial or economic technicalities. For a better appreciation of this new approach, however, it is worth while to review and appraise past efforts and achievements.

4. The present report again concerns succession of States in respect of State property. It will be recalled that, in view of the complexity of the subject, the International Law Commission, at its twenty-fifth session, in 1973, endorsed the Special Rapporteur's proposal to limit its study for the time being to just one of the three categories of *public property* dealt with by the Special Rapporteur, namely, *property of the State*.<sup>5</sup>

5. At its twenty-fifth session the Commission adopted eight draft articles, worded as follows:

#### *Article 1. Scope of the present articles*

The present articles apply to the effects of succession of States in respect of matters other than treaties.

#### *Article 2. Cases of succession of States covered by the present articles*

The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

#### *Article 3. Use of terms*

For the purposes of the present articles:

(a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

<sup>5</sup> *Yearbook ... 1973*, vol. II, p. 202, document A/9010/Rev.1, para. 87.

(d) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates.

*Article 4. Scope of the articles in the present Part*

The articles in the present Part apply to the effects of succession of States in respect of State property.

*Article 5. State property*

For the purposes of the articles in the present Part, "State property" means property, rights and interests which, on the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

*Article 6. Rights of the successor State to State property passing to it*

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State property as passes to the successor State in accordance with the provisions of the present articles.

*Article 7. Date of the passing of State property*

Unless otherwise agreed or decided, the date of the passing of State property is that of the succession of States.

*Article 8. Passing of State property without compensation*

Without prejudice to the rights of third parties, the passing of State property from the predecessor State to the successor State in accordance with the provisions of the present articles shall take place without compensation unless otherwise agreed or decided.

6. In 1974, at the Commission's twenty-sixth session, the Special Rapporteur submitted a seventh report, dealing exclusively with succession of States in respect of State property. The Commission was unable to consider the draft at that session, owing to lack of time. In its resolution 3315 (XXIX) of 14 December 1974, the General Assembly recommended that the Commission should "Proceed with the preparation, *on a priority basis*,\* of draft articles on succession of States in respect of matters other than treaties".

7. In 1975, during its twenty-seventh session, the International Law Commission considered draft articles 9 to 15 and X, Y and Z contained in the Special Rapporteur's seventh report.<sup>6</sup> At that session it adopted the following articles, worded as indicated:

*Article 9. General principle of the passing of State property*

Subject to the provisions of the articles of the present Part and unless otherwise agreed or decided, State property which, on the date of the succession of States, is situated in the territory to which the succession of States relates shall pass to the successor State.

<sup>6</sup> See *Yearbook ... 1975*, vol. I, pp. 72 et seq., 1318th to 1329th meetings.

*Article 11.<sup>7,8</sup> Passing of debts owed to the State*

Subject to the provisions of the articles of the present Part and unless otherwise agreed or decided, debts owed (*créances dues*) to the predecessor State by virtue of its sovereignty over, or its activity in, the territory to which the succession of States relates shall pass to the successor State.]

*Article 3, subparagraph (e) (Use of terms)*

...  
(e) "third State" means any State other than the predecessor State or successor State.

*Article X. Absence of effect of a succession of States on third State property*

A succession of States shall not as such affect property, rights and interests which, on the date of the succession of States, are situated in the territory [of the predecessor State or] of the successor State and which, at that date, are owned by a third State according to the internal law of the predecessor State [or the successor State as the case may be].

8. At the twenty-seventh session the International Law Commission also began its consideration of section 2 of the draft articles proposed in the seventh report of the Special Rapporteur (Provisions relating to each type of succession of States). It took up articles 12 to 15, as drafted by the Special Rapporteur, on the questions of currency, Treasury and State funds, State archives and libraries, and State property situated outside the transferred territory in the case of the first type of succession of States, namely, that relating to "transfer of part of a territory". A general discussion followed. Before drawing any conclusions from the discussion, however, the Special Rapporteur wishes to return to the question of *types of succession* in order to settle the matter definitely for the purposes of the draft articles under consideration and to avoid further discussion of the kind which occurred over the concept of "transfer of part of a territory" or "succession in respect of part of territory".

**B. Choice of types of succession**

9. For the topic of succession of States in respect of treaties, the International Law Commission, in its 1972 draft,<sup>9</sup> adopted four separate types of succession of States: (a) transfer of part of a territory; (b) newly independent States; (c) uniting of States and dissolution of unions; (d) secession or separation of one or more parts of one or more States.

<sup>7</sup> The Commission reserved its position on draft article 10, relating to rights in respect of the authority to grant concessions, because, as stated in its report, it considered it "unnecessary that the draft articles should affirm the principle of the sovereignty of the successor State over its natural resources, since that principle derives from statehood itself and not from the law of succession of States" (*Yearbook ... 1975*, vol. II, p. 108, document A/10010/Rev. I, para. 66).

<sup>8</sup> The Commission decided to place this article between square brackets for the time being, because of some reservations expressed by certain of its members (*ibid.*, pp. 113-114, document A/10010/Rev. I, chap. III, sect. B, art. 11, paras. (10) and (11) of the commentary).

<sup>9</sup> *Yearbook ... 1972*, vol. II, pp. 230 et seq., document A/8710/Rev. I, chap. II, sect. C.

At its twenty-sixth session, in 1974, the Commission, which had before it for second reading the draft articles on succession of States in respect of treaties, made certain changes which had the effect of defining the first type of succession more fully and clearly and combining the last two types into one.

10. First of all, "transfer of part of a territory" was referred to more accurately as "succession in respect of part of territory". The Commission added to and incorporated into this type of succession the case in which "any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State".<sup>10</sup> The Commission meant this somewhat hermetic formula to cover the case of a Non-Self-Governing Territory which achieves its decolonization by integration with a State other than the colonial State. Any such case is now assimilated to the first type of succession, namely, "succession in respect of part of territory".<sup>11</sup> In addition, the Commission combined the last two types of succession of States under one heading, "uniting and separation of States".

11. In considering the question of succession of States in respect of treaties, the International Law Commission summarized its choice of types of succession as follows:

The topic of succession of States in respect of treaties has traditionally been expounded in terms of the effect upon the treaties of the predecessor State of various categories of events, notably: annexation of territory of the predecessor State by another State; voluntary cession of territory to another State; birth of one or more new States as a result of the separation of parts of the territory of a State; formation of a union of States; entry into the protection of another State and termination of such protection; enlargement or loss of territory. In addition to studying the traditional categories of succession of States, the Commission took into account the treatment of dependent territories in the Charter of the United Nations. It concluded that for the purpose of codifying the modern law of succession of States in respect of treaties it would be sufficient to arrange the cases of succession of States under three broad categories: (a) succession in respect of part of territory; (b) newly independent States; (c) uniting and separation of States.<sup>12</sup>

12. All these changes which the Commission made on second reading in the draft articles on succession in respect of treaties could not, of course, be taken into account by the Special Rapporteur in his draft articles on succession of States in respect of matters other than treaties, which had been prepared prior to the 1974 changes.

<sup>10</sup> *Yearbook ... 1974*, vol. II (Part One), p. 208, document A/9610/Rev. 1, chap. II, sect. D, art. 14.

<sup>11</sup> To be perfectly logical, this case should not really be so assimilated; for where is the "part" of territory affected by the succession? (1) It is not "part" of the territory of the predecessor State. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex) prohibits treating a Non-Self-Governing Territory as "part" of the territory of the administering Power. (2) Nor is it "part" of the successor State—at least not yet, until the succession occurs. Furthermore, succession of States is being considered as a phenomenon affecting the territory of the successor State. (3) Finally, the succession obviously relates not merely to "part" of the Non-Self-Governing Territory, but to the whole of it.

Regarding the problems involved in defining types of succession of States, see *Yearbook ... 1973*, vol. II, pp. 29 *et seq.*, document A/CN.4/267, paras. 20–51, and *Yearbook ... 1974*, vol. II (Part One), p. 102, documentary A/CN.4/282, paras. 13–16.

<sup>12</sup> *Yearbook ... 1974*, vol. II (Part One), p. 172, document A/9610/Rev. 1, para. 71.

13. The Special Rapporteur decided that in the present report, with a view to harmonizing the two sets of draft articles, he would follow the Commission's lead by adopting, for these articles also, three types of succession with the same wording, namely:

- (a) Succession in respect of part of territory;
- (b) Newly independent States;
- (c) Uniting and separation of States.

### C. Criteria of linkage of the property to the territory

14. Succession to State property is governed, irrespective of the type of succession, by two key criteria which the Special Rapporteur has tried to emphasize throughout his work. While it is entirely proper for all manuals and treaties on international law to note the existence of a general principle that State property passes from the predecessor State to the successor State, the need for certain nuances quite quickly becomes apparent. The essential principle that State property passes to the successor State is simply a reflection of the *principle of the linkage of such property to the territory*. It is through the application of a material criterion, namely, the relation which exists between the territory and the property by reason of the origin or nature of the property or where it is situated, that the existence of the principle of succession to State property can be deduced. Moreover, behind this principle lies the further principle of the actual viability of the territory to which the succession of States relates. In more complicated situations, however, a quite natural combination of another criterion with the one mentioned above is clearly called for if a stalemate is to be avoided. This is the principle of equity, which in such cases enjoins apportionment of the property between the successor State and the predecessor State, or among the successor States if there is more than one.

15. If the predecessor State has effected the *allocation* of the property in question to the territory to which the succession of States relates, or if such property *belongs* to the territory or at least was purchased with the territory's funds (the problem of *origin of the funds*), or if by its nature the property *relates* to the territory, then there is a direct *linkage* between the property and the territory, and this relationship constitutes a ground for the passing of the property to the successor State, at least when such property is situated *in* the territory to which the succession of States relates. When it is situated in the part of the territory remaining under the responsibility of the predecessor State or in the territory of a third State, the difficult problems which arise can be solved only by recourse to the principle of equity and of *apportionment* of the property.

### D. Dangers of a study relating to property regarded *in concreto*

16. The debate at the twenty-seventh session of the Commission on draft articles 12 to 15, relating to "succession in respect of part of territory" and covering the problems of

currency, Treasury and State funds, archives, and property situated outside the territory to which the succession of States refers,<sup>13</sup> brought to light certain doubts which the Special Rapporteur would now like to put into stronger terms and to summarize more usefully as follows:

(a) In the case of succession in respect of part of territory, problems of currency, Treasury and State funds, archives and the like do not usually arise. *This is therefore an artificial choice*, since it bears no relation to reality.

(b) In the case of other types of succession, the problems of currency, Treasury and State funds, archives and the like codified in the draft articles submitted by the Special Rapporteur are not the only ones which arise. *This is therefore an arbitrary choice*, since it does not cover all possible categories of State property.

(c) In any event—i.e., even if the choice is neither artificial nor arbitrary—the approach chosen by the Special Rapporteur exposes the Commission to having to formulate a set of highly technical draft articles on problems, such as currency and Treasury or State funds, which are not within its normal area of competence. *This is therefore an inappropriate choice*, since it exposes the Commission to great technical difficulties which it might even find insurmountable.

17. The Special Rapporteur would like to discuss this question of the threefold handicap of an artificial, arbitrary and inappropriate choice.

He believes, as do some other members of the Commission, that this choice is not artificial. The quite unique nature of “succession in respect of part of territory”, as compared with other types of succession, is the cause—allowing for some ambivalence—of many of the difficulties encountered by members of the Commission and of their doubts as to the desirability of enunciating rules of the kind set out in draft articles 12 to 15. A frontier adjustment, which as such raises a problem of “succession in respect of part of territory”, may in some cases affect only a few acres of a territory that may, as for example in the case of the USSR, cover more than 8 million square miles. A frontier adjustment affecting only a few acres of land, such as that which enabled Switzerland to extend the Geneva-Cointrin airport into what was formerly French territory, is really too minor, in the view of some members of the Commission, to raise problems of currency, Treasury and State funds or archives. Thus, the questions covered by draft articles 12 to 15 seem almost unreal in such cases. It is also noted that minor frontier adjustments are usually the subject of agreements settling all the questions arising as a result between the predecessor State ceding territory and the successor State to which it is ceded.

18. While it is true that “succession in respect of part of territory” does cover the case of an insignificant frontier adjustment which, moreover, may result from an agreement providing a general settlement of all the problems involved, it is nevertheless a fact that this type of succession also

includes cases affecting very large territories and enormous tracts of land. In those circumstances, the problems covered by draft articles 12 to 15 certainly do arise, and in fact they are particularly acute. It is this situation—namely, the fact that the area affected by the territorial change may be either very large or very small—that accounts for the ambiguities, the uniqueness, and hence the difficulty of the specific case of “succession in respect of part of territory”. In short, the magnitude of the problems dealt with in articles 12 to 15 varies with the size of the territory transferred. *These problems arise in each and every case*, but more perceptibly and more conspicuously when the area of the transferred territory is large.

19. What clinches the argument is the fact that problems relating to currency, Treasury and State funds and archives have actually arisen in specific cases of this type of succession and that the Special Rapporteur has given many substantial historical examples throughout his various reports.<sup>14</sup> This incontrovertible reality is simply a reflection of the phenomenon of substitution of sovereignty over the territory in question, which inevitably manifests itself through an extension to the territory of the successor State's own legal order and hence through a change, for example, in the monetary tokens in circulation or in the ownership of the territory's archives. Currency in particular is a very important item of State property, being the expression of a regalian right of the State and the manifestation of its sovereignty.

20. It should be added that cases of “succession in respect of part of territory” do not always involve agreements the existence of which would justify the abandonment of attempts to formulate rules governing succession. Moreover, it is in those cases where a very large part of the territory of a State passes to another State—in other words, precisely the cases in which the problems of currency, Treasury and State funds and archives arise on a larger scale—that agreements for the settlement of such problems may be lacking. This is not a theoretical hypothesis. Apart from war or the annexation of territory by force, both of which are prohibited by contemporary international law, one can envisage the case of detachment of part of a State's territory and its attachment to another State following a referendum on self-determination, or the case of secession by part of a State's population and attachment of the territory in which it lives to another State. In such situations, it is not always possible to count on the existence of an agreement between the predecessor State and the successor State, especially in view of the politically charged circumstances which may surround such territorial changes. In view of the Special Rapporteur, therefore, the choice of the problems dealt with in articles 12 to 15 is not artificial, since it in fact relates to reality.

21. Nor is the choice an arbitrary one. Once it is conceded that “succession in respect of part of territory” may give rise to problems of the kind referred to in articles 12 to

<sup>13</sup> See *Yearbook . . . 1975*, vol. I, pp. 108–131, 1325th to 1329th meetings. For the text of the draft articles, see *Yearbook . . . 1974*, vol. II (Part One), pp. 103 *et seq.*, document A/CN.4/282, chap. IV, sect. 2, sub-section 1.

<sup>14</sup> To mention only the sixth report, see *Yearbook . . . 1973*, vol. II, pp. 34–36, document A/CN.4/267, part four, article 12 and commentary (on currency); *ibid.*, pp. 36–37, article 13 and commentary (on Treasury and State funds) and *ibid.*, pp. 37 *et seq.*, article 14 and commentary (on archives).

15, there remains the observation that, both in this type of succession and in all the others, the categories of State property covered by those articles are not the only ones involved in State succession. According to this point of view, therefore, the list of articles should be lengthened to cover other categories of State property besides those envisaged in articles 12 to 15.

22. In fact, the problems considered in the articles in question are precisely those which arise in all circumstances in every type of succession of States. There are, of course, other kinds of property. It should be borne in mind, however, that the Special Rapporteur has limited his study exclusively to State property, and has thus left aside for the time being any consideration of other categories of public property, such as the property of public establishments (e.g., railways and rolling-stock). If this is kept clearly in mind and care is taken to avoid considering as State property items which actually belong to public establishments or territorial authorities (as was not always the case in the Commission's debate), it will be seen that State property is limited mainly to the categories covered by draft articles 12 to 15. Of course, one can think of other kinds of State property, such as naval vessels or warplanes. However, while one can conceive of a State without a navy, for example, it is impossible to imagine one without a currency, without a Treasury, without funds and without archives. In other words, articles 12 to 15 covered those kinds of State property which are most essential and most widespread—so much so that they can be said to *derive from the very existence of the State*. Seen in that light, there was nothing arbitrary about inquiring into what would become of such State property in cases of succession of States and even limiting the study to those kinds of State property, which represent the common denominators, so to speak, of all States.

23. It should also be borne in mind that, in any event, State property other than that referred to in articles 12 to 15, such as armaments, is covered by the general provision in article 9 (General principle of the passing of State property).

24. There remains the last criticism of the articles proposed by the Special Rapporteur, namely, that they are inappropriate because they expose the Commission to having to formulate draft articles involving such technicalities, economic, financial and other, that they might not be in keeping with the nature and the activities of the Commission. The Special Rapporteur fully appreciated this risk, especially as he himself, throughout his reports, admitted that he was ill at ease among such monetary, financial and Treasury questions because of his lack of familiarity with them.

25. During the debate on draft article 12, concerning currency in the case of "succession in respect of part of territory", one member of the Commission, Mr. Kearney, suggested the following wording as an improvement on the text of article 12:

1. Gold and foreign exchange reserves stored by the predecessor State in the transferred territory and allocated to that territory shall pass to the successor State.

2. The assets of the central institution of issue in the predecessor State,

including those allocated for the backing of issues for the transferred territory, shall be apportioned in the proportion which the average volume of currency in circulation in the transferred territory during the six months prior to the date of succession bears to the average volume of currency in circulation in the predecessor State as a whole during the same period.

3. Currency and monetary tokens of the predecessor State that are in circulation in the transferred territory on the date of succession shall be converted into the currency of the successor State at the exchange rate notified to the International Monetary Fund or, if there is no such exchange rate, at the average of the middle rate in the financial markets of the predecessor State and of the successor State on the date of succession. Currency and tokens acquired by the successor State in the conversion shall be delivered to the predecessor State together with any gold and foreign exchange reserves stored in the transferred territory but not allocated to that territory.<sup>15</sup>

Tribute is due to the author for the pains he took to prepare this draft. However, this suggestion, and others that may be submitted, could be an indication of the kind of highly technical and complex article 12 which might eventually emerge. Consequently, it seems safe to say that this approach may take us very far into the formulation of draft articles which are too complex and, in the final analysis, inappropriate.

26. Under the circumstances, the Special Rapporteur requested the Commission to clarify its intentions<sup>16</sup> so that a choice could be made between the method which he has used provisionally thus far and which led him to propose, for each type of succession, articles as non-technical as possible on such topics as currency, Treasury and archives, and a radically different method which would involve drafting, for each type of succession, more general articles not relating *in concreto* to each of these kinds of State property. The second method appeared on the face of it to be more attractive in that, in all probability, it would have facilitated the Commission's task by sparing it the major problems it would inevitably have encountered in dealing with financial technicalities with which it is certainly not familiar, and might ultimately have made the proportions of the draft more acceptable, since the number of articles would have been smaller because of their general nature. However, the Commission was unable to take up this point, with the result that the Special Rapporteur is still uncertain as to its real preferences.

27. The Special Rapporteur had proposed articles on the most important kinds of State property which seemed to him to be affected by succession of States. The initial discussion on this subject showed that, while some members favoured following him along those lines, others suggested exploring another approach which would have resulted in the formulation of some more general articles. The Special Rapporteur is again trying this latter approach, which he adopted in some of the earlier reports<sup>17</sup> and which was explored by one member of the Commission during the debate on draft article 12.<sup>18</sup> That is the object of the present

<sup>15</sup> *Yearbook . . . 1975*, vol. I, p. 130, 1329th meeting, para. 46.

<sup>16</sup> *Ibid.*, p. 131, para. 52.

<sup>17</sup> See above, para. 2.

<sup>18</sup> Mr. Ushakov suggested to the Special Rapporteur a general article 12, worded as follows:

"1. When part of a State's territory becomes part of the territory of another State, the passing of State property of the predecessor State to

(Continued on next page.)

study. If the Commission finds this approach satisfactory, it will follow it by considering the proposals in this report. If not, it will always be free to revert to the seventh report and continue its consideration of it. No mention has been made of a third course which is also possible, namely, to combine the first two and formulate for each type of succession one or two articles of a general character, perhaps adding one or two more relating to specific kinds of State property.

28. For the time being, the Special Rapporteur proposes in the present report to proceed as indicated above by formulating general texts. Section 2 below (provisions relating to each type of succession of States) will be divided into three parts relating respectively to: (a) Succession in respect of part of territory; (b) Newly independent States; (c) Uniting and separation of States.

29. However, before the members of the International Law Commission are presented with a study and draft articles based on the distinction between movable and immovable property, it is important to know whether this distinction is familiar to the various national legal systems. Consequently, the Special Rapporteur will (1) examine English, French, Soviet and Moslem law as examples, and (2) attempt a synthesis and classification.

## E. Distinction between movable and immovable property

### 1. DISTINCTION IN DIFFERENT NATIONAL LEGAL SYSTEMS

#### (a) English law<sup>19</sup>

30. Under English law, property is divided basically into real property and personal property, these terms having quite different meanings from "*propriété réelle*" and "*propriété personnelle*". In order to understand this distinction, it is necessary to disregard all the concepts inherited from Roman law, particularly the notions of the "right *in rem*" and the "right *in personam*". English law is in no way concerned with making theoretical classifications and is therefore entirely procedural in origin; in other words, its present principles derive not from doctrinal research, but from procedural elements employed for centuries past in individual cases. The term "real property" accordingly

(Foot-note 18 continued)

the successor State shall be settled by agreement between the predecessor and successor States.

"2. In the absence of the agreement referred to in paragraph 1:

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

(c) the movable State property other than that mentioned in subparagraph (b) shall pass to the successor State in an equitable proportion." (Yearbook . . . 1975, vol. I, p. 123, 1328th meeting, para. 10.)

<sup>19</sup> For these researches into comparative law, the Special Rapporteur used the following sources: F. H. Lawson, *The Rational Strength of English Law* (1951), pp. 75-106; René David, *Les grands systèmes de droit contemporain*, 7th ed. (Paris, Dalloz, 1975); René David, *Le droit anglais*, 3rd ed. (Paris, Presses universitaires de France, "Que sais-je?" collection, No. 1162, 1975).

refers to rights which, before the procedural reform of 1833, were secured by "real" actions, and the term "personal property" to those secured by "personal" actions. A glance at the procedure followed until the nineteenth century serves to explain this terminology.

31. This rather complex procedure involved two types of possible actions. First there were real actions, to secure rights that were particularly important in feudal society. These rights were consequently protected for their own sake and without any reference to the person possessing them. Secondly, there were personal actions, to protect rights that were considered less important. Since they could not be protected for their own sake, an oblique approach involving reference to the person possessing the right was employed: impairment of the right is tantamount to impairment of the person of the petitioner; hence the term "personal action". The distinction between real and personal property therefore has nothing to do with the physical nature of the property.

However, the most important interests prevailing in feudal society were of course those concerning immovables, essentially the land itself, inasmuch as the economic values of movables was not recognized until the present era. In practice if not in theory, therefore, real property has to do with the law of immovable property. It should be noted in passing that the English term "property" does not mean "*propriété*" (ownership), but involves the notion of "*biens*". The law of property is the *droit des biens*. Will this mean eventually that personal property can actually be assimilated to the *droit des biens mobiliers*? English law is moving in that direction, particularly since the reform of 1925, so that the differences between real and personal property may now be reduced to the differences which exist in French law between "*immeubles*" and "*meubles*".

32. But there remains one important consequence of the original definition: from the feudal conception of ownership, which at that time was also sovereignty, there has derived the principle that no one can have full ownership of immovables because no one, except the king, could combine and retain all the attributes of ownership. In contrast to French law, the basic rule for the ownership of immovable property is fragmentation: one never has ownership, in the full sense, of an immovable, but only an interest or "estate". There are a number of kinds of estate, the commonest of which, the estate in fee simple, corresponds in effect to ownership (*propriété*) as it is known in continental European law—in other words, combining *usus*, *fructus* and *abusus*.

33. This state of affairs has a curious terminological consequence which may be mentioned in conclusion: English is the only language which has a special term meaning "to be the proprietor of", namely, "to own". But this verb, and the corresponding noun "ownership", cannot in any case be used with respect to "real property". In this connexion, René David writes: "One may own goods but, strictly speaking, one never owns land or a house according to the law."<sup>20</sup>

<sup>20</sup> René David, *Le droit anglais* (op. cit.), p. 103.

(b) *French law*<sup>21</sup>

34. The key to the matter is to be found in articles 516, 517 and 527 of the French Civil Code. The basic distinction between kinds of property is set out in article 516, which states that "all property is either *meuble* or *immeuble*". According to article 517, "property is immovable by nature, or by destination, or by the object to which it applies". Accordingly, French law distinguishes between "*immovables by nature*" (such as land or objects incorporated with or attached to the land), "*immovables by destination*" (such as things placed in a tenement (*fonds*) for its service and exploitation—e.g., agricultural implements—or fixtures permanently attached to the tenement—e.g., a mirror or a picture), and "*immovables by the object to which they apply*" (comprising both rights *in rem* over immovables, such as usufruct of immovable property or a mining concession, and real estate shares). In the case of movables, which are regulated by article 527 of the French Civil Code, a distinction is made between "*movables by nature*" (such as corporeal movables) and movables "*by determination of the law*" (such as, firstly, rights which constitute movable property because of the object to which they apply—e.g., debt-claims and shares in public companies—and secondly, annuities, interests in private companies or partnerships, and incorporeal property).

35. Thus, in French law the criteria for the distinction are physical (the nature of the property) or economic (the use to which the property is put) in the case of corporeal property. In the case of incorporeal property, on the other hand, the object of the right and determination by law are used as criteria. Historically, the distinction between corporeal and incorporeal property derives from Roman law, while the distinction between movables and immovables derives from ancient French law. In mediaeval society, all power, economic or political, came from the land, and that explains why French law attaches more importance to immovables than to movables, although the adage *res mobilis, res vilis* is now outdated. The basic reason is that immovable property is a portion of territory remaining constantly under the control of the sovereign, while movable property is apt to elude such control. To sum up, the distinction between movables and immovables in French law is based on the physical attributes and economic utility of the property concerned.

(c) *Soviet law*<sup>22</sup>

36. The basic distinction made in Soviet law in accordance with Marxist theory is between *production property* and *consumption property*. It should first of all be explained that "consumption property" does not mean the consumables of Roman law, in the sense of things which are destroyed by the first use made of them; it means items intended to meet the material and cultural needs of the individual. Only this category of property can be subject to

<sup>21</sup> For French law, see Jean Carbonnier, *Droit civil*, vol. 3, *Les biens*, 6th ed. (Paris, Presses universitaires de France, 1969), J.-Ph. Lévy, *Histoire de la propriété* (Paris, Presses universitaires de France, "Que sais-je?" collection, No. 36, 1972).

<sup>22</sup> R. David, *Les grands systèmes . . .* (*op. cit.*); M. Lesage, *Le droit soviétique* (Paris, Presses universitaires de France, "Que sais-je?" collection, No. 1052, 1975).

private appropriation, which is termed "personal ownership". This distinction is made in accordance with the Marxist theory that the law is conditioned by the economic structure of society. Thus, the mode of administration of property is of great importance, whereas under the capitalist system the owner is sovereign and the mode of administration is irrelevant.

37. The State may own property of any kind. Article 6 of the Soviet Constitution lists a number of things which are State property and which cannot, therefore, be freely alienated by the State (a constitutional amendment would be necessary). They include the land, forests, mines, railways, banks, postal facilities and so forth. The important point is that the State being the owner, has the right to possess, utilize and dispose of this property but that it is other bodies corporate, such as the collective farms, or social organizations, which exercise it because they have a right of "operational management". The latter right must be exercised within the limits of the purpose of the body corporate concerned and in accordance with planning objectives and the intended use of the property. There is therefore no distinction between movables and immovables, this being a consequence of State ownership of the land, since, as Jean Carbonnier points out, article 21 of the Soviet Civil Code provides that "the land is the property of the State . . . Note: With the abolition of private ownership of the land, the distinction between movable and immovable property is also abolished".<sup>23</sup>

(d) *Moslem law*<sup>24</sup>

38. Moslem law distinguishes between movable and immovable property. Although doctors of Islamic law have sometimes excelled in elaborating this distinction by making numerous divisions and subdivisions within each of these two categories of property, they have nevertheless adhered to the unified concept of the patrimony (*al māf*) and its protection. Originally, in writings on Moslem law, the distinction between movable and immovable property was made, not in defining the nature or legal characteristics of such property, but on the basis of a consideration of certain rights *in rem* such as sale, exchange, the constitution of property in mortmain (*waqf* or *habous* property), the right of pre-emption (*chofâa*), hypothecation, and so forth. It is in considering these rights *in rem* and their application that doctors of Moslem law have made the distinction between movable and immovable property, based firstly on the mobility of the property and secondly on its physical nature. These are the two basic criteria: any property which can move or be moved is a movable (*manqûl*), and any which cannot move or be moved is an immovable (*asl* or *aqâr*).

39. Moreover, the classification of property according to its physical nature has led to a proliferation of categories of movable property. In the work cited above, Ibn 'Asim makes a breakdown of property into immovable property, movable articles, edible and fungible articles, gold and silver, vegetable products and animate beings (domestic animals, birds, fish, etc.). Immovable property means not

<sup>23</sup> J. Carbonnier, *op. cit.*, p. 68.

<sup>24</sup> Ibn 'Asim, *Tohja'*, Arabic text with translation into French by O. Houdas and F. Martel (Algiers, Gavault Saint-Lager, 1882) pp. 343 *et seq.*



only land and buildings but also everything attached to the land, such as trees and plantations.

40. In Moslem law, this classification of property is irrelevant in determining the competence of the judge, because of the principle of the single judge (*qādi*), a system applied in the earliest days of Islam and still in effect in some Moslem countries. On the other hand, this classification is basic to the exercise of certain rights *in rem*. For instance, the *chofâa*, or right of pre-emption, can be exercised only over immovables; the sale of the property of a minor by the guardian is regulated differently depending on whether movables or immovables are involved; as regards the risks involved in sale, the rules vary according as the property sold is movable or immovable; and so on.

## 2. TENTATIVE SYNTHESIS AND CLASSIFICATION

41. Despite the considerable differences due to the particular principles on which societies are founded, the criteria applied in the development of the law of property can be classified under three headings: economic and, implicitly, physical in English and Moslem law; physical and economic in French law; purely economic in Soviet law. The only universal element is the economic one. Thus, even in systems of law applying the physical criterion, property is considered less in terms of its nature than in terms of its use for human needs. How, then, can we define property from the standpoint of apportionment between the predecessor State and the successor State and in a way that is acceptable to all legal systems?

42. It would seem that the problem of devising such a classification should be approached from the standpoint of physical and economic considerations. State sovereignty developed historically over land. Whoever possessed land possessed economic and political power, and this is bound to have a far-reaching effect on present-day law. Consequently, modern State sovereignty is based primarily on a tangible element: territory. It can therefore be concluded that everything linked to territory, in any way whatever, is a base without which a State cannot exist, irrespective of its political or legal system.

43. But what kind of linkage is involved? First of all, a physical one, and here it is necessary to introduce a distinction arising out of the very nature of things. Some property is physically linked to territory so that it cannot be moved. This is immobilized property. Then there are other kinds of property which are capable of being moved, so that they can be taken out of the territory or, in other words, be made to elude State sovereignty. It seems certain that these two categories of property cannot be given identical treatment and that in the event of State succession the two cases must be considered separately, irrespective of the legal systems of the predecessor State and the successor State. Next there is economic linkage, because this question is inseparable from

the question of the exercise of sovereignty. Corporations, and the State in particular, tend to monopolize profitable "production property", even in capitalist countries. This is an outcome of economic and social circumstances. Mr. Bilge also called attention to this point about the importance of the economy when he proposed, during the discussion in connexion with draft article 9, that there should be a reference to the purpose for which the property was used.<sup>25</sup> In this connexion, it is interesting to note the definition given by the Italian jurist, F. Carnelutti: "Movables are things whose *usefulness depends* and immovables are things whose *usefulness does not depend* on their movement."<sup>26</sup>

44. A question of terminology arises next. How should property be described? The simplest solution would no doubt be to follow Mr. Ushakov's suggestion and distinguish between immovable State property and movable State property, thus applying a primarily physical criterion for differentiation. However, it seems desirable to make it clear that this is not a matter of leaning towards universal application of the laws of those systems that derive purely from Roman law, because, as the Special Rapporteur has already pointed out on the subject of distinguishing between public domain and private domain, a notion of internal law should not be referred to, as in any case it does not exist in all legal systems.<sup>27</sup> The distinction made here has nothing to do with the rigid legal categories found, for example, in French law.<sup>28</sup> It is simply that the terms "movable" and "immovable" seem most appropriate for designating property which can be moved or which is immobilized.

45. At this stage of the study, account should be taken of the idea of utility, for while it is true that an item of immovable property is likely, because of its characteristics, to be linked to territory and consequently to sovereignty, the fact that an item of property is movable does not mean that it will not be necessary to the exercise by a State of its sovereignty. Currency is but one example of this. On the basis of these observations, therefore, property can generally be considered to be linked to the exercise of sovereignty if it is State property physically linked to territory, i.e., immovable property of all kinds, or State property which is not physically linked to territory, i.e., movable property, but which has a direct and necessary link with the territory in question. The problem of the passing of State property from the predecessor State to the successor State will accordingly be considered separately for each type of succession in view of the obvious differences due, first, to the political environment in each of the cases where a change of sovereignty occurs, and, secondly, to the various constraints which the movable nature of certain kinds of property places on the quest for solutions.

<sup>25</sup> See *Yearbook . . . 1975*, vol. I, p. 84, 1320th meeting, para. 13.

<sup>26</sup> Quoted by J. Carbonnier, *op. cit.*, p. 69.

<sup>27</sup> See *Yearbook . . . 1975*, vol. I, p. 73, 1318th meeting, para. 10.

<sup>28</sup> See para. 34 above.



## CHAPTER III

*New draft articles 12 to 17*

## SECTION 2. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

## SUB-SECTION 1. SUCCESSION IN RESPECT OF PART OF TERRITORY

*Article 12. succession in respect of part of territory as regards State property situated in the territory concerned*

When territory under the sovereignty or administration of a State becomes part of another State:<sup>29</sup>

(a) the ownership of immovable property of the predecessor State situated in the territory to which the succession of States relates shall, unless otherwise agreed or decided, pass to the successor State;

(b) the ownership of movable property of the predecessor State which, on the date of the succession of States, is situated in the territory to which the succession of States relates, shall also pass to the successor State:

- (i) if the two States so agree, or
- (ii) if there is a direct and necessary link between the property and the territory to which the succession of States relates.

## COMMENTARY

(1) The definition of succession in respect of part of territory given here by the Special Rapporteur is the one used by the International Law Commission in 1972 in the case of the draft articles on succession of States in respect of treaties. A more precise but more unwieldy variant for the same draft adopted by the Commission in 1974 on second reading, appears in the foot-note.

(2) In his approach to the first article on succession of States in respect of part of territory, the Special Rapporteur is attempting to make a twofold distinction, first, according to the nature of the property—movable or immovable—and secondly according to where the property is situated on the date of the succession of States. That is why there are two articles dealing with the passing of State property, namely, article 12, concerning property situated in the territory to which the succession of States relates, and article 13, concerning property situated outside that territory. That is also the reason for the existence, in article 12, of the two subparagraphs (a) and (b), the first relating to immovable property and the second to movable property.

(3) Subparagraph (a) of article 12 enunciates the principle of the passing of immovable property from the predecessor

State to the successor State in the case of a succession in respect of part of territory. From this standpoint it is quite in keeping with article 9, establishing the general principle of the passing of State property, of which it is merely the application in the case of a particular type of State succession. Like article 9, subparagraph (a) of article 12 applies to the case of property situated in the territory to which the succession of States relates.

(4) The immovable State property which thus passes to the successor State in case of a succession in respect of part of territory is property which the predecessor State formerly used, in the portion of territory concerned, for the manifestation and exercise of its sovereignty or of the performance of the general duties implicit in the exercise of that sovereignty, such as the defence of that portion of territory, security, promotion of public health and education, national development, and so on. Such property can easily be listed: it includes, for example, barracks, airports, prisons, fixed military installations, State hospitals, State universities, local government office buildings, premises occupied by the main central government services, buildings of the State financial, economic or social institutions, and postal and telecommunications facilities where the predecessor State was itself responsible for the functions which they normally serve.

A. *Devolution of State property in legal theory, judicial decisions and State practice*

(5) *The devolution of such State property is clearly established practice.* There are, moreover, very many international instruments which simply record the express relinquishment by the predecessor State, without any *quid pro quo*, of all public property without distinction situated in the territory to which the succession of States relates. It may be concluded that relinquishment of the more limited category of *immovable State* property situated in that territory should *a fortiori* be accepted.

(6) Two types of cases will be omitted from the following specimens as being not sufficiently illustrative—or, perhaps one should say, as being too readily illustrative in themselves—because the fact that they reflect the application of this rule is due to other causes of a peculiar and specific kind.

(7) The first type comprises all cessions of territories against payment. The purchase of provinces, territories and the like was an accepted practice in centuries past but has been tending towards complete extinction since the First World War, and particularly since the increasingly firm recognition of the right of peoples to self-determination. It follows from this right that the practice of transferring the territory of a people against payment must be condemned. Clearly,

<sup>29</sup> Variant: "When part of the territory of a State, or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State . . .".

these old cases of transfer are not longer demonstrative. On purchasing a territory, a State purchased everything in it, or everything it wanted, or everything the other party wanted to sell there, and the transfer of State property does not constitute proof of the existence of the rule, which in this case is replaced by the mere capacity to pay.<sup>30</sup>

(8) The second type consists of *forced cessions of territories*, which are prohibited by international law, so that succession to property in such cases cannot be regulated by international law.<sup>31</sup> In this connexion, it may be recalled that the Commission has adopted, on the proposal of the Special Rapporteur, a draft article 2 reading as follows:

The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

<sup>30</sup> See, for example, the Convention of Gastein of 14 August 1865 whereby Austria sold Lauenburg to Prussia for the sum of 2.5 million Danish rix-dollars (English text in *British and Foreign State Papers, 1865-1866* (London, William Ridgeway, 1870), vol. 56, p. 1026; French text in *Archives diplomatiques, 1865* (Paris, Aymot, 1865), vol. IV, p. 6); the Treaty of Washington of 30 March 1867 whereby Russia sold its North American possessions to the United States of America for \$1.2 million (English text in W. M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1909* (Washington, D.C., U.S. Government Printing Office, 1910), vol. II, p. 1521; the Convention whereby France ceded Louisiana to the United States of America for \$15 million (English and French texts in G. F. de Martens, ed., *Recueil des principaux traités* (Göttingen, Librairie Dieterich, 1831), vol. VII, pp. 706 and 707).

<sup>31</sup> In former times, such forced cessions were frequent and widespread. Of the many examples which history affords, one may be cited here as documentary evidence of the way in which the notion of succession to property that was linked to sovereignty could be interpreted in those days. Article XLI of the Treaty of the Pyrenees, which gained France the places of Arras, Béthune, Lens, Bapaume, and so forth, specified that the places in question

“... shall remain ... unto the said Lord the most Christian King, and to his Successors and Assigns ... with the same rights of Sovereignty, Propriety, Regality, Patronage, Wardianship, Jurisdiction, Nomination, Prerogatives and Preeminences upon the Bishopricks, Cathedral Churches, and other Abbys, Priories, Dignitys, Parsonages, or any other Benefices whatsoever, being within the limits of the said Countrys ... formerly belonging to the said Lord the Catholick King ... And for that effect, the said Lord the Catholick King ... doth renounce [these rights] ... together with all the Men, Vassals, Subjects, Boroughs, Villages, Hamlets, Forests ... the said Lord the Catholick King ... doth consent to be ... united and incorporated to the Crown of France; all Laws, Customs, Statutes and Constitutions made to the contrary ... notwithstanding.” (English text in F. Israel, ed., *Major Peace Treaties of Modern History, 1648-1967* (New York, Chelsea House publishers in association with McGraw-Hill Book Co., 1967), vol. I, pp. 69-70; French text in J. Du Mont, *Corps universel diplomatique du droit des gens, contenant un recueil des traités d'alliance, de paix, de trêve* ... (Amsterdam, Brunel, 1728), vol. VI, part II, p. 269).

There was a very special conception of patrimony and domain in many European countries at that time. Cession effected transfer of the sovereign power in its entirety, involving not only property but also rights over property and over persons. Treaties of the sixteenth and seventeenth centuries contained clauses whereby the dispossessed sovereign absolved the inhabitants of the ceded territory from their oath of fidelity and the successor received their “faith, homage, service and oath of fidelity”.

See also, for example, article 47 of the 1667 Treaty of Capitulation of Lille, Douai and Orchies:

“And shall retain the said towns and the commoners aforesaid without distinction of station, and likewise the churches, chapels, public

(9) A third set of cases which are, perhaps, only too demonstrative consists of those involving *voluntary cessions without payment*. In these very special and marginal cases, the passing of immovable State property is neither controversial nor ambiguous because it takes place not so much under the general principle of succession of States as by an expressly stated wish.<sup>32</sup>

(10) Cases of “succession in respect of part of territory” have occurred relatively often following a war. In such cases, peace treaties contain provisions relating to territories ceded by the defeated Power. For that reason, the provisions of peace treaties and other like instruments governing the problems raised by transfers of territory must be treated with a great deal of caution, if not with express reservations.

(11) Subject to that proviso, it may be noted that the major peace treaties which ended the First World War opted for the devolution to the successor States of all public property situated in the ceded German, Austro-Hungarian or Bulgarian territories.<sup>33</sup>

A Treaty of 29 June 1945 between Czechoslovakia and the Union of Soviet Socialist Republics stipulated the cession to the USSR of the Sub-Carpathian Ukraine within the boundaries specified in the Treaty of Saint-Germain-en-Laye. An annexed protocol provided for “transfer without payment of the right of ownership over State property in the Sub-Carpathian Ukraine”.

The Treaty of Peace concluded on 12 March 1940 between Finland and the USSR<sup>34</sup> provided for reciprocal territorial cessions and included an annex requiring that all constructions and installations of military or economic importance situated in the territories ceded by either country should be handed over intact to the successor. The protocol makes special mention of bridges, dams, aerodromes, barracks, warehouses, railway junctions, manufac-

loan-offices, and all foundations, cloisters, hospitals, communities, poor-houses whether general or special, lazarets, confraternities, convents, including such as are foreign, all their movable and immovable property, rights, titles, privileges, plate, or coin, bells, pewter, lead, all other metals whether worked or unworked, rings, jewels, ornaments, sacred vessels, relics, libraries and in general all their property, offices and benefices of any kind or condition whatsoever, without any obligation of payment, and shall also recover property that has been confiscated or carried away, if such there be, or if it is situated in the kingdom, whether in conquered territory or elsewhere.”

<sup>32</sup> See, for example, the cession by Great Britain to the United States in 1850 of part of the Horse-Shoe Reef in Lake Erie; the decision in July 1821 by an assembly of representatives of the Uruguayan people held at Montevideo concerning the incorporation of the Cisplatina Province; the voluntary incorporation in France of the free town of Mulhouse in 1798; the voluntary incorporation of the Duchy of Courland in Russia in 1795; the Treaty of Rio of 30 October 1909 between Brazil and Uruguay for the cession without compensation of various lagoons, islands and islets; the voluntary cession of Lombardy by France to Piedmont, without payment, under the Treaty of Zurich of 10 November 1859; etc.

<sup>33</sup> Articles 256 of the Treaty of Versailles (*British and Foreign State Papers, 1919*, vol. 112, p. 125), 208 of the Treaty of Saint-Germain-en-Laye (*ibid.*, pp. 412-414), 191 of the Treaty of Trianon (*ibid.* (1920), vol. 113, pp. 564-565), and 142 of the Treaty of Neuilly-sur-Seine (*ibid.* (1919), vol. 112, pp. 821-822).

<sup>34</sup> English text in *Supplement to the American Journal of International Law* (Concord, N. H., American Society of International Law, Rumford Press, 1940), vol. 34, pp. 127-131.

turing enterprises, telegraphic installations and electric stations.

The Treaty of Peace of 10 February 1947 between the Allied and Associated Powers and Italy also contained provisions dealing with various cases of "succession in respect of part of territory" and applying the principle of the passing of property, including immovable property, from the predecessor State to the successor State. In particular, paragraph 1 of annex XIV to the Treaty provided that "The successor State shall receive, without payment, *Italian State\** and para-statal *property\** within territory ceded to it . . ."<sup>35</sup>

(12) Article V of the Treaty of Cession of the Territory of the Free Town of Chandernagore,<sup>36</sup> signed at Paris by India and France on 2 February 1951, states that "The Government of the French Republic transfers . . . *all the properties owned by the State\** and the public bodies lying within the territory of the Free Town . . ."<sup>37</sup>

Similarly, the return to the Moroccan State of the international Town of Tangier was carried out in a manner which supports to a great extent the principle set out in article 12. Under the terms of article 2 of the protocol annexed to the Final Declaration of the International Conference in Tangier (29 October 1956), the Moroccan State, which recovered all its property in Tangier, also succeeded to all the property of the International Administration of the Town: "The Moroccan State, which recovers possession of the public and private domain entrusted to the International Administration . . . receives the latter's property . . ."<sup>38</sup>

(13) Courts and other jurisdictions also seem to endorse unreservedly the principle of the devolution of public property in general, and *a fortiori* of State property and therefore of immovable property. This is true, in the first place, of national courts. Rousseau writes: "The general principle of the passing of public property to the new or annexing State is now accepted without question by national courts."<sup>39</sup> Decisions of international jurisdictions

confirm this rule. In the Peter Pázmány University case, the Permanent Court of International Justice stated in general terms (which is why the statement can be cited in this context) the principle of the devolution of public property to the successor State. According to the Court, this is a "*principle of the generally accepted law of State succession\**"<sup>40</sup>

(14) In cases of "succession in respect of part of territory", the Franco-Italian Conciliation Commission established under the Treaty of Peace with Italy of 10 February 1947 confirmed the principle of the devolution to the successor State, in full ownership, of immovable State property. This can be readily deduced from one of its decisions. The Commission found that "The main argument of the Italian Government conflicts with the very clear wording of paragraph 1: it is the successor State *that shall receive, without payment, not only the State property\** but also the para-statal property, including *biens communaux*, within the territories ceded".<sup>41</sup>

(15) It will thus be seen that legal theory, judicial decisions and State practice generally admit devolution of the public property of the predecessor State. The illustrations given by the Special Rapporteur seemed in each case to be broader in scope than the rule he has suggested. Nevertheless, he considered it preferable to concentrate exclusively on finding the least common denominator.

#### B. *The problem of movable property in cases of succession in respect of part of territory*

(16) The Special Rapporteur is more or less convinced that the problem of movable property does present itself in a very special manner in cases of "succession in respect of part of territory". The special aspects of the problem in these cases cannot be due solely to the fact that the property in question is movable; if that were so, the problem would present itself similarly in all types of succession of States and there would thus be nothing special about it. They seem in fact to be due rather to the actual type of succession which involves part of a territory. Let us consider first those special aspects which are due to the movable nature, and the mobility, of State property.

##### 1. *Special aspects due to the mobility of the property*

(17) The fact that the State property in question is movable

which recognizes the validity of the transfer of Ottoman public property to the (British) Government of Palestine, by interpretation of article 60 of the Treaty of Lausanne of 1923.

<sup>40</sup> Judgment of 15 December 1933, Appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (the Peter Pázmány University v. the State of Czechoslovakia), *P.C.I.J.*, Series A/B, No. 61, p. 237.

<sup>41</sup> Franco-Italian Conciliation Commission, "Dispute concerning the apportionment of the property of local authorities whose territory was divided by the frontier established under article 2 of the Treaty of Peace: decisions Nos. 145 and 163, rendered on 20 January and 9 October 1953 respectively" (United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), p. 514).

Annex XIV, para. 1, provided that "The successor State shall receive, without payment, *Italian State and para-statal property* within territory ceded to it . . ." (United Nations, *Treaty Series*, vol. 49, p. 225).

<sup>35</sup> United Nations, *Treaty Series*, vol. 49, p. 225.

<sup>36</sup> It will be recalled that the Commission assimilated the case of decolonization of a Non-Self-Governing Territory by integration with a State other than the colonial State to "succession in respect of part of territory" (see para. 10 above).

<sup>37</sup> United Nations, *Treaty Series*, vol. 203, p. 158.

<sup>38</sup> *Ibid.*, vol. 263, p. 171. The example of the Town of Tangier, cited here after that of the Town of Chandernagore, is mentioned for the purpose of illustration, although in fact it does not fit into any type of succession: the International Administration was not a predecessor State any more than Morocco, to which Tangier had always belonged, was a successor State.

<sup>39</sup> Charles Rousseau, *Cours de droit international public—Les transformations territoriales des Etats et leurs conséquences juridiques* (Paris, Les Cours de droit, 1964–1965), p. 139. Reference is generally made to the judgement of the Berlin Court of Appeal (*Kammergericht*) of 16 May 1940 (case of the succession of States to Memel—return of the territory of Memel to the German Reich following the German-Lithuanian Treaty of 22 March 1939 (H. Lauterpacht, ed., *Annual Digest and Reports of Public International Law Cases, 1919–1942, Supplementary Volume* (London), case No. 44, pp. 74–76), which refers to the "comparative law" (a mistake for what the context shows to be "the ordinary law") of the passing of public property to the successor. Reference is also made to the judgement of the Palestine Supreme Court of 31 March 1947 (case of Amine Namika Sultan v. Attorney-General (H. Lauterpacht, ed., *Annual Digest . . . , 1947*, case No. 14, pp. 36–40)),

does, of course, add a special dimension of difficulty to the problem of succession of States in these cases; it may seem farcical to spell out a rule when it is known in advance that the application of it can only be left to the good faith and good will of the predecessor State, since the fact that the property is movable and therefore can be moved at any time makes it easy to place it out of reach of any succession. To regulate the treatment of *movable* property "situated" in a territory, as though it was fixed there, might therefore seem absurd or naïve. The Special Rapporteur accordingly suggests that the Commission should take precautions against both of these. First, to avoid absurdity, it should specify that it is referring to movable property which, *on the date of the succession of States*, was actually situated in the territory to which the succession of States relates. The artificiality and absurdity of "anchoring" such property to the territory in question, when it can by its very nature be removed from it, is thus eliminated. It is no longer absurd to refer to movable property actually "situated" in the territory, since on the date of the succession of States the property was in fact there. The Commission will thus avoid giving the impression that it is enunciating a rule which would be rendered pointless by the disappearance of the property in question.

(19) However, while this eliminates the absurdity, the fact that everything depends on the goodwill of the predecessor State means that the Commission is exposed to the risk of enunciating a rule the application of which would, in the final analysis, be left entirely to the discretion of the predecessor State. Hence the need for a second precaution, this time against naïveté. The rule should be formulated in such a way as somewhat to ease the constraints created by the movable or mobile nature of the State property in question. This rule might be based on the following two considerations: the mere fact that movable property is situated in the territory to which the succession of States relates should not automatically entitle the successor State to claim such property, nor should the mere fact that the property is situated outside the territory automatically entitle the predecessor State to retain it. In order for the predecessor State to retain or the successor State to acquire property, *conditions* other than the too simple and convenient one of where the property is situated must be met. The task now is to determine what those other conditions are.

(20) They are not unrelated to the general conditions concerning *viability* both of the territory to which the succession of States relates and of the predecessor State. They are closely linked to the general principle of *equity*, which should never be lost from view. A territory stripped of those of its archives which are most essential to its everyday administration will be able to survive only with great difficulty. The predecessor State must not unduly exploit the mobility of the State property in question, to the point of seriously disorganizing the territory which it is handing over and of jeopardizing its viability. Attention should therefore be drawn to the "natural" limits beyond which the predecessor State cannot go without failing in an essential international duty. The Special Rapporteur accordingly suggests that the direct link and the necessary relationship between movable property and the territory to which the

succession of States relates should be taken into account.

(21) Any movable property of the predecessor State which is in the territory being handed over quite by chance at the time when the succession of States occurs should not, *ipso facto*, or purely automatically, pass to the successor State. If only the place where the property is situated were taken into account, that would in some cases constitute a breach of equity.

(22) Moreover, the fact that State property may be where it is purely by chance is not the only reason for caution in formulating the rule. There may even be cases where the predecessor State situates movable property, not by chance, but deliberately, in the territory to which a succession of States will relate, without that property's having a direct and necessary link with the territory, or at least without its having such a relationship to that territory *alone*. In such a case, it would be inequitable to leave the property to the successor State *alone*. For example, it might be that the country's gold reserves or the metallic cover for the currency in circulation throughout the territory of the predecessor State had been placed in the territory to which the succession of States relates. It would be unthinkable, merely because the entire gold reserves of the predecessor State were in the territory to be handed over, to allow the successor State to claim them if the predecessor State was unable to evacuate them in time.

(23) On the other hand, while the presence of movable State property in the part of the territory which remains under the sovereignty of the predecessor State after the succession of States normally justifies the presumption that it should remain the property of the predecessor State, such a presumption, however natural it may be, is not necessarily irrefutable. The mere fact that property is *situated* outside the territory to which the succession of States relates cannot *in itself* constitute an absolute ground for retention by the predecessor State of the right of ownership of such property. If the property is linked solely, or even concurrently, to the territory to which the succession of States relates, equity and the viability of the territory require that the successor State should be granted a right to the property in proportion to the extent of its relationship to the territory.

(24) However, as the Special Rapporteur has indicated,<sup>42</sup> the problem of movable State property has some remarkable special aspects not so much, perhaps, because of the mobility of such property (which has just been discussed) as because of the special nature of "succession in respect of part of territory", which must be considered next.

## 2. *Special aspects due to the nature of the succession of States*

(25) In the case of the merging or uniting of States, the starting-point is the existence of two States, or, in other words, of two distinct juridical orders. The mobility of State property is naturally limited by political boundaries (e.g., in the case of the currency in circulation in each of the two States). If movable property (e.g., a government vehicle) were to cross those frontiers, the fact of its being *foreign* property is what would distinguish it in the neighbouring

<sup>42</sup> See para. (16) above.

State where it would temporarily be. In every case of merger, the movable property of State A and that of State B was easily identifiable before the union, either because it had remained within the geographical boundaries of the State to which it belonged or because, having crossed those boundaries, it automatically acquired in the neighbouring State the distinctive status of foreign property.

(26) The same is true, at least from the standpoint with which we are concerned, in the case of newly independent States. The Non-Self-Governing Territory is distinct, and usually very remote geographically, from the colonial State. Moreover, in accordance with the colonial principle of "special laws", the Non-Self-Governing Territory is governed by legislation distinct from that in force in the metropolitan territory, so that it is not wrong to say that in some respects, in this case also, there are two different juridical orders. Thus, here again the property of the colonial State is relatively easy to identify.

(27) The situation is different in the case of a "succession in respect of part of territory". In this case, before the succession of States occurs there is only one juridical order, namely, that of the State a part of whose territory will later be detached. All the movable State property involved in such a succession belonged solely to one State. In other words, "succession in respect of part of territory" clearly involves the *fragmentation* of a previously undifferentiated *unitary* whole, whereas the other cases of succession generally involve two entities which were already distinct prior to their separation or their uniting or merging. In the case of "succession in respect of part of territory" there is no differentiation, in that up to the time when the succession of States occurs there is only *one* rightful owner of *all* movable State property, namely, the predecessor State. The difficulty—as compared with cases of merger or uniting of States, for example—is that not *all* movable State property, irrespective of where it is situated, will be affected by the succession of States, but only part of it. But what part? That is the problem. The part situated in the territory to which the succession relates? That is so in most cases, but not in each and every one if equity is taken into account. And what of the part situated outside that territory on the date of the succession of States? Normally it should not be affected by the succession, although the principle must be qualified so as not to conflict with that very equity which is so highly prized.

(28) The point is that, in addition to the special nature of succession in respect of part of territory, the problem is complicated by the fact that some State property is immaterial or incorporeal, or belongs to the entire national community, which contributed as a whole to its formation and development. Thus, handing over all such property to the successor State would clearly injure the community remaining under the same sovereignty, just as withholding it from the successor State will to some extent injure the inhabitants of the ceded territory. The only solution left in this case is to reconcile considerations of equity as much as possible with the requirements of viability both for the predecessor State and for the territory to which the succession of States relates.

### C. *The direct and necessary relationship between property and territory*

(29) A study of the practice of States shows in various ways that the condition for the passing to the successor State of an item of property situated in the transferred territory seems in fact to be the existence of a direct and necessary link between the property and the territory in question. As examples, the cases of currency and gold and foreign exchange reserves, State funds and archives will be discussed in turn below.

#### 1. *Currency*

(30) *A definition of currency* for the purposes of international law should take account of the following three fundamental elements: (a) currency is an attribute of sovereignty; (b) it circulates in a given territory and (c) it represents purchasing power.<sup>43</sup> Dominique Carreau observes that this legal definition

... necessarily relies on the concept of statehood or, more generally, that of *de jure* or *de facto* sovereign authority. It follows from the proposition that media of exchange in circulation are, legally speaking, not currency unless their issue has been established or authorized by the State, and, *a contrario*, that currency cannot lose its status otherwise than through formal demonetization.<sup>44</sup>

(31) For the purposes of our subject, this means that the predecessor State loses and the successor State *exercises its own monetary authority* in the territory to which the succession of States relates. That should mean that at the same time the State patrimony associated with the expression of monetary sovereignty in that territory (gold and foreign exchange reserves, and real property and assets of the institution of issue situated in that territory) must pass from the predecessor State to the successor State.

(32) *The normal relationship between currency and territory* is expressed in the idea that currency can circulate only in the territory of the issuing authority. The concept of the State's "territoriality of currency" or "monetary space" implies, first, *the complete surrender by the predecessor State of monetary powers in the territory considered* and, secondly, *its replacement by the successor State in the same prerogatives in that territory*. But both the surrender and the assumption of powers must be organized on the basis of a factual situation, namely, the impossibility of leaving a territory without any currency in circulation on the day on which the State succession occurs. The currency inevitably left in circulation in the territory by the predecessor State and retained temporarily by the successor State justifies the latter in claiming the gold and foreign exchange which constitute the security or backing for that currency. Similarly, the real property and assets of any branches of the central institution of issue in the territory to which the State succession relates pass to the successor State under this principle of the State's "currency territoriality" or "monetary

<sup>43</sup> *Yearbook ... 1974*, vol. II (Part One), p. 104, document A/CN.4/282, chap. IV, article 12, para. (5) of the commentary.

<sup>44</sup> D. Carreau, *Souveraineté et coopération monétaire internationale* (Paris, Cujas, 1970), p. 27.

space". It is because the circulation of currency implies security or backing—the public debt, in the last analysis—that *currency in circulation cannot be dissociated from its base or normal support, which is formed by all the gold or foreign exchange reserves and all assets of the institution of issue. This absolute inseparability is, after all, merely the expression of the global and "mechanistic" fashion in which the monetary phenomenon itself operates.*

(33) In the world monetary system as it exists today, *currency has value only through the existence of its gold backing, and it would be futile to try, in the succession of States, to dissociate a currency from its backing.* For that reason it is essential that the successor State, exercising its jurisdiction in a territory in which there is inevitably paper money in circulation, should receive in gold and foreign exchange the equivalent of the backing for such issue. The Special Rapporteur would point out, however, that this does not always happen in practice.

(34) The principle of allocation or assignment of monetary tokens to the territory to which the succession of States relates is essential here. If currency, gold and foreign exchange reserves, and monetary tokens of all kinds belonging to the predecessor State are *temporarily or fortuitously* present in the transferred territory without the predecessor State's having intended to allocate them to that territory, obviously they have *no link or relationship with the territory* and cannot pass to the successor State. The gold owned by the Banque de France which was held in Strasbourg during the Franco-German War of 1870 could not have passed to Germany after Alsace-Lorraine was annexed to that country had it not been established that that gold had been "allocated" to the transferred territory.

(35) When Transjordan became Jordan, it succeeded to a share of the surplus of the Palestine Currency Board, estimated at £1 million, but had to pay an equivalent amount to the United Kingdom for other reasons.<sup>45</sup>

(36) The French Government withdrew its monetary tokens from the French Establishments in India but agreed to pay compensation. Article XXIII of the Franco-Indian Agreement of 21 October 1954<sup>46</sup> stated:

The Government of France shall reimburse to the Government of India within a period of one year from the date of the *de facto* transfer the equivalent value at par in £ sterling or in Indian rupees of the currency withdrawn from circulation from the Establishments after the *de facto* transfer.

(37) With the demise of the old Tsarist empire after the First World War, some of its territories passed to Estonia, Latvia, Lithuania and Poland.<sup>47</sup> Under the peace treaties concluded, the new Soviet régime became fully responsible

<sup>45</sup> See the Agreement of 1 May 1951 between the United Kingdom and Jordan for the settlement of financial matters outstanding as a result of the termination of the mandate for Palestine (United Nations, *Treaty Series*, vol. 117, p. 19).

<sup>46</sup> English text in India, *Foreign Policy of India, Texts of Documents, 1947-1964* (New Delhi, Lok Sabha (secretariat), 1966), p. 212. French text in France, Ministry of Foreign Affairs, *Recueil des traités et accords de la France, année 1962* (Paris, 1962), p. 535.

<sup>47</sup> No reference is made here to the cases of Finland, which already enjoyed monetary autonomy under the former Russian régime, Bessarabia, which was incorporated by the great Powers into Romania, or Turkey.

for the debt represented by the paper money issued by the Russian State Bank in these four countries.<sup>48</sup> The provisions of some of these instruments indicated that Russia *released* the States concerned from the relevant portion of the debt, as if this was a derogation by treaty from a principle of automatic succession to that debt. Other provisions even gave the reason for such a derogation, namely, the destruction suffered by those countries during the war.<sup>49</sup>

At the same time and in the same treaties, part of the bullion reserves of the Russian State Bank was transferred to each of these States. The ground given in the case of Poland is of some interest: the 30 million gold roubles paid by Russia under this head corresponded to the "active participation" of the Polish territory in the economic life of the former Russian Empire.

## 2. State funds

(38) State public funds in the transferred territory should be understood to mean cash, stocks and shares which, although they form part of the over-all assets of the State, *are situated in the territory or have a link with it by virtue of the State's sovereignty over or activity in that region.* The principle of total transfer of all the assets of the predecessor State requires that these funds should pass to the Successor State. If they were situated in the territory affected by the change of sovereignty and were *allocated* to that territory, State funds, whether liquid or invested, pass to the successor State. The principle of allocation or assignment is decisive in this case, since it is obvious that funds of the predecessor State which are in transit through the territory in question or are temporarily or fortuitously present in that territory do not pass to the successor State. State public funds may be liquid or invested; they include stocks and shares of all kinds. Thus, the acquisition of "all property and possessions" of the German States in the territories ceded to Poland included also, according to the Supreme Court of Poland, the transfer to the successor of a share in the capital of an association.<sup>50</sup>

(39) Slovakia succeeded to Czechoslovakia's holdings under an agreement with the Third Reich dated 13 April 1940. All the funds of public establishments, "whether or not possessing juridical personality",<sup>51</sup> became Slovak, automatically and without payment, provided that they were situated in the territory of Slovakia. Hungary, under the agreement of 21 May 1940 with the Reich, succeeded *ipso jure* to the property of establishments "controlled"

<sup>48</sup> See the following treaties: with Estonia of 2 February 1920, article 12; with Latvia of 11 August 1920, article 16; with Lithuania of 12 July 1920, article 12; and with Poland of 18 March 1921, article 19 (League of Nations, *Treaty Series*, vol. XI, p. 51; vol. II, p. 212; vol. III, p. 122; and vol. VI, p. 123).

<sup>49</sup> Cf. B. Nolde, "La Monnaie en droit international public," *Recueil des Cours de l'Académie de droit international de La Haye, 1929-II* (Paris, Hachette, 1930), vol. 27, p. 295.

<sup>50</sup> Digest by the United Nations Secretariat of the decision of the Supreme Court of Poland in *Polish State Treasury v. Deutsche Mittelstandskasse* (1929), *Yearbook . . . 1963*, vol. II, p. 133, document A/CN.4/157, para. 337.

<sup>51</sup> "Betriebe, Anstalten und Fonds, mit oder ohne eigene Rechtspersönlichkeit\*", in the words of the Agreement of 13 April 1940 between Slovakia and the Reich, quoted by I. Paenson, *Les conséquences financières de la succession des Etats (1932-1953)* (Paris, Domat-Monchrestien, 1954), p. 104.

by Czechoslovakia in the territory taken over by Hungary. It is true that these cases, which are cited by writers, lack relevance because they involve forced transfers of territory.

(40) As part of the "transfer without payment of the right of ownership over State property", the Union of Soviet Socialist Republics received public funds situated in the Sub-Carpathian Ukraine, which, within the boundaries specified in the Treaty of Saint-Germain of 10 September 1919, was ceded by Czechoslovakia in accordance with the Treaty of 29 June 1945.

### 3. State archives

(41) State archives, jealously preserved, are the essential instrument for the administration of a community. They both record the management of State affairs and enable it to be carried on, while at the same time embodying the ins and outs of human history; consequently, they are of value to both the researcher and the administrator. Secret or public, they constitute a heritage and a public property which the State generally makes sure is inalienable and imprescriptible. Espionage is often nothing but a paper war which enables the more successful to obtain the enemy's—or even the ally's—plans, designs, documents, secret treaties, and so forth. The destructive hatchet and torch of wars, which have eternally afflicted mankind, have seriously impaired the integrity of archival collections. The documents are sometimes of such importance that the victor hastens to remove these valuable sources of information to its own territory. Armed conflict may result not only in the occupation of a territory, but also in the plundering of its records.

(42) The Second World War, more than any other conflict, was concerned with this problem of archives. The Hitlerite régime played havoc with archives, for instance in Moravia, in the Sudetenland. The victors of 1945 gave extra attention to the question of archives and confiscated those in the possession of the Third Reich, wherever they were, the better to ascertain and pin-point Hitlerite responsibility. Some of these archives were later returned to the post-war German Government.<sup>52</sup> The peace treaties reflected the concern of the Allies that the important problem of archives should not be ignored, and it was found possible to include in those agreements a number of provisions which will be discussed later.

(43) Where State succession is concerned, this matter has been regulated by treaty in quite considerable detail. It is only in rare cases that the instrument setting the seal on the understanding between the two parties simply provides that arrangements for the handing over of documents, deeds and archives will be agreed on by the competent authorities of the parties.<sup>53</sup> Even less frequently does the agreement

merely legalize the *status quo*, each party retaining the archives which are in its possession.<sup>54</sup> Treaties relating to changes of sovereignty over a territory are, on the contrary, usually more specific in regulating this problem.

(44) Advances in technology have completely changed the factual background to the question of archives and, it would seem, must inevitably have an effect on State succession in this respect. The difficulties which used to arise between States because archives were indivisible and reproducing them was a very lengthy task no longer exist, owing to modern reproduction methods. In the past, the problem was resolved in a drastic manner and the archives went to whoever fared best on the field of battle. The old idea of the indivisibility of archives, which aroused fears of the breaking up of collections and was responsible in some cases for the preservation of the integrity of historical repositories, is more easily accepted by the parties because photocopying, microfilming and other modern techniques make it possible to find solutions better fitted to the situations which arise. The predecessor State can without harm leave the archives to the successor, in the assurance that they can be rapidly and conveniently reproduced.

#### (a) Definition of items affected by the transfer

(45) The items involved are *of every kind*. There does not exist—at least in French—any generic term capable of covering the great wealth of written, photographic or graphic material which the expression used is intended to suggest. It must be understood as a comprehensive expression referring to the ownership, type, character, category and nature of the items.

(46) The phrase "archives and documents" is understood here in the broadest sense, due regard being had to diplomatic practice, which is extremely consistent.

It is understood that the words "of every kind" refer in the first place to the *ownership* of the archives. In the context of the proposed article, the reference will obviously be to State archives. Practice has shown, however, that it is immaterial whether they are the property of the State, of an intermediate authority or of a local public body, the essential point being that they consist of public documents.

The expression "of every kind" also refers to the *type* of archives, whether diplomatic, political or administrative, military, civil or ecclesiastical, historical or geographical, legislative or regulative, judicial, financial or other.

The *character* of the items—whether public or secret—is likewise immaterial.

The question of the *nature* or *category* of the archives relates not only to the fact that they may consist of written material, whether in manuscript or in print, or of photographs, graphic material, and so forth, or that they may be originals or copies, but also to the substance of which they are made, such as paper, parchment, fabric, leather, etc.

<sup>52</sup> See, for example, the exchange of letters constituting an agreement between the United States of America and the Federal Republic of Germany relating to the transfer of German files and archives, Bonn, 14 March 1956, and Bonn/Bad Godesberg, 18 April 1956 (United Nations, *Treaty Series*, vol. 271, p. 320).

<sup>53</sup> See, for example, article 8 of the Treaty between the Netherlands and the Federal Republic of Germany concerning certain parcels of land on the frontier, signed on 8 April 1960 (United Nations, *Treaty Series*, vol. 508, p. 154).

<sup>54</sup> See, for example, the agreement between France and Viet-Nam concluded by an exchange of letters dated 8 March 1949, sect. VI ("Cultural questions"), subsection "Archives" (France, Présidence du Conseil, Secrétariat général du Gouvernement et Ministère de la France d'outre-mer, Direction des affaires politiques, *La documentation française* (Paris, 20 June 1949), No. 1147, p. 7).



Lastly, it is necessary to cover all *varieties* of documents. The wordings used in diplomatic instruments include "archives, registers, plans, title-deeds and documents of every kind";<sup>55</sup> "archives, documents and registers concerning the civil, military and judicial administration of the ceded territories";<sup>56</sup> "all title-deeds, plans, cadastral and other registers and papers";<sup>57</sup> and so on.

One of the most detailed definitions of the term "archives" that the Special Rapporteur has come across is the one in article 2 of the Agreement of 23 December 1950 between Italy and Yugoslavia, concluded pursuant to the Treaty of Peace of 10 February 1947. It encompasses not only State papers but also documents relating to all the public services, to the various parts of the population, and to categories of property, situations or private juridical relations.<sup>58</sup> The Special Rapporteur mentions it here by way of illustration, even though the draft article submitted to the Commission for its consideration is limited to the case of State archives.

(b) *The principle of the transfer of archives to the successor State*

(47) The principle of the transfer of archives to the successor State seems to be unquestioned. Writers comment only occasionally and briefly on the problem of archives

and appear to be unanimous on this point, and judicial decisions, although even rarer, do not deviate from this principle. Diplomatic practice, on the other hand, is more copious and enables the scope of the principle to be pinpointed.

(48) This principle originated long ago in territorial transfers carried out in the Middle Ages. France and Poland provide examples of them.<sup>59</sup> In France, King Philippe Auguste founded in 1194 his *Trésor des Chartes*, in which he assembled the documents relating to his kingdom. In 1271 Philippe III (the Bold), upon inheriting the estates of his uncle, Alphonse de Poitiers (almost the whole of southern France), had the archives immediately incorporated into the *Trésor*: title-deeds to the estates, cartularies, registers of letters, surveys and administrative accounts. This was the practice followed over the centuries, as the Crown acquired new lands. The same practice was followed in Poland, from the fourteenth century onwards, as the kingdom gradually became unified through the absorption of the ducal provinces: the archives of the dukes were transferred to the king at the same time as the duchy.

Thus the principle of transfer has been applied for a very long period, although, as will be seen, the reason invoked has varied.

(49) If the central State archives are an indivisible entity, the predecessor State and the successor State will agree to reproduce them in the most suitable way and to apportion them between themselves according to such procedures as they may choose. One example not to be emulated is that provided by the Treaty of Turin of 16 March 1816<sup>60</sup> between the Kingdom of Sardinia and the Swiss Confederation establishing the frontiers of Savoy and the State of Geneva: they went so far as to tear books apart or cut pages out of common land registers with scissors in order to give each of the parties its due.<sup>61</sup> Nowadays, of course, the solution to problems of this kind is greatly facilitated by the existence of sophisticated modern techniques of document reproduction.

(50) The principle of the transfer of archives concerning the part of territory ceded is itself justified by the application of two basic principles: (a) the *principle of territorial origin* or of the *territoriality of archives*, according to which all papers and documents originating in the territory to which the succession of States relates must pass to the successor State, and (b) the *principle of pertinence*, according to which papers concerning the territory in question, irrespective of where they are kept, are likewise handed over.

(i) *Archives of every kind*

(51) *Archives of every kind are generally handed over to the successor State immediately or within a very short time-*

<sup>55</sup> This expression appears in several clauses of the Treaty of Versailles of 28 June 1919, e.g., part III, sec. I, article 38, concerning Germany and Belgium, and sect. V, article 52, concerning Germany and France in respect of Alsace-Lorraine; (*British and Foreign State Papers* (London, H.M. Stationery Office, 1922), vol. 112, pp. 29-30 and 42), in the Treaty of Saint-Germain-en-Laye of 10 September 1919, in article 93, concerning Austria (*ibid.*, p. 361), and in the Treaty of Trianon of 4 June 1920 in article 77, concerning Hungary (*ibid.*, vol. 113, p. 518).

<sup>56</sup> Article 3 of the Treaty of Peace between the German Empire and France, signed at Frankfurt on 10 May 1871 (provision relating to the cession of Alsace-Lorraine; (G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1874), vol. XIX, p. 689).

<sup>57</sup> Article 8 of the Additional Agreement to the Treaty of Peace, signed at Frankfurt on 11 December 1871 (provision relating to the cession of Alsace-Lorraine) (*ibid.*, 1875, vol. XX, p. 854).

<sup>58</sup> Agreement, signed at Rome on 23 December 1950, between the Italian Republic and the Federal People's Republic of Yugoslavia with respect to the apportionment of archives and documents of an administrative character or of historical interest relating to the territories ceded under the terms of the Treaty of Peace (United Nations, *Treaty Series*, vol. 171, p. 291). Article 2 reads as follows:

"The expression 'archives and documents of an administrative character' shall be construed as covering the documents of the central administration and those of the local public administrative authorities.

"The following [in particular shall be covered] . . .

"Documents . . . such as cadastral registers, maps and plans; blueprints, drawings, drafts, statistical and other similar documents of technical administration, concerning *inter alia* the public works, railways, mines, public waterways, seaports and naval dockyards;

"Documents of interest either to the population as a whole or to part of the population, such as those dealing with births, marriages and deaths, statistics, registers or other documentary evidence of diplomas or certificates testifying to ability to practise certain professions;

"Documents concerning certain categories of property, situations or private juridical relations, such as authenticated deeds, judicial files, including court deposits in money or other securities . . .

"The expression 'historical archives and documents' shall be construed as covering not only the material from archives of historical interest properly speaking but also documents, acts, plans and drafts concerning monuments of historical and cultural interest."

The enumeration given in article 6 of the same agreement rounds off the definition of "administrative" archives.

<sup>59</sup> France, Direction des archives de France, *Actes de la sixième Conférence internationale de la Table ronde des archives, Les archives dans le vie internationale* (Paris, Imprimerie nationale, 1963), pp. 12 et seq.

<sup>60</sup> Treaty between H.M. the King of Sardinia, the Swiss Confederation and the Canton of Geneva (G. F. de Martens, ed., *Nouveau Recueil de traités* (Göttingen, Dieterich, 1880) vol. IV (1808-1819) (reprint), p. 214).

<sup>61</sup> France, *Les archives dans la vie internationale* (*op. cit.*), p. 20.

*limit*. It is sufficient that these archives *relate directly* to the territory affected by the succession of States, that is to say, that they should have a *direct link, administrative or historical*, with that territory.

The Franco-German Treaty of 1871 providing for transfer required the French Government to hand over to the German Government the archives relating to the ceded territories.<sup>62</sup> The Additional Agreement to that Treaty imposed on the two States the obligation to return to each other all the title-deeds, registers, and so forth, for municipalities on either side bounded by the new frontier line between the two countries.<sup>63</sup> After the First World War, the territories ceded in 1871 having changed hands again, the archives were dealt with in the same way and the Treaty of Versailles required the German Government to hand over without delay to the French Government the items relating to those territories.<sup>64</sup> Under the terms of an identically worded provision of the same Treaty, the German Government contracted the same obligation towards Belgium.<sup>65</sup> Without any change in wording, other international instruments, namely, the Treaty of Saint-Germain-en-Laye and the Treaty of Trianon, imposed on Austria and Hungary respectively, the same obligation towards the successor States.<sup>66</sup>

(ii) *Archives as an instrument of evidence*

(52) In old treaties, archives were handed over to the successor State primarily as instruments of evidence and as titles to property. The writings of past years seem to retain the impress of this concern for "evidence". "Archives", wrote Fauchille, "and titles to the property acquired by the annexing State," which form . . . part of the public domain, must also be handed over to it".<sup>67</sup>

(iii) *Archives as an instrument of administration*

(53) The obligation to hand over as viable a territory as possible has the compelling force of a simple idea and should induce the predecessor State to relinquish to the successor all such instruments as will enable breakdowns in administration to be kept to a minimum and help to ensure that the territory ceded is properly governable. Hence the obligation to leave in the territory all the written, graphic and photographic material needed for the continuance of its administrative functioning.

For instance, when the provinces of Jämtland, Härjedalen, Gottland and Ösel were ceded, the Treaty of Brömsebro of 13 August 1645 between Sweden and Denmark made obligatory the transfer to the Queen of

Sweden of all instruments, registers and cadastral documents relating to justice (article 29) as well as any information relating to the fiscal situation of the ceded provinces. Similar stipulations were incorporated by the two Powers in their subsequent peace treaties of Roskilde (26 February 1658) (article 10) and Copenhagen (27 May 1660) (article 14).<sup>68</sup>

Article 69 of the Treaty of Munster of 30 January 1648 between the Netherlands and Spain provided that "all registers, maps, letters, archives and papers, together with all documents relating to lawsuits, *concerning\** any of the United Provinces, associated countries, towns . . . located in courts, chancelleries, councils and chambers, shall be handed over . . ."<sup>69</sup>

In the Treaty of Utrecht of 11 April 1713, Louis XIV ceded to the States General (of the Netherlands) Luxembourg, Namur and Charleroi "with all the papers, letters, documents and archives *concerning\** the said Netherlands".<sup>70</sup>

(54) Most treaties concerning succession in respect of part of territory contain a clause relating to the transfer of the archives; thus it is impossible to list them all. The treaties are sometimes even supplemented by a special convention relating solely to that point. Thus, following on the peace treaties which ended the First World War, the Convention between Hungary and Romania, signed at Bucharest on 16 April 1924,<sup>71</sup> relates to the exchange of legal documents, land registers and registers of civil status, and specifies the manner in which the transfer is to be effected.

(55) Where there is more than one successor State, each taking over a portion of territory of the predecessor State, which does not, however, cease to exist, special solutions have been adopted to deal with the archives. These examples are old and isolated and cannot be considered to constitute a custom, but the Special Rapporteur felt that they were worth mentioning because modern reproduction methods would make the solution of the problem very simple nowadays.

The Barrier Treaty of 15 November 1715, concluded between the Holy Roman Empire, England and Holland provided in article 18 that the archives of the dismembered territory, Gelderland, would not be divided among the three successor States but would remain intact and that an inventory would be drawn up and a copy given to each of the three parties, which would be able to consult the documents freely.<sup>72</sup>

Similarly, article VII of the Treaty concluded between Prussia and Saxony on 18 May 1815<sup>73</sup> mentions "deeds and papers which . . . are of common interest to the two parties". The solution chosen was that Saxony would keep the originals and be responsible for giving Prussia certified copies.

<sup>62</sup> Article 3 of the Treaty of Peace of 10 May 1871 (see foot-note 56 above).

<sup>63</sup> Article 8 of the Additional Agreement of 11 December 1871 (see foot-note 57 above).

<sup>64</sup> Article 52 of the Treaty of Versailles of 28 June 1919, part III, sect. V (Alsace-Lorraine), article 52 (see foot-note 55 above).

<sup>65</sup> Article 38 of the Treaty of Versailles (*ibid.*).

<sup>66</sup> Article 93 of the Treaty of Saint-Germain-en-Laye of 10 September 1919 (see foot-note 55 above) and article 77 of the Treaty of Trianon of 4 June 1920 (*ibid.*).

<sup>67</sup> P. Fauchille, *Traité de droit international public*, 8th edition of the Manuel de droit international public of H. Bonfils (Paris, Rousseau, 1922), vol. 1, p. 360, para. 219.

<sup>68</sup> France, *Les archives dans la vie internationale (op. cit.)*, p. 16.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*, p. 17.

<sup>71</sup> League of Nations, *Treaty Series*, vol. XLV, p. 331.

<sup>72</sup> France, *Les archives dans la vie internationale (op. cit.)*, p. 17.

<sup>73</sup> G. F. de Martens, ed., *Nouveau Recueil de traités* (Göttingen, Dieterich, 1818), vol. II, p. 276.

(56) Thus, in accordance with the principle of respect for collections, which arose from the desire to facilitate administrative continuity, the entire collection of archives remained intact, whatever the number of successors. However, that same principle and desire will lead to numerous contestations when applied today, owing to the distinction that has arisen between administrative and historical archives.

(iv) *Historical component of archives*

(57) The practice of States as it emerges from an analysis of old treaties of annexation, especially in Europe, has sometimes led the predecessor State to consider itself entitled to hand over only archives of an administrative character<sup>74</sup> and to retain those which had a historical interest. However, such instances seem to be rather isolated ones and often become questionable with the passage of time.

The Agreement between France and India of 21 October 1954 concerning the future of the French Establishments in India<sup>75</sup> makes this distinction between types of archives.<sup>76</sup> Article 33 of the Agreement provides as follows:

The French Government shall keep in their custody the records having an historical interest: they shall leave in the hands of the Indian Government the records required for the administration of the Territory.<sup>77</sup>

(58) For the sake of clarity in the discussion, it should be borne in mind that what is involved is not the predecessor State's entire historical archives but only, of course, those relating to the transferred territory. Thus, the case mentioned above obviously concerns not France's historical archives but those of a similar nature relating to the former "French Establishments in India".

(59) The Special Rapporteur looked in vain for other similar diplomatic precedents; it seems clear that the predecessor State's retaining the historical archives of the territory is not justified, and that this does not reflect either a rule or a custom. It is no doubt one of those isolated cases which are probably due to special circumstances. Of course, if the succession of States relates to an insignificant extent of territory of the predecessor State, which has no historical archives, the problem does not arise.

(60) The examples cited below are evidence, on the contrary, of the actual transfer of archives, including historical documents. In some cases, however, the transfer took place after much delay. For instance, France, as the successor State in Savoy and Nice, was able not only to obtain from the Sardinian Government the historical archives which were in the ceded territories at the time but also, a century later, to obtain from Italy<sup>78</sup> the historical

archives at Turin.<sup>79</sup> Similarly, Yugoslavia and Czechoslovakia obtained from Hungary, by the Treaty of Peace of 1947, all historical archives which had come into being under the Hungarian monarchy between 1848 and 1919 in those territories. Under the same Treaty, Yugoslavia was also to receive from Hungary the archives concerning Illyria, which dated from the eighteenth century.<sup>80</sup> It would be easy to find many more examples relating to this point.

(61) The Treaty of Vienna of 3 October 1866 by which Austria ceded Venetia to Italy provided in article 18 for the handing over to Italy of all "title-deeds, administrative and judicial documents . . . *political and historical documents of the former Republic of Venice*"\*, while each of the two parties pledged to let the other copy "*historical and political*"\* documents that might concern the territories remaining in the possession of the other Power and which, in the interests of knowledge, cannot be taken from the archives to which they belong".<sup>81</sup>

Again, the Peace Treaty between Finland and Russia signed at Dorpat on 14 October 1920 specifies in article 29, paragraph 1, that

The Contracting Powers undertake at the first opportunity to restore the archives and documents which belong to public authorities and institutions which may be within their respective territories, and which refer entirely or mainly to the other Contracting Power or its history.\*<sup>82</sup>

(62) Obviously, the successor State cannot claim simply any archives, but only those which belong to the territory. The organic link between the territory and the archives relating to it is what must be taken into account.<sup>83</sup> However, a difficulty arises when the strength of this link has to be gauged for each category of archives. Writers agree that, where the documents in question "relate to the predecessor State as such and refer only incidentally to the ceded territory", they "remain the property of the ceding State, [but] it is generally accepted that copies will be supplied to the annexing State at its request".<sup>84</sup> The "archives-territory" link was specifically taken into account in the Rome Agreement of 23 December 1950 between Yugoslavia and Italy concerning archives, cited above.<sup>85</sup>

<sup>79</sup> The agreements of 1860 relating to the cession of Nice and Savoy were supplemented by the provisions of the Treaty of Peace with Italy of 10 February 1947, article 7 of which required the Italian Government to hand over to the French Government

"all archives, historical and administrative, prior to 1860, which concern the territory ceded to France" under the Treaty of March 24, 1860 and the Convention of August 23, 1860".

<sup>80</sup> Article 11 of the Treaty of Peace with Hungary (United Nations, *Treaty Series*, vol. 41, p. 178).

<sup>81</sup> France, *Les archives dans la vie internationale* (op. cit.), p. 27.

<sup>82</sup> League of Nations, *Treaty Series*, vol. III, p. 72.

<sup>83</sup> Under article 11, para. 1, of the Treaty of Peace of 10 February 1947 (for reference, see foot-note 80 above), Hungary handed over to the successor States, Czechoslovakia and Yugoslavia, objects "constituting [their] cultural heritage . . . which originated in those territories\* . . .".

<sup>84</sup> Ch. Rousseau, op. cit., p. 136. See also D. P. O'Connell, *State Succession in Municipal Law and International Law* (Cambridge University Press, 1967), vol. I, *Internal Relations*, pp. 232-233.

<sup>85</sup> Article 6 of the Agreement (see foot-note 58 above) provides that archives which are indivisible or of common interest to both parties "shall be assigned to that Party which, in the Commission's judgement, is more interested in the possession of the documents in question, according to the extent of the territory or the number of

(Continued on next page.)

<sup>74</sup> This expression was understood in the broadest sense: taxation documents of all kinds, cadastral and property registers, administrative documents, registers of births, marriages and deaths, land registers, judicial and penitentiary archives, etc.

<sup>75</sup> For reference, see foot-note 46 above.

<sup>76</sup> This involved a case of decolonization by integration with a State other than the colonial State, which, as has been noted, is to be assimilated to succession in respect of part of territory.

<sup>77</sup> A similar provision already appeared in article VI of the Treaty of cession of the territory of the Free Town of Chandernagore signed in 1951 between India and France (for reference, see above, foot-note 37).

<sup>78</sup> This seems especially significant, in that Italy was itself the successor to the Sardinian Government.

63. Attention may be drawn at this point to the decision of the Franco-Italian Conciliation Commission in which the Commission held that archives and historical documents, even if they belonged to a municipality whose territory was divided by the new frontier drawn up in the Treaty of Peace with Italy, must be assigned in their entirety to France whenever they related to the territory ceded.<sup>86</sup>

64. After the Franco-German war of 1870, the archives of Alsace-Lorraine were handed over to the new German authority in the territory. However, the problem of the archives of the Strasbourg educational district and of its schools was amicably settled by means of a special convention. In this case, however, the criterion of the "archives-territory" link was applied only in the case of documents considered to be "of secondary interest to the German Government".<sup>87</sup>

65. Even though it has a different application, we could cite in support of the principle of the transfer of archives the following resolution of the General Conference of UNESCO:

*The General Conference Recognizing the role of mass media in all aspects of human development, in fostering international understanding and as an instrument for the acceleration of social development, Recommends to Member States*

...  
(d) to co-operate in the return of original manuscripts and documents, or, if this is not possible for special reasons, of copies of them, to the countries of origin.<sup>88</sup>

The logic and form of the language can only be interpreted to mean that the expression "country of origin" denotes the territory concerned by the archives, that is to say, the successor State in the event that there has been a succession of States.

**Article 13. Succession in respect of part of territory as regards State property situated outside the territory concerned**

**When territory under the sovereignty or administration of**

(Foot-note 85 continued.)

persons, institutions or companies to which these documents relate.\* In this case, the other Party shall receive a copy of such documents, which shall be handed over to it by the Party holding the original."

<sup>86</sup> Decision No. 163 rendered on 9 October 1953 (United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), p. 503. This decision includes the following passage:

"Communal property apportioned pursuant to paragraph 18 [of annex XIV to the Treaty of Peace with Italy] should be deemed not to include 'all relevant archives and documents of an administrative character or historical value'; such archives and documents, even if they belong to a municipality whose territory is divided by a frontier established under the terms of the Treaty, pass to what is termed the successor State if they concern the territory ceded or relate to property transferred\* (annex XIV, para. 1); if these conditions are not fulfilled, they are not liable either to transfer under paragraph 1 or to apportionment under paragraph 18, but remain the property of the Italian municipality. *What is decisive, in the case of property in a special category of this kind, is the notional link with other property or with a territory\**" (*ibid.*, pp. 516-517).

<sup>87</sup> Convention of 26 April 1872 signed at Strasbourg (G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1875) vol. XX, p. 875.

<sup>88</sup> UNESCO, *Records of the General Conference, Sixteenth Session, Resolutions* (Paris, 1970), p. 89, resolution 9.134.

a State becomes part of another State,<sup>89</sup> [movable or immovable] property of the predecessor State situated outside the territory to which the succession of States relates shall, unless otherwise agreed or decided:

- (a) remain the property of the predecessor State;
- (b) pass to the successor State if it is established that the property in question has a direct and necessary link with the territory to which the succession of States relates; or
- (c) be apportioned equitably between the predecessor State and the successor State if it is established that the territory to which the succession of States relates contributed to the creation of such property.

COMMENTARY

(1) The Special Rapporteur recalls that succession of States relates only to property of the predecessor State and not to property owned by the detached part of the territory in its own right. The latter property, which falls outside the scope of draft article 13, may be situated either in the territory of the predecessor State or in that of a third State.

The case of property proper to the detached territory which is situated in the predecessor State is clear: this is property belonging as of right to the territory appended to a pre-existing State but situated in the rest of the territory retained by the predecessor State. The occurrence of State succession does not transfer the right of ownership of property of this kind, which remains within the patrimony of the ceded or detached territory. It cannot suddenly, merely because of the succession of States, become the property of the predecessor State, even if it is situated in the part of territory remaining to that State after curtailment. Since the predecessor State did not own this property before the succession of States, it cannot, merely because of the succession, create new rights for itself. This is so *a fortiori* when such property proper to the detached territory is in the territory of a third State.

(2) The scope of draft article 13 therefore extends only to property of the predecessor State. The article complements draft article 12 in that it refers to State property situated, in this case, outside the territory to which the succession of States relates. The problem in connexion with draft article 13 is whether, as a result of the succession of States, the successor State possesses, outside its sphere of territorial jurisdiction, some right to property of the predecessor State. The correct answer to this question can only be in the negative. Unless otherwise agreed, the predecessor State naturally retains ownership of all its property situated either in the part of territory remaining to it after curtailment or in the territory of a third State. This is the answer clearly given by subparagraph (a) of draft article 13.

(3) But subparagraphs (b) and (c) nevertheless envisage the possibility of assigning the ownership of all or some of that State property to the successor State, according as the property has a direct and necessary link with the detached territory or was created with a contribution from that terri-

<sup>89</sup> Variant: "When part of the territory of a State, or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State . . .".

tory. The provisions of these subparagraphs, which constitute exceptions to the principle formulated in subparagraph (a), are based on considerations of equity. If, because of its movable nature, State property has been removed from the territory to which the succession relates even though it has a direct and necessary link with that territory, subparagraph (b) enables it to be duly returned to the territory. However, subparagraph (b) can apply equally well to an item of immovable property, although such cases will be less frequent. Subparagraph (c) can apply either to movable or to immovable property. The principle of equity embodied in this subparagraph allows account to be taken of various factors of apportionment, particularly the respective contributions of the predecessor State and of the territory which has been detached from it.

(4) A review of State practice will shed light on the content of these rules. Particular attention will be paid to the case of archives.

#### ARCHIVES SITUATED OUTSIDE THE DETACHED TERRITORY

(5) Draft article 13, according to the text submitted by the Special Rapporteur for discussion, enables the successor State to claim archives wherever they may be, provided that they concern the detached territory and have a direct link with it.

The Treaties of Paris and Vienna of 1814 and 1815 required the return to the original place of deposit of the State archives which had been concentrated in Paris during the Napoleonic period.<sup>90</sup>

Under the Treaty of Tilsit of 7 July 1807, Prussia, which had returned the part of Polish territory it had conquered, was obliged to hand over to the new Grand Duchy of Warsaw not only the current local or regional archives relating to the returned territory but also the State documents ("Berlin archives") relating to it.<sup>91</sup>

Similarly, Poland recovered the central archives of the former Polish State which had been transferred to Russia at the end of the eighteenth century and those of the former autonomous Kingdom of Poland of 1815–1863 and of its continuation up to 1876. In addition, it received the documents of the Secretariat of State of the Kingdom of Poland, which operated at St. Petersburg as a central Russian department from 1815 to 1863, those of the Tsar's Chancellery for Polish Affairs and the documents from the Office of the Russian Minister of the Interior responsible for land reform in Poland.<sup>92</sup>

Under the Treaty of Vienna of 30 October 1864, Denmark was to cede the three duchies of Schleswig, Holstein and Lauenburg. Article 20 of the Treaty therefore stipulated that "Property titles, administrative documents and civil-justice instruments concerning the territories surrendered and included among the records of the Kingdom of Denmark" were to be handed over, together with "all portions of the Copenhagen records which

belonged to the duchies surrendered and have been removed from their archives, . . ."<sup>93</sup>

(6) For the sake of greater precision in considering this State practice (although, as a matter of principle, it is undesirable to attach too much importance to peace treaties, in which solutions are based on a certain "power ratio"), a distinction may be drawn between two cases: that of archives removed from the territory concerned, and that of archives established outside the territory but relating directly to it.

#### A. Archives which have been removed

(7) Current practice seems to acknowledge that archives which have been removed by the predecessor State, either immediately before the transfer of sovereignty or even at a much earlier period, should be returned to the successor State.

(8) There is a striking similarity in the wording of the instruments which terminated the wars of 1870 and 1914. Article 3 of the Treaty of Peace between France and Germany signed at Frankfurt on 10 May 1871<sup>94</sup> provided as follows:

If any of these items [archives, documents, registers, etc.] have been removed, they will be restored by the French Government on the demand of the German Government.

This statement of the principle that archives which have been removed must be returned was later incorporated, in the same wording, in article 52 of the Treaty of Versailles,<sup>95</sup> the only difference being that in that treaty it was Germany that was compelled to obey the law of which it had heartily approved when it was the victor.

(9) Similar considerations prevailed in the relations between Italy and Yugoslavia. Italy was to restore to the latter administrative archives relating to the territories ceded to Yugoslavia under the treaties signed in Rapallo, on 12 November 1920, and in Rome, on 27 January 1924, which had been removed by Italy between 4 November 1918 and 2 March 1924 as the result of the Italian occupation, and also deeds, documents, registers and the like belonging to those territories which had been removed by the Italian Armistice Mission operating in Vienna after the First World War.<sup>96</sup> The Agreement between Italy and Yugoslavia of 23 December 1950 is even more specific: its article 1 provides for the delivery to Yugoslavia of all archives "which are in the possession, or which will come into the possession\* of the Italian State, of local authorities, of public institutions and publicly-owned companies and associations", and adds that "should the material referred to *not be in Italy*,\* the

<sup>93</sup> *Ibid.*, pp. 26–27. English text of Treaty in F. L. Israel, ed., *Major Peace Treaties of Modern History, 1648–1967* (New York, Chelsea House Publishers, 1967) vol. I, p. 611.

<sup>94</sup> See G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1874), vol. XIX, p. 689.

<sup>95</sup> Treaty of Versailles, sect. V, article 52, concerning Alsace-Lorraine; see *British and Foreign State Papers, 1919*, vol. 112, p. 42.

<sup>96</sup> Article 12 of the Treaty of Peace with Italy of 10 February 1947 (United Nations, *Treaty Series*, vol. 49, p. 134). For the Rapallo Treaty, see League of Nations, *Treaty Series*, vol. XVIII, p. 387; for the Rome Treaty, *ibid.*, vol. XXIV, p. 31.

<sup>90</sup> France, *Les archives dans la vie internationale* (op. cit.), pp. 19–20.

<sup>91</sup> *Ibid.*, p. 20.

<sup>92</sup> *Ibid.*, pp. 35–36.

Italian Government shall endeavour to recover it and deliver it to the Yugoslav Government".<sup>97</sup>

(10) However, some French writers of an earlier era seemed for a time to accept a contrary rule. Referring to partial annexation, which in those days was the most common type of State succession, owing to the frequent changes in the political map of Europe, Despagnet wrote: "The dismembered State retains . . . archives relating to the ceded territory which are preserved in a repository situated outside that territory".<sup>98</sup> Fauchille did not go so far as to support this contrary rule, but implied that distinctions could be drawn: if the archives are outside the territory affected by the change of sovereignty, exactly which of them must the dismembered State give up? As Fauchille put it:

Should it hand over only those documents that will provide the annexing Power with a means of administering the region, or should it also hand over documents of a purely historical nature?<sup>99</sup>

(11) The fact is that these writers hesitated to support the generally accepted rule, and even went so far as to formulate a contrary rule, because they accorded excessive weight to a court decision which was not only an isolated instance but bore the stamp of the political circumstances of the time. This was a judgement rendered by the Court of Nancy on 16 May 1896, after Germany had annexed Alsace-Lorraine, ruling that

the French State, which prior to 1871 had an imprescriptible and inalienable right of ownership over all these archives, was in no way divested of that right by the change of nationality imposed on a part of its territory.<sup>100</sup>

It should be noted that the main purpose in this case was not to deny Germany (which was not a party to the proceedings) a right to archives belonging to territories under its control at that time, but to deprive an individual of public archives which were improperly in his possession.<sup>101</sup> Hence, the scope of this isolated decision, which appeared to leave to France the right to claim from individuals archives which should or which might fall to Germany, seems to be somewhat limited.

(12) The Special Rapporteur has nevertheless mentioned this isolated school of thought because it seemed to prevail, at least for some time and in some cases, in French diplomatic practice. If we are to give credence at least to one interpretation of the texts, this practice seems to indicate that only administrative archives should be returned to the territory affected by the change of sovereignty, while historical documents relating to that territory which are situated outside or are removed from it remain the property of the predecessor State. For example,

the Treaty of Zurich of 10 November 1859 between France and Austria provided that archives containing titles to property and documents concerning administration and civil justice relating to the territory ceded by Austria to the Emperor of the French "which may be in the archives of the Austrian Empire", including those at Vienna, should be handed over to the commissioners of the new Government of Lombardy.<sup>102</sup> If there is justification for interpreting in a very strict and narrow way the expressions used, which apparently refer only to items relating to current administration, it may be concluded that the historical part of the imperial archives at Vienna relating to the ceded territories was not affected.<sup>103</sup>

Article 2 of the Treaty of the same date between France and Sardinia<sup>104</sup> refers to the aforementioned provisions of the Treaty of Zurich, while article 15 of the Treaty concluded between Austria, France and Sardinia also on the same date reproduces them word for word.<sup>105</sup>

Similarly, a Convention between France and Sardinia, signed on 23 August 1860 pursuant to the Treaty of Turin of 24 March 1860 confirming the cession of Savoy and the county of Nice to France by Sardinia, includes an article 10 cast in the same mould as the article cited above, which states:

Any archives containing titles to property and any administrative, religious and civil justice documents relating to Savoy and the administrative district of Nice which may be in the possession of the Sardinian Government shall be handed over to the French Government.<sup>106</sup>

(13) The Special Rapporteur is somewhat hesitant to conclude that these texts contradict the existence of a rule permitting the successor State to claim all archives, including historical archives, relating to the territory affected by the change of sovereignty which are situated outside that territory. Would it, after all, be very rash to interpret the words *titles to property* in the formula "titles to property, administrative, religious and judicial documents", which is used in all these treaties, as alluding to historical documents (and not only administrative documents) that prove the ownership of the territory? The fact is that in those days, in the Europe of old, the territory itself was the property of the sovereign, so that all titles tracing the history of the region concerned, and providing evidence regarding its ownership, were claimed by the successor. If

<sup>102</sup> Article 15 of the Treaty of Peace between France and Austria, signed at Zurich on 10 November 1859 (France, *Archives diplomatiques, Recueil de diplomatie et d'histoire* (Paris, Aymot, 1861), vol. 1, p. 10; M. de Clercq, *Recueil des traités de la France* (Paris, Durand et Pédone-Lauriel, 1880), vol. VII (1856-1859), p. 647).

<sup>103</sup> For this viewpoint, see G. May, "La saisie des archives du département de la Meurthe pendant la guerre de 1870-1871", *Revue générale de droit international public* (Paris), vol. XVIII, 1911, p. 35, and id., *Le traité de Francfort* (Paris, Berger-Levrault, 1909), p. 269, foot-note 2.

<sup>104</sup> Article 2 of the Treaty between France and Sardinia concerning the cession of Lombardy, signed at Zurich on 10 November 1859 (France, *Archives diplomatiques* (op. cit.), p. 16; and M. de Clercq, op. cit., p. 652).

<sup>105</sup> Article 15 of the Treaty between Austria, France and Sardinia, signed at Zurich on 10 November 1859 (France, *Archives diplomatiques* (op. cit.), pp. 22-23; and M. de Clercq, op. cit., pp. 661-662).

<sup>106</sup> M. de Clercq, op. cit., vol. VIII (1860-1863), p. 83; G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1869), vol. XVII, part II, p. 25.

<sup>97</sup> United Nations, *Treaty Series*, vol. 171, p. 293.

<sup>98</sup> F. Despagnet, *Cours de droit international public*, 4th ed. (Paris, 1910), p. 128, para. 99.

<sup>99</sup> P. Fauchille, op. cit., p. 360, para. 219.

<sup>100</sup> Judgement of the Court of Nancy of 16 May 1896, *Dufresne v. the State* (M. Dalloz et al., *Recueil périodique* (Paris, Bureau de jurisprudence générale, 1896), part 1, pp. 411-412).

<sup>101</sup> The decision concerned 16 cartons of archives which a private individual had deposited with the archivist of Meurthe-et-Moselle. They related both to the ceded territories which remained French, and this provided a ground for the Court's decision.

this view is correct, the texts mentioned above, no matter how isolated, do not contradict the rule concerning the general transfer of archives, including historical archives, situated outside the territory concerned. If the titles to property meant only titles to public property, they would be covered by the words "administrative and judicial documents". Such an interpretation would seem to be supported by the fact that these treaties usually include a clause which appears to create an exception to the transfer of all historical documents, in that private documents relating to the reigning house, such as marriage contracts, wills, family mementoes, and so forth, are excluded from the transfer.<sup>107</sup>

(14) What really clinches the argument, however, is the fact that these few cases which occurred in French practice were deprived of all significance when France, some ninety years later, claimed and actually obtained the remainder of the Sardinian archives, both historical and administrative, relating to the cession of Savoy and the administrative district of Nice, which were preserved in the Turin repository. The agreements of 1860 relating to that cession were supplemented by the provisions of the Treaty of Peace with Italy of 10 February 1947, article 7 of which provided that the Italian Government should hand over to the French Government

*all archives, historical and administrative, prior to 1860, which concern\* the territory ceded to France under the Treaty of March 24, 1860, and the Convention of August 23, 1860.*<sup>108</sup>

(15) Consequently, there seems to be ample justification for accepting as a rule which adequately reflects State practice the fact that the successor State should receive all the archives, historical or other, relating to the territory affected by the change of sovereignty, even if those archives have been removed or are situated outside that territory.

#### B. Archives established outside the territory

(16) This case involves items and documents which relate to the territory affected by the change of sovereignty but which were established and have always been kept outside the territory. Many treaties include this category among the archives which must revert to the successor State.

As already noted, France was able to obtain, through the Treaty of Peace with Italy of 1947, sets of archives relating to Savoy and Nice established by the City of Turin.<sup>109</sup>

Under the agreement signed at Craiova on 7 September 1940 concerning the cession of Southern Dobruja by Romania to Bulgaria, the latter obtained not only the archives situated in the ceded territory but also certified true copies of the documents at Bucharest relating to the region which had become Bulgarian.

<sup>107</sup> Article 10 of the Convention of 23 August 1860 between France and Sardinia (see foot-note 106 above) provided that France was to *return* to the Sardinian Government "titles and documents relating to the royal family", which implies that France had already taken possession of them together with the other historical archives. This clause relating to private papers, which is based on the dictates of courtesy, is also included, for example, in the Treaty of 28 August 1736 between France and Austria concerning the cession of Lorraine, article 16 of which left to the Duke of Lorraine family papers such as "marriage contracts, wills and other papers".

<sup>108</sup> United Nations, *Treaty Series*, vol. 49, p. 132.

<sup>109</sup> See para. (14) above.

(17) What if the archives relating to the territory affected by the change of sovereignty are situated neither within the territory itself nor in the predecessor State?

Article 1 of the Agreement signed in Rome on 23 December 1950 between Italy and Yugoslavia provided that

Should the material referred to not be in Italy, the Italian Government shall endeavour\* to recover it and deliver it to the Yugoslav Government".<sup>110</sup>

In other words, to use terms dear to experts in French civil law, this was a matter not so much of "an obligation concerning the result" as of "an obligation concerning the means".

#### SUB-SECTION 2. NEWLY INDEPENDENT STATES

##### *Article 14. Succession to State property situated in newly independent States*

1. Unless otherwise agreed or decided, the newly independent State shall exercise a right of ownership of immovable property which, in the territory which has become independent, was owned on the date of the succession of States by the predecessor State.

2. Movable property of the predecessor State situated, on the date of the succession of States, in the territory which has become independent shall pass to the successor State unless:

(a) the two States otherwise agree;

(b) such property has no direct and necessary link with the territory, and the predecessor State has claimed ownership thereof within a reasonable period.

3. Nothing in the foregoing provisions shall affect the permanent sovereignty of the newly independent State over its wealth, its natural resources and its economic activities.

#### COMMENTARY

(1) Draft article 14 deals exclusively with succession to State property situated in newly independent States. It therefore leaves two categories of property outside its scope. The first is that of property proper to the Non-Self-Governing Territory which is about to become a newly independent State. Such property is not affected by the succession of States, firstly because, by definition, it does not belong to the predecessor State, whose property alone is affected by the succession of States, and secondly because it does not in any case qualify as State property, since the Non-Self-Governing Territory does not acquire statehood until the day on which the succession of States occurs. The second category is that of property situated outside the territory of the newly independent State, which will be covered by the provisions of draft article 15.

#### A. SPECIAL CHARACTERISTICS OF THIS TYPE OF SUCCESSION<sup>111</sup>

(2) Before commenting on the rules contained in the above draft article, it is worth while to recall the special characteristics of this type of succession as compared with

<sup>110</sup> United Nations, *Treaty Series*, vol. 171, p. 293.

<sup>111</sup> For further details, see M. Bedjaoui, "Problèmes récents de succession d'Etats dans les Etats nouveaux", *Recueil des cours . . .*, 1970-II (Leyden, Sijthoff, 1971), vol. 130, pp. 457-585, and especially pp. 483-502.



others. It involves a "Non-Self-Governing Territory", which means, in accordance with the United Nations Charter, a territory having a certain international status. In contrast to other types of State succession, where until the occurrence of the succession the predecessor State possesses the territory to which the succession of States relates and exercises its sovereignty there, this is a case of a non-self-governing country whose *people* is ethnically different from that inhabiting the "metropolitan country", whose *territory* is juridically distinct from that of the State administering it, and over which the latter State does not exercise *sovereignty*, having only the status of an "administering Power".

(3) The position now, according to General Assembly resolution 2625 (XXV) of 4 November 1970 (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations), is that

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination . . ."

It is on this basis that one can affirm that every non-independent territory has a legal status of its own which is regulated and protected by international law.

(4) Furthermore, it is now accepted that sovereignty in a colony in no case belongs to the "metropolitan country" but belongs to the dependent people. When that people accedes to independence, it exercises its own sovereignty and not that of the administering State, supposedly transmitted to it by the latter. In accordance with General Assembly resolution 1514 (XV), every people, even if it is not politically independent at a certain stage of its history, possesses the attributes of national sovereignty inherent in its existence as a people, and that status and those attributes can cease to exist only if the people concerned is literally destroyed.

(5) Consequently, the State which administers a Non-Self-Governing Territory can only have the status of an "administering Power", involving a set of obligations which the United Nations Charter and the International Court of Justice have defined. This status entitles the State which possesses it to perform administrative acts in the territory, but not acts for the disposal of the territory, its property or the rights of its population.

(6) In the light of the foregoing, the administering Power is clearly the beneficiary of a United Nations trust and must accordingly assume the international obligation not to jeopardize the viability of a State on the verge of independence by improperly disposing of property which should revert to it or by arrogating to itself, directly or indirectly, its resources of any kind.

(7) In contrast with the situation concerning "succession in respect of part of territory", cases of accession to independence by force still occur. Moreover, it often happens that negotiations to break the bonds of colonial domination begin and end on terms and in circumstances which are distinctly unfavourable to the party acceding to independence, because of the unequal and unbalanced legal and political relationship between the two parties.

(8) At all events, negotiated peaceful settlements are almost the exception here, and the wording of the article should therefore be particularly clear, taking account of the fact that the successor State must enjoy favourable provisions because, as it enters international life, it needs as solid a foundation as possible in order to guarantee its sovereignty and consolidate its independence, and also because the predecessor State will tend not to "play fair" in transferring property.

(9) The general principle is thus that State property situated in the territory which has become independent passes to the successor State.

#### B. Succession to immovable property: State practice and judicial decisions

(10) Paragraph 1 of article 14, as submitted by the Special Rapporteur, regulates the problem of immovable property of the predecessor State situated, on the date of the succession of States, in the territory which has become independent. In accordance with the general principle of State succession (draft article 9, already adopted by the Commission), paragraph 1 of article 14 provides that immovable property of the predecessor State situated in the territory to which the succession relates shall pass to the newly independent State.

This solution is generally accepted in the literature and in State practice, although in neither case is express reference always made to "immovable" property which is "situated in the territory" but rather to property in general, irrespective of its nature or its geographical situation. Thus, if general transfer is the rule, the passing to the successor State of the more limited category of property provided for in article 14, paragraph 1, must *a fortiori* be permitted.

(11) Article 19, first paragraph, of the Declaration of Principles concerning Economic and Financial Co-operation (Evian agreements between France and Algeria of 19 March 1962) provided that

Public real estate [of the French State] in Algeria will be transferred to the Algerian State . . .<sup>112</sup>

In fact, all French military real estate and much of the civil real estate (excluding certain property retained by agreement and other property which is still in dispute) has over the years gradually passed to the Algerian State.

(12) A great many bilateral instruments or unilateral enactments of the administering or constituent Power simply record the express relinquishment by the predecessor State without any *quid pro quo*, of all State property or, even more broadly, all public property without distinction situated in the territory to which the succession of States relates.<sup>113</sup>

<sup>112</sup> United Nations, *Treaty Series*, vol. 507, p. 65.

<sup>113</sup> The Federation of Malaya, later involved in a uniting of States, was initially a case of decolonization to which the United Kingdom applied the principle enunciated above.

See, for example, the Constitution of the Federation of Malaya (1957), which provided that all property and assets in the Federation or one of the colonies which were vested in Her Britannic Majesty should on the date of proclamation of independence vest in the Federation or one of its States. The term used, being general and without restrictions or

(Continued on next page.)

The "draft agreement on transitional measures" of 2 November 1949 between Indonesia and the Netherlands, adopted at the end of the Hague Round-Table Conference (August-November 1949),<sup>114</sup> provided for the devolution of *all* property, and not only immovable property, in the Netherlands public and private domain in Indonesia. A subsequent military agreement transferred to Indonesia, in addition to some warships and military maintenance equipment of the Netherlands fleet in Indonesia, which constituted movable property, all fixed installations and equipment used by the colonial troops.<sup>115</sup>

When the Colony of Cyprus attained independence, all property of the Government of the island (including immovable property) became the property of the Republic of Cyprus.<sup>116</sup>

Libya received "the movable and *immovable\** property located in Libya owned by the Italian State, either in its own name or in the name of the Italian administration".<sup>117</sup> In particular, the following property was transferred immediately: "the public property of the State (*demanio pubblico*) and the inalienable property of the State (*patrimonio indisponibile*) in Libya", as well as the public archives and "the property in Libya of the Fascist Party and its organizations".<sup>118</sup>

Burma was to succeed to all property in the public and private domain of the colonial Government,<sup>119</sup> including fixed military assets of the United Kingdom in Burma.<sup>120</sup>

(13) Without the principle of the passing of immovable State property being in any way called in question, the Special Rapporteur has drafted paragraph 1 of article 14,

(Foot-note 113 continued.)

specifications, authorizes the transfer of all the property, of whatever kind, of the predecessor State. (*Materials on Succession of States* (United Nations publication, Sales No. E/F.68.V.5), pp. 85-86.)

See also the Malaysia Act, 1963, which provides that the property of any of the Borneo States and of Singapore occupied or used by the United Kingdom in those States shall vest in the Federation (*ibid.*, p. 92).

The same wording was used for the Constitution of the independent State of Western Samoa (1962): "All property . . . vested in Her Majesty . . . or in the Crown . . . shall . . . vest in Western Samoa" (*ibid.*, p. 117).

When the town of Tangier was returned to Morocco, the new independent State recovered all its own property and succeeded to all that of the International Administration:

The Moroccan State, which recovers possession of the public and private domain entrusted to the International Administration . . . receives the latter's property . . . (Final Declaration of the International Conference in Tangier, and annexed Protocol, signed at Tangier on 29 October 1956, article 2 of the Protocol) (United Nations, *Treaty Series*, vol. 263, p. 171).

<sup>114</sup> *Ibid.*, vol. 69, p. 266.

<sup>115</sup> *Ibid.*, p. 288.

<sup>116</sup> Treaty concerning the establishment of the Republic of Cyprus, signed at Nicosia on 16 August 1960, with annexes, schedules, maps, etc. (United Nations, *Treaty Series*, vol. 382), annex E, section 1 and *passim*.

<sup>117</sup> United Nations General Assembly resolution 388 (V) of 15 December 1950, entitled "economic and financial provisions relating to Libya", article 1.

<sup>118</sup> *Ibid.* The inalienable property of the State is defined in articles 822-828 of the Italian Civil Code and includes, in particular, mines, quarries, forests, barracks (i.e., immovable property), arms, munitions, etc. (i.e. movable property).

<sup>119</sup> Government of Burma Act, 1935.

<sup>120</sup> See United Kingdom, *Treaty between the Government of the United Kingdom and the Provisional Government of Burma regarding the recognition of Burmese independence and related matters*, Annex: Defence Agreement signed on the 29th August 1947 in Rangoon, Cmd. 7360 (London, H.M. Stationery Office, 1948).

which deals with this principle, in such a way as to allow the successor and predecessor States to depart from it by agreement if they so desire, regard being had to the nature and closeness of the bonds of "co-operation" they may wish to establish between themselves.

This practice has been especially widely followed in the cases of decolonization in French-speaking black Africa.<sup>121</sup> The independence agreements were accompanied by various protocols concerning property, under which the independent State did not succeed to all the property belonging to the predecessor State. It is in France that the strongest legal tradition has sanctioned the distinction between the public domain and the private domain of the State. In the colonies, such distinctions also existed in the case of the property of the colonial State. However, with the arrival of independence, they were in several instances discarded in favour of treaty provisions designed to take into account the military, cultural or other presence of the predecessor State in these countries. In exchange for French co-operation, a limited transfer of public property was agreed upon.

(14) In some cases, the pre-independence *status quo*, with no transfer of property, was provisionally maintained.<sup>122</sup> In others, devolution of the (public and private) domain of the French State was affirmed as a principle but was actually implemented only in the case of property which would not be needed for the operation of the various French military or civilian services.<sup>123</sup> Sometimes the agreement between France and the territory that had become independent clearly transferred all the public and private domain to the successor, which incorporated them in its patrimony but, under the same agreement, retroceded parts of them either in ownership or in usufruct.<sup>124</sup> In some cases the newly

<sup>121</sup> See G. Fouilloux: "La succession aux biens publics français dans les Etats nouveaux d'Afrique," in *Annuaire français de droit international*, XI, 1965 (Paris, C.N.R.S.), pp. 885-915. Cf. also G. Fouilloux, "La succession des Etats de l'Afrique du Nord aux biens publics français", in *Annuaire de l'Afrique du Nord*, 1966, pp. 51-79.

<sup>122</sup> "Agreement between the Government of the French Republic and the Government of the Republic of Chad concerning the transitional arrangements to be applied until the entry into force of the agreements of co-operation between the French Republic and the Republic of Chad", signed in Paris on 12 July 1960 (*Materials on Succession of States (op. cit.)* pp. 153-154), article 4: "... the statute of the Domain currently in force shall continue to be applied ...". A Protocol to a property agreement was signed later, on 25 October 1961. It met the concern of the two States to provide for "respective needs" and enabled the successor State to waive the devolution of certain property (see Decree No. 63-271 of 15 March 1963 publishing the Protocol to the property agreement between France and the Republic of Chad of 25 October 1961 (with the text of the Protocol annexed), in: France, *Journal officiel de la République française, Lois et décrets* (Paris, 95th year), 21 March 1963, pp. 2721-2722).

<sup>123</sup> See Decree No. 63-270 of 15 March 1963 publishing the Convention concerning the property settlement between France and Senegal, signed on 18 September 1962 (with the text of the Convention annexed), *ibid.*, p. 2720. Article 1 establishes the principle of the transfer of "ownership of State appurtenances registered . . . in the name of the French Republic" to Senegal. However, article 2 specifies: "Nevertheless, State appurtenances shall remain under the *ownership\** of the French Republic and be registered in its name if they are certified to be needed for the operation of its services . . . and are included in the *list\**" given in an annex. This provision concerns not the *use* of State property for the needs of the French services but the *ownership* of such property.

<sup>124</sup> A typical example is the public property Agreement between France and Mauritania of 10 May 1963 (Decree No. 63-1077 of 26

independent State agreed to a division of property between France and itself, but the criterion for this division is not apparent except in the broader context of the requirements of technical assistance and of the French presence.<sup>125</sup> Lastly, there have been cases where a treaty discarded the distinctions between public and private domains, of the territory or of the metropolitan country, and provided for a division which would satisfy "respective needs", as defined by the two States in various co-operation agreements:

The Contracting Parties agree to replace the property settlement based on the nature of the appurtenances by a *global settlement based on equity and satisfying their respective needs*.<sup>126</sup>

(15) The case of French-speaking black Africa was the one most readily accessible to the Special Rapporteur.<sup>127</sup> However, he doubts whether it was unique in the history of decolonization and whether roughly similar cases are not to be found in the demise of other colonial empires.

(16) In any event, it seems to the Special Rapporteur that the only conclusion he can draw from the foregoing cases is that they involve treaty provisions illustrating the freedom given to States to depart by agreement from a customary rule which would otherwise be definite.<sup>128</sup> However, apart

(Foot-note 124 continued.)

October 1963) (France, *Journal officiel de la République française, Lois et décrets* (Paris, 31 October 1963), 95th year, No. 256, pp. 9707-9708). Article 1 permanently transfers the public domain and the private domain. Article 2 grants ownership of certain public property needed for the French Services. Article 3 retrocedes to France the ownership of military premises used for residential purposes. Article 4 states that France may freely dispose of "installations needed for the performance of the defence mission entrusted to the French military forces" under a defence agreement.

<sup>125</sup> Cf. Decree No. 63-268 of 15 March 1963 publishing the Protocol to the property Agreement between France and the Gabonese Republic, of 6 June 1961 (France, *Journal officiel de la République française, Lois et décrets* (Paris, 21 March 1963), 95th year, No. 69, pp. 2718-2719), and Decree No. 63-267 of the same date concerning the Central African Republic (*ibid.*, p. 2718).

<sup>126</sup> Article 31 of the Franco-Malagasy Agreement of 27 June 1960 concerning economic and financial co-operation, approved by a Malagasy Act of 5 July 1960 and by a French Act of 18 July 1960 (France, *Journal officiel de la République française, Lois et décrets* (Paris, 20 July 1960), 92nd year, No. 167, p. 6615). A Franco-Malagasy Protocol on property was signed later, on 18 October 1961 (Decree No. 63-269 of 15 March 1963 publishing this Protocol, in France, *Journal officiel de la République française, Lois et décrets* (Paris, 21 March 1963), 95th year, No. 69, pp. 2719-2720). This confirms the situation created by the agreement of 27 June 1960 and acknowledges—but in this context—Madagascar's ownership of the remaining State appurtenances, although France retains the ownership of military premises and constructions.

<sup>127</sup> The Special Rapporteur quoted earlier (see para. (11) above) part of the first paragraph of article 19 of the Declaration of Principles concerning Economic and Financial Co-operation between France and Algeria (for reference, see above, foot-note 112).

"Public real estate [of the French State] in Algeria will be transferred to the Algerian State, *except, with the agreement of the Algerian authorities*", for the premises deemed essential to the normal functioning of temporary or permanent French services." This is a further example of an agreement which limits the transfer of property.

<sup>128</sup> Madeleine Grawitz wrote in connexion with the decolonization of Libya:

"There is a custom . . . (one dare not say a principle) . . . , one of the rare customs in the extremely diverse and confusing question of State succession; it is that the successor State inherits the public domain of the *annexed* State." (M. Grawitz, "Chronique-Jurisprudence internationale, Tribunal des Nations Unies en Libye", sentence du 27 juin

from the quite relevant question of the validity of an agreement concluded on unequal terms<sup>129</sup> and the limited manner in which the agreements concluded between the predecessor State and the successor State effected the partial transfer of immovable State property, these instruments were generally unable to survive for long the more balanced evolution of the political relations between the predecessor State and the newly independent State. Thus, after periods of varying length and varying degrees of "restlessness", in many cases the successor State in French-speaking Africa finally obtained the passing to it of the immovable State property situated in its territory.

### C. Succession to movable property

(17) Paragraph 2 of draft article 14 concerns the conditions under which *movable property* passes to the newly independent State. In this article, as in others submitted by the Special Rapporteur, the problem of movable property remains the most difficult to solve because of the mobility of the property. Yet such property not only exists but may have a sizeable patrimonial content, so that it would be inconceivable to ignore it on the ground that its mobility would enable it to be placed beyond the reach of any rule that might be established.

(18) The problem of movable property seems to be particularly weighty and accentuated in cases of decolonization. History teaches that at all times and in all places a colonial country does not withdraw from a dependent territory without inflicting much damage on it, for instance by removing a great deal of property and wealth which should revert to the territory. Immovable property does, of course, resist such removal because of its fixed nature, although there are cases where legislation or measures of alienation taken during the "*période suspecte*" enable the colonial country to whittle down the immovable patrimony which is to be left behind. None the less, the favourite area of operations for impoverishing the patrimony of a territory which is about to become independent is still that of movable property.

Man and freedom being what they are, freedom must always be wrested away and is seldom granted, whether at the individual or at the social group level. The tensions created by this quest for freedom are all the more difficult to avoid in that, as Spinoza put it, "every being tends to persist in its being". For these and other reasons, it is hardly to be expected that the transfer of property, and in particular movable property, will in practice be carried out fully in accordance with the canons of justice, morality and law.<sup>130</sup>

(19) Some difficulties seem to have arisen in the succession of the Comoros to the property of the predecessor State. At all events, the Comorian Government issued an Ordinance

1955, *Annuaire français de droit international*, I, 1955 (Paris), p. 289).

Her terminology, however, lacks precision.

<sup>129</sup> Cf. M. Bedjaoui, *loc. cit.*, pp. 487-488.

<sup>130</sup> See *Yearbook . . . 1971*, vol. II (Part One), p. 185, document A/CN.4/247 and Add.1, foot-note 149.

concerning its succession to that property.<sup>131</sup> The introductory *exposé des motifs* to this Ordinance, issued in Moroni, is interesting to examine from the point of view of the theory of the succession of States by decolonization, in that it clearly sanctions the total and immediate transfer of all movable and immovable property to the successor State. The *exposé des motifs* states:

In acceding to independence, the Comoros replaces the former administering Power. This means that *all*\* administrative resources\* of that Power *in service*\* in the Comoros henceforth belong to the Comorian State and that the French State shall retain in our territory no property other than that the use of which we leave to it.

In fact, article 1 of the Ordinance provides that

All movable and immovable property belonging to the government services of the former administering Power shall, as from the declaration of independence, be the property of the Comorian State.

However, the Ordinance is a penal instrument. The *exposé des motifs* states that "in order to forestall any irresponsible individual action on either the French or the Comorian side, the Executive Council must ensure that property for which it is responsible is not stolen or destroyed". Article 3 therefore provides penalties of imprisonment and fines for the following offences:

Theft of material of any kind connected with the functioning of administrative and technical services: office equipment, vehicles, files, documents, electronic devices, maintenance equipment, tools, etc.;

The substitution of obsolete equipment for equipment currently in use;  
The sabotage of such equipment.

Article 4 of the Ordinance empowers the customs authorities, with the assistance of the security services, to "examine packages and luggage leaving each island in order to determine that no government property is illegally exported".

(20) Apparently, some of the difficulties encountered on the date of the succession of States in the Comoros were created by the transfer of all kinds of property from the islands of the Archipelago to the island of Mayotte, which remained French.<sup>132</sup>

<sup>131</sup> Ordinance No. 75-14/CEN of 26 November 1975 "for the prevention and punishment of certain offences against the administrative and technical property of the Comorian State", with an introductory *exposé des motifs*, signed by the President of the National Council, Mr. Saïd Mohammed Jaffar. See Comores, *Journal officiel d'Etat Comorien*, (Antananarivo), 1 December 1975, 15th year, No. 396, p. 434.

<sup>132</sup> However, in an article entitled "Comoro Overkill", *The New York Times* of 15 January 1976 criticized France's attitude to the Comoros, comparing it to the French attitude towards Guinea at the time of its accession to independence, and stating:

"When Sékou Touré's Guinea in 1958 became the only one of France's African colonies to reject General de Gaulle's offer of a French 'community' of African States—choosing full independence instead—the French leader reacted in anger. He ordered all French administrators, teachers, doctors and technicians out of Guinea. Before leaving, they destroyed documents, ripped out telephones, smashed light bulbs and stripped the police of uniforms and weapons.

No telephones, light bulbs or police uniforms were reported removed from the Comoro Islands in December when the last French technicians and experts suddenly left France's former Indian Ocean colony, after cutting off budgetary and other financial support. But, in other respects, the abrupt withdrawal—leaving most of the Islands' 320,000 people threatened by bankruptcy, famine and the breakdown of essential services—was reminiscent of the Guinean precedent."

#### D. Property proper to the Non-Self-Governing Territory

(21) It should of course be noted that article 14, like all the texts submitted by the Special Rapporteur, applies to property, movable or immovable, of the predecessor State. It is obvious, that for example, movable property which belonged *as of right* to the Non-Self-Governing Territory is not affected by the succession of States. It will be the indisputable property of the newly independent State.

(22) Paragraph 2 (b) of the article appears to leave to the predecessor State the ownership of such property as paintings, works of art, and a country's whole stock of museological or cultural material, since it cannot be said that a painting, for example, has a "direct and necessary link with the territory".

(23) Actually, however, that is not the problem. Property of this kind can fall into only two categories. Either it belonged to the Non-Self-Governing Territory, which acquired it with its own funds or in some other way, in which case it is not affected by the succession of States: the Non-Self-Governing Territory cannot be dispossessed of such property merely because it becomes a newly independent State, any more than it should be dispossessed of it merely because the property happens to be in the so-called "metropolitan" territory. Or, alternatively, it belonged to the predecessor State, and as such it is genuine State property but in this case it is rarely situated in the territory acceding to independence. Since such property is usually and normally situated in the territory of the predecessor State, its presence in the newly independent State can only be fortuitous or temporary (e.g., an inter-museum loan or exchange for the duration of an exhibition, or for the protection in an overseas territory of works of art which the "metropolitan" country, at war with a neighbouring State, is afraid of losing). In this case, such State property, which has "no direct and necessary link with the territory" in which it happens to be, cannot pass to the successor State. However, the predecessor State must claim it within a reasonable period. Such a requirement seems logical in order to avoid awkward or uncertain situations and to encourage their speedy clarification.

#### E. Succession in respect of currency

(24) Let us consider first of all the question of the *privilege of issue* and recall that it does not relate directly to succession of States. This privilege, which is a regalian right and an attribute of public authority, must belong as of right to the new sovereign in the territory to which the succession of States relates, or, in other words, to the newly independent State. By its nature, it cannot be the subject of a succession or a transfer. The predecessor State loses its privilege of issue in the Non-Self-Governing Territory and the newly independent State exercises its own privilege of issue, which it derives from its sovereignty. Just as the successor State does not derive its sovereignty from the predecessor State, so also it does not receive from the predecessor State an attribute of sovereignty such as the privilege of issue.

(25) There have, however, been cases where agreements between the former metropolitan country and the ex-colony

allowed the predecessor State to continue temporarily to exercise the privilege of issue in the territory which had become independent.

It is nevertheless a firm principle that the privilege of issue belongs to the successor State, the existence of such agreements being a manifestation of the power of free disposal which the newly independent State has in this field pending transfer.

(26) The agreements concluded by the French-speaking African States and France are instructive in this connexion. The newly independent State is recognized as sole possessor of the privilege of issue, which it nevertheless entrusts to a French or Community body. Article 1 of the Agreement on monetary co-operation between France and the States of Equatorial Africa reads as follows:

The French Republic recognizes that the accession to international sovereignty\* of the States of Equatorial Africa confers on them the right to introduce a national currency and to establish their own bank of issue\*.

Once the possession of the right has thus been recognized, the exercise of it is temporarily left to a Community body supervised by the French Republic. Article 2 of the Agreement is accordingly worded as follows:

The States of Equatorial Africa confirm their adherence to the Monetary Union of which they are members within the franc area. The CFA franc issued by the Banque Centrale des Etats d'Afrique équatoriale ... shall remain the lawful currency being legal tender throughout their territories.<sup>133</sup>

(27) Under this Franco-African system, monetary policy was in principle decided multilaterally within a franc area comprising, in addition to the Banque de France, four banks of issue linked to the French Treasury. The West African Monetary Union, composed of Ivory Coast, Senegal, the Upper Volta, the Niger, Dahomey [Benin] and Togo,<sup>134</sup> has a common currency, the CFA (Communauté financière

<sup>133</sup> Agreement on Co-operation in Economic and Financial Matters between the French Republic and the Central African Republic, the Republic of the Congo and the Republic of Chad (France, *Journal Officiel de la République française, Lois et décrets* (Paris), 24 November 1960, 92nd year, No. 273, p. 10461, and Decree of Publication No. 60-1230, *ibid.*, p. 10459.

The Agreement on Co-operation in Monetary, Economic and Financial Matters between the French Republic and the Malagasy Republic (*ibid.*, 20 July 1960, p. 6612) includes an article 1 recognizing Madagascar's right to introduce its own national currency and to establish its own national bank of issue, and an article 2 entrusting the function of issuing currency to a Malagasy public establishment and creating a currency linked to the French franc.

Cf. also other agreements entered into by France on monetary, economic and financial matters, including in particular the Treaty of 24 April 1961 with the Ivory Coast (*ibid.*, 6 February 1962, 94th year, No. 30, p. 1261), especially article 19; the Agreements of 22 June 1960 with the Federation of Mali (*ibid.*, 20 July 1960 (*op. cit.*), p. 6634); the "Bamako Agreement" of 9 March 1962 with Mali after the dissolution of the Federation of Mali (*ibid.*, 10 July 1964, 96th year, No. 160, p. 6131); the Agreements of 24 April 1961 with Niger (*ibid.*, 6 February 1962 (*op. cit.*), p. 1292); the Agreement of 13 November 1960 with Cameroon (*ibid.*, 9 August 1961, 93rd year, No. 186, p. 7429); the Agreements of 17 August 1960 with Gabon (*ibid.*, 24 November 1960 (*op. cit.*), p. 1048); the Agreement of 10 July 1963 with Togo (*ibid.*, 10 June 1964, 96th year, No. 134, p. 5000); the Treaty of 19 June 1961 with Mauritania (*ibid.*, 6 February 1962 (*op. cit.*), p. 1324).

<sup>134</sup> Mauritania, which was the seventh member, withdrew as from the end of December 1972 and established its own bank of issue.

africaine) franc, issued by the Banque Centrale des Etats de l'Afrique de l'Ouest, whose head office is in Paris. The Banque Centrale des Etats de l'Afrique équatoriale et du Cameroun which, following the recent agreements concluded at Brazzaville, in December 1972, and at Fort-Lamy, in February 1973, has become the Banque d'Etat de l'Afrique Centrale, comprises Cameroon, the People's Republic of the Congo, Gabon, Chad and the Central African Republic, and also has its head office in Paris. Mali and Madagascar each have their own banks of issue.

(28) The peculiarity of these four banks, which issue a CFA franc that has no "international personality" and has an absolutely fixed rate of exchange with the French franc, is that each of them has an "operations account" opened in its name with the French Treasury in Paris. This account is credited with all earnings by the French-speaking African State or group of States from their trade with other countries and debited with the amounts of the expenditure abroad. In return, the French Treasury gives these four banks of issue its guarantee—in principle unlimited—by undertaking to supply them with francs and foreign exchange to balance their operations accounts.<sup>135</sup>

(29) The fact that these monetary agreements are currently being revised testifies both to their eminently evolutive character and to the newly independent State's right of free disposal with respect to its privilege of issue, the exercise of which it can at any time reclaim and the possession of which, indeed, it never legally lost.

(30) When the independence of the various Latin American colonies was proclaimed at the beginning of the nineteenth century, the Spanish currency was generally not withdrawn. The various republics confined themselves to substituting the seal, arms or inscriptions of the new State for the image and name of His Most Catholic Majesty on the coins in circulation,<sup>136</sup> or to giving some other name to the Spanish peso without changing its value or the structure of the currency.<sup>137</sup>

(31) In the proceedings of the Hague Round-Table Conference, there was one instance of a restriction on the exercise of the privilege of issue. The new Indonesian Republic was required, as long as it had liabilities towards the Netherlands, to consult the Netherlands before establishing a new institution of issue and a new currency. However, this restriction did not last for long.

(32) Ethiopia and Libya apparently did not succeed to the

<sup>135</sup> It is no secret, however, that many African States requested revision of these monetary agreements because they considered the guarantee offered by the French Treasury to be illusory. In their view, the French Treasury operates less like a generous guardian than like a prudent banker who gives an unlimited guarantee only to a customer having a credit balance. In other words, the guarantee would not operate. It is a fact that the agreements which were concluded lay down very strict rules to guard against imbalances between receipts and expenditure in the operations accounts that were opened with the French Treasury. It is a further fact that those accounts are in surplus, thus draining off to France the African resources amassed by the local banks.

<sup>136</sup> In Chile the new inscriptions on the Spanish peso in 1817 were: "Liberty, Union and Strength" and "Independent Chile"; in Argentina: "Union and Liberty" and "Provinces of Rio de la Plata". In Peru and Mexico the new emblem, arms or seal were stamped on the coins.

<sup>137</sup> "Boliviano", "bolivar" and "sucre" were the new names given to the Spanish peso in Bolivia, Venezuela and Ecuador respectively.

monetary reserves, judging by the more clearly established fact that they did not succeed to the obligations derived from the issue of Italian currency. However, both countries made use of their right of issue to carry out monetary reforms when they became independent.

(33) In pursuance of the decisions taken at the Conference on Indo-China held at Pau from 30 June to 27 November 1950, a bank for Indo-China was to begin operations on 1 January 1952 with authority to issue piastre notes, which would be individualized for each of the three Associated States of Indo-China but would circulate as legal tender throughout those States.

(34) In the case of India, various agreements were concluded between the United Kingdom and its two former Dominions and also between the two Dominions. The first point to be noted is that India had an entirely separate monetary system before the colonial Power withdrew and the country was partitioned. The only problem which would arise in the normal course of events was the apportionment of reserves and currency between India and Pakistan. As soon after 30 September 1948 as practicable, the Reserve Bank of India was to transfer to Pakistan assets equal to the volume of money actually in circulation at that time in the latter State. Before that date, Indian rupee notes issued by the Reserve Bank of India would still be legal tender in Pakistan. The apportionment of the cash balances of the Reserve Bank of India, which amounted to about 400 crores of rupees, was determined by the agreements of December 1947 between India and Pakistan<sup>138</sup> and by the Pakistan (Monetary System and Reserve Bank) Order, 1947. Pakistan received 75 crores of rupees and also obtained part of the Bank's sterling assets. The ratio of the note circulation in India and Pakistan had been taken into account for the purpose of this apportionment. Pakistan's actual share came to 17.5 per cent.

(35) India succeeded to the sterling assets of the Reserve Bank of India, estimated at £1,160 million.<sup>139</sup> However, these assets could not be utilized freely, but only progressively. A sum of £65 million was credited to a free account and the remainder—i.e., the greater part of the assets—was placed in a blocked account. Certain sums had to be transferred to the United Kingdom by India as working balances and were credited to an account opened by the Bank of England in the name of Pakistan. The conditions governing the operation of that account were specified in 1948 and 1949 in various agreements concluded by the United Kingdom with India and Pakistan.<sup>140</sup>

(36) We may also eliminate another question which, like the privilege of issue, does not relate directly to succession of States. This is the question of *monetary tokens proper to the Non-Self-Governing Territory*. In the present debate, the Commission and the Special Rapporteur should confine themselves to the question of State property, which means

property of the predecessor State, thus excluding property proper to the Non-Self-Governing Territory. Many dependent territories had their own institution of issue and their own currency. The privilege of issue in the territory was exercised by a private bank, a government body of the metropolitan country or a public body of the territory. So far as assets are concerned, the monetary tokens in circulation may have been a mixture of the issues of two or more institutions of the kinds mentioned above. Whatever portion of those monetary tokens was owned by the territory that is being transferred should normally revert to it, without there being any problem of State succession.

(37) It is necessary, therefore, to concentrate exclusively on the general, factual situation which can be observed on the date of the succession of States in a territory which has become independent: at that time there is a currency in circulation—this is an observable fact. If the currency was issued by an institution of issue proper to the territory, independence will not change the situation. However, if the currency was issued for the territory by and under the responsibility of a "metropolitan" institution of issue, it must be backed by gold and reserves if it is to be kept in circulation. Geneviève Burdeau writes:

Determination of the total amount of currency to be shared . . . is based on the idea that the entire assets of the institution of issue shown under the heading "backing for the issue" guarantee all currency issued by the institution in the interest of the country as a whole.<sup>141</sup>

(38) The monetary tokens in question must, however, be ones that were placed in circulation or stored by the predecessor State in the territory which has become independent and were allocated by it to that territory. Consideration must be given to cases where the monetary gold of the predecessor State may be in the dependent territory only *temporarily or fortuitously*—for example, where as a result of an armed conflict the colonial Power had thought to safeguard its gold reserves by placing them in a territory which at the time was still one of its dependencies. All the gold of the Banque de France was thus evacuated to West Africa during the Second World War. Obviously, in such circumstances the gold and foreign exchange reserves stored in the territory had not been *allocated* to the territory. The "movable property" in question had no direct and necessary link with the territory which had become independent, and could not therefore be transferred to the newly independent State in accordance with paragraph 2 (b) of draft article 14.

#### F. Succession in respect of Treasury and public funds

(39) Here again, the Special Rapporteur leaves aside the question of a Treasury and of funds which are proper to the Non-Self-Governing Territory, since it does not relate to the succession of States. As a corporation under internal public law, the territory will usually have had, prior to independence, a system of public finances consisting of machinery, institutions and a Treasury distinct from those of the colonial Power. Public funds which accordingly belonged to the territory prior to independence, being the product of

<sup>138</sup> See *Keesing's Contemporary Archives, 1946–1948*, vol. VI, 24–31 January, p. 9066.

<sup>139</sup> United Kingdom, *Financial Agreement between the Government of the United Kingdom and the Government of India*, Cmnd. 7195 (London, H.M. Stationery Office, 14 August 1947).

<sup>140</sup> For details, see I. Paenson, *op. cit.*, *passim* and in particular pp. 65–66 and 80.

<sup>141</sup> G. Burdeau, "Les successions de systèmes monétaires en droit international" (Paris, 1974) (thesis, Paris II, mimeographed), p. 276.



duties, taxes and fees of all kinds, debt-claims and the like, connected with activities in the territory, can only remain among the financial assets of the territory once it has become independent. Logically, their status cannot be affected in any way by the fact of their being in the territory itself or in the territory of the predecessor State or of any other third State, since it is well established that they belonged to the territory which has become independent.

(40) It is necessary, therefore, to concentrate exclusively on the Treasury and funds of the predecessor State situated in the Non-Self-Governing Territory. Furthermore, these assets must have been allocated to and destined for the territory in question by the predecessor State if they are to pass to the newly independent State in accordance with article 14, paragraph 2 (b). Here, too, the principle of allocation and destination of the property is basic and decisive. If funds, holdings or assets of the Treasury of the predecessor State should be provisionally or fortuitously in the Non-Self-Governing Territory, they remain the property of the predecessor State.

(41) It appears that the public funds of the British Mandatory Government in Palestine were withdrawn by the United Kingdom. Yet this example does not invalidate the general principle of transfer to the newly independent State, inasmuch as a Mandate, which was conceived as an international public service assumed by a State on behalf of the international community, in no way deprives the Mandatory Power of the authority to withdraw its own property when such property is clearly separable and detachable from that of the mandated country.

(42) Treasury relations are very complicated. Reduced to simple terms, they comprise two aspects. In the first place, there is no reason why the rights of the Treasury of the territory which has become independent should, paradoxically, cease to exist simply because of the territory's accession to independence. In the second place, the obligations, whether or not corresponding, previously incurred by the Treasury of the territory to private persons or to the predecessor State or any other State are assumed, in the absence of special treaty provisions, on such terms and in accordance with such rules as apply to succession to the public debt.

(43) On termination of the French Mandate, Syria and Lebanon succeeded jointly to the "common interests" assets, including "common interests" Treasury funds and the profits derived by the two States from various concessions. The two countries succeeded to the assets of the Banque de Syrie et du Liban. However, most of these assets were blocked and were released only progressively over a period extending to 1958.<sup>142</sup>

(44) In the case of the advances which the United Kingdom had made in the past towards Burma's budgetary deficits, the United Kingdom waived repayment of £15 million and allowed Burma a period of 20 years to repay the remainder,

free of interest, starting on 1 April 1952. The former colonial Power also waived repayment of the costs it had incurred for the civil administration of Burma after 1945 during the period of reconstruction.<sup>143</sup>

#### G. Succession in respect of State archives and libraries

(45) Applied to the problem of archives, article 14 permits the transfer to the newly independent State of all archives of the predecessor State that are in the territory to which the succession of States relates. However, the article leaves aside three categories of archives. First, there are those which belonged as of right to the Non-Self-Governing Territory, before or during its colonization. They naturally become the archives of the newly independent State, without regard to any question of State succession. However, where they are situated at the time when the succession of States occurs is of decisive importance. Belonging incontestably to the Non-Self-Governing Territory, which acquired them with its own funds or in any other way or which assembled them throughout its history, the archives should revert to the newly independent State if they are still in its territory at the time of its accession to independence, or be claimed by it if they have been transferred out of the territory by the predecessor State. Here again, one encounters the difficulties inherent in the mobility of some kinds of property, such as archives, whose improper removal from the territory raises the whole problem of recovering them. This problem will be encountered yet again in connexion with draft article 15. In any case, however, this is property belonging to the Non-Self-Governing Territory which is becoming independent, without regard to any question of State succession.

(46) Then there is a second category of archives not covered by the present article, namely, archives of the predecessor State which may be situated, for one reason or another, in the Non-Self-Governing Territory without having any "direct and necessary link" with it. According to the wording of paragraph 2 (b) of article 14, the predecessor State can obtain restitution of such archives if it so requests within a reasonable period, should it have overlooked any of them when withdrawing from the territory.

(47) Lastly, there is a third category of archives, comprising any papers and documents which fulfil three conditions: they are situated outside the Non-Self-Governing Territory (usually in the territory of the predecessor State); they actually belong to the predecessor State, but they relate by their subject-matter to the history or the life of the Non-Self-Governing Territory. The Special Rapporteur refrains for the time being from commenting on what should happen to such items, but will have occasion to discuss that point when dealing with draft article 15 concerning property situated outside the Non-Self-Governing Territory.

(48) Having thus sketched out the "fringes" of article 14, one can affirm that, on the basis of the rule which it enunciates, the newly independent State is obviously entitled to retain any archives which are in its territory, unless it is

<sup>142</sup> For Syria, see the Convention on Winding-up Operations, the Convention on Settlement of Debt-claims and the Payments Agreement, all three dated 7 February 1949 (France, *Journal officiel de la République française, Lois et décrets*, Paris, 10 March 1950, 82nd year, No. 60, pp. 2697-2700); for Lebanon, see the Franco-Lebanese monetary and financial agreement of 24 January 1948 (*ibid.*, 14 and 15 March 1949, 81st year, No. 64, pp. 2651-2654; also in United Nations, *Treaty Series*, vol. 173, p. 99).

<sup>143</sup> The United Kingdom also reimbursed Burma for the cost of supplies to the British Army incurred by that territory during the 1942 campaign and for certain costs relating to demobilization.



clear that they were stored there fortuitously and temporarily by the predecessor State and that they have no link with the territory. Understood in this way, the rule provides what is, after all, a very meagre result where archives are concerned; for it is trivial to observe that archives belong to the successor State—if it finds them in its territory. The rule as enunciated does not solve what constitutes the very essence of the problem in such a case. The question is what happens in precisely those cases where the predecessor State does not leave these archives, or leaves only a part of them, in the territory to which the succession of States relates. Here we encounter the twofold problem of archives which have been removed or established outside the territory and which relate to the Non-Self-Governing Territory.

Article 14 therefore needs to be supplemented by an additional rule, which will be found in article 15 relating to property situated outside the territory acceding to independence. Once again, we encounter the special problem of the mobility of some kinds of property.

(49) Article 14, paragraph 2, does not in the final analysis pose any particular difficulty in connexion with archives, and its scope in relation to that specific subject is relatively limited. The problems will emerge rather in connexion with article 15. There is no need, therefore, to prolong the present commentary, inasmuch as it seems evident that the archives of a territory, situated in that territory, belong to the newly independent State. The Special Rapporteur will, however, take this occasion to furnish some information on the practice of States.

(50) The problem raised by the attribution of archives relating to Non-Self-Governing Territories is wholly contemporary. In the past, the colonial Powers scarcely considered the question when ceding or abandoning one of their territories. There were two possibilities. Either the archives remained in the territory and shared its destiny. Such was the case of the local archives of the Spanish possessions in America. The new States of Latin America therefore had at their disposal a nucleus for constituting their own collections. Or else, as happened most frequently, the colonial Power repatriated the archives either by force or by agreement. Thus Spain, having ceded Louisiana to France in 1802, immediately repatriated all the archives and agreed to hand over to France only papers “relating to the limits and demarcation of the territory”.<sup>144</sup>

Similarly, in 1864 Great Britain authorized the Ionian Islands to unite with Greece and transferred all the archives to London.<sup>145</sup>

France at an early stage practised a particular form of repatriation of archives: a royal edict of 1776 set up the *Dépôt des papiers publics des colonies*, which was to receive every year, at Versailles, copies of papers of court record-offices, notaries' records, registers of births, marriages and deaths, and so forth.<sup>146</sup> It still exists today but now only receives the registers of births, marriages and deaths.

<sup>144</sup> France, “*Les archives dans la vie internationale*”, *op. cit.*, pp. 41–42. However, when France in turn sold Louisiana to the United States, the Franco-American Treaty of 30 April 1803 provided for the handing over of “archives, papers, and documents relating to the lands and to sovereignty” (*ibid.*).

<sup>145</sup> *Ibid.*, p. 42.

<sup>146</sup> Carlo Laroche: “Les archives françaises d’outre-mer”, *Comptes-*

(51) Many examples could be given; not until the period following the Second World War, with decolonization, was an attempt made to find a uniform solution with regard to the devolution of archives. Decolonization revived the problem of archives and posed it in different terms, since until that time the question had always related to the passing of a territory from one sovereignty to another already constituted sovereignty, whereas it then became a question of a territory obtaining or recovering its own sovereignty.

(52) Although it seems that there should be no doubt concerning the principle, no satisfactory solution has yet been reached concerning this question. This may be explained in part by the diversity of situations: variety of local conditions, of the preceding status and of the degree of administrative organization left by the colonial Power in the territory.

(53) The attribution of archives therefore seems to have been decided case by case, naturally on the basis of the degree of importance of the documents for the newly independent territory and for the former metropolitan country, but especially on the basis of the “ratio of power”. It is stated in the publication of the French Direction des archives already quoted that:

It appears undeniable that the metropolitan country should hand over to States that achieve independence in the first place *the archives which antedate the colonial régime*,\* which are without question the property of the territory. It also has the duty to hand over *all documents which make it possible to ensure the continuity of administrative activity and to preserve the interests of the local population*\* . . . As a result, the titles to property of the State and of semi-public institutions, documents concerning public buildings, railways, public highways, cadastral documents, census results, local registers of births, marriages and deaths, etc., shall normally be handed over with the territory itself. This supposes the regular handing over of the local administrative archives to the new authorities. It is regrettable that the conditions in which the passing of power from one authority to another occurred did not always make it possible to ensure the regularity of this handing over of archives, which may be considered indispensable.<sup>147</sup>

#### H. *Permanent sovereignty of States over their natural resources and wealth and over their economic activities (the economic content of the concept of sovereignty)*

(54) Paragraph 3 of draft article 14 specifies that “Nothing in the foregoing provisions shall affect the permanent sovereignty of the newly independent State over its wealth, its natural resources and its economic activities.” The point here is that the rules relating to succession of States which the International Law Commission is to formulate should take into account the general context of decolonization and the reappraisal which is under way of the relations between industrialized and developing countries.

(55) While it is essentially true that, in contemporary international law, agreement continues to form the basis for relations between States,<sup>148</sup> and while it is only natural to

*rendus mensuels des séances de l’Académie des sciences d’outre-mer*, vol. XXVI, meeting of 18 March 1966 (pp. 122–149), pp. 124–125.

<sup>147</sup> France, “*Les archives dans la vie internationale*”, *op. cit.*, pp. 43–44.

<sup>148</sup> Cf. Ch. Chaumont, “Cours général de droit international public”. *Recueil des cours . . . 1970-I* (Leiden, Sijthoff, 1971), vol. 129, pp. 415 *et seq.*

provide, as the Special Rapporteur has so far done in each of his draft articles, that predecessor and successor States may, by agreement, reach whatever settlement they choose on the question of State property, it is no less certain, firstly, that in the case of all types of succession of States there is a general presumption of the transfer of State property to the successor State, and, secondly, that in the case of decolonization there is in addition a general context which is increasingly incompatible with any limitations imposed by treaty on the rule of the total transfer of State property.

(56) This general context includes, firstly, the increasingly strong affirmation of the permanent sovereignty of States over their natural resources. For more than a quarter of a century, the United Nations has been concerned with this problem and has refined the content of this "inalienable right of each State".<sup>149</sup> Resolution 1737 (LIV) of the United Nations Economic and Social Council, of 4 May 1973, whose implications for the very concept of sovereignty will be discussed below, even declares that

*an intrinsic condition\** of the exercise of the sovereignty of every State is that its sovereignty be exercised fully and effectively over all its natural resources.

The same resolution repeats the affirmation, which has become a regular feature of all resolutions of the General Assembly and the Economic and Social Council on the subject, that

any act, measure or legislative provision which one State may apply against another for the purpose of suppressing its inalienable right to the exercise of its full sovereignty over its natural resources . . . or of using coercion to obtain advantages of any other kind, is a flagrant violation of the Charter of the United Nations, contradicts the principles adopted by the General Assembly in its resolutions 2625 (XXV) and 3016 (XXVII) . . . , and that to persist therein could constitute a threat to international peace and security.

(57) The most recent resolution of the Economic and Social Council on this question (resolution 1956 (LIX), of 25 July 1975)

*Strongly\** reaffirms the *inalienable\** right of States to exercise *full permanent\** sovereignty over *all\** their *wealth, natural resources and economic activities\**.

One could hardly state this principle in stronger or more comprehensive terms.

(58) General Assembly resolution 2625 (XXV) of 24 October 1970, containing the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, specifies that

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.

(59) The formulation of a Charter of Economic Rights and Duties of States under the auspices of the United Nations Conference on Trade and Development<sup>150</sup> looms large

among the recent developments within the United Nations system in the matter of permanent sovereignty over natural resources. This Charter, which was adopted by the General Assembly in its resolution 3281 (XXIX) of 12 December 1974, should, according to the resolution,

constitute an effective instrument towards the establishment of a new system of international economic relations based on equity, sovereign equality and interdependence of the interests of developed and developing countries.

(60) The fifteen fundamental principles which, according to this Charter (chapter I), should govern economic as well as political relations among States include the

Remedying of injustices which have been brought about by force and which *deprive a nation of the natural means necessary for its normal development\**.

State property is certainly one of those "necessary natural means".

(61) Article 2 of this Charter (para. 1) states 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.

Expanding on the passage from the resolution quoted above, article 16 states in its paragraph 1 that:

It is the right and duty of all States, individually and collectively, to eliminate colonialism, . . . neo-colonialism . . . and the economic and social consequences thereof, as a *prerequisite for development\**. States which practise such coercive policies are economically responsible to the countries, territories and peoples affected for the *restitution\** and full compensation for the exploitation and depletion of, and damages to, *the natural and all other resources\** of those countries, territories and peoples. It is the duty of all States to extend assistance to them.

(62) The General Assembly, meeting in a special session for the first time in the history of the United Nations to discuss economic problems following the "energy crisis", gave due prominence to the "full permanent sovereignty of every State over its natural resources and all economic activities" in its Declaration on the Establishment of a New International Economic Order (resolution 3201 (S-VI), of 1 May 1974). In section VIII of its Programme of Action on the establishment of that new international economic order (resolution 3202 (S-VI), of 1 May 1974), the Assembly states that all efforts should be made

*To defeat attempts\** to prevent the free and effective exercise of the rights of every State to full and permanent sovereignty over its natural resources.

(63) All these rules of conduct are already clearly incompatible with any "agreements" restricting the nature and scope of the transfer of the property of the predecessor State to the newly independent State, especially as article 25—like article 16 mentioned above—of the Charter of Economic Rights and Duties of States actually asks the predecessor State not only to transfer to the new State the property to which it is entitled but also to give it additional assistance:

. . . the international community, especially its developed members, shall pay special attention to the particular needs and problems of the least developed among the developing countries, of land-locked developing countries and also island developing countries, *with a view to helping them to overcome their particular difficulties\** and thus contribute to their economic and social development.

<sup>149</sup> Cf. General Assembly resolutions 626 (VII) of 21 December 1951, 1803 (XVII) of 14 December 1962, 2158 (XXI) of 25 November 1966, 2386 (XXIII) of 19 November 1968 and 2692 (XXV) of 11 December 1970.

<sup>150</sup> See *Proceedings of the United Nations Conference on Trade and Development, Third Session*, vol. I, *Report and annexes* (United Nations publication, Sales No. E.73.II.D.4), annex I.A, resolution 45 (III).

(64) Referring to what he has called the "ideology of sovereignty over natural resources", one author writes:

Sovereignty over natural resources does not constitute a special category; it appears separate only because of the unfortunate wording which is used in this connexion. Reference is made to "sovereignty over natural resources" ... but in fact it would be better to speak of sovereignty in respect of natural resources, which are not an additional title of sovereignty but simply one object among many providing the State with an opportunity to exercise its sovereignty: natural resources are situated within State territory; like all persons and things in the same situation, they provide an occasion for the exercise of territorial jurisdiction ...

One cannot be sovereign "in respect of wealth", any more than one can be an owner "in respect of property".

And the author considers that this "ideology", because of the "intoxication of sovereignty" which it produces, presages a precarious future for the world, "unstable legal situations" and an "anomy of States' decision-making power".<sup>151</sup>

(65) The fact of the matter is that it is in the nature of neo-colonialism and imperialism to try to thwart any effective expression of the sovereignty of newly independent States anxious to achieve their full development. The set of relationships established between the former colonial Power and the former dependent territory, the introduction of "forced bilateralism", as Gunnar Myrdal calls it, and the more or less formal and nominal replacement of the relationship of domination by so-called "special" or "preferential" ties are in reality conducive to the alienation of political and economic sovereignty, internally and externally. Complete sovereignty can be promoted only through a long struggle against the scourges of colonialism, neo-colonialism and imperialism, which succeed each other at various stages in the evolution of newly independent States, paralysing their development by ways and means that are constantly being diversified. And when the underdeveloped countries exercise their sovereign rights over their wealth or their property, or merely aspire to do so, they are criticized for a "dangerous excess of sovereignty" or for making anachronistic use of sovereignty at a time when—it is said—interdependence should be the keynote.

(66) Fictitious political independence and actual economic subordination unfortunately remain the most striking characteristics of the situation of many third world countries, permitting neo-colonialism to keep them in a state of underdevelopment. Showing through the artificiality of the legal and institutional structures created in order to give an appearance of national sovereignty are elements of real dependence, based on organized economic subordination, which is patently incompatible with the *true concept of sovereignty*. This sham sovereignty makes independence a superficial phenomenon beneath which the old forms of dependence survive and economic empires prosper.

(67) Ritually recited, the litany of formal sovereignty, learnt only too well from classical law, will contribute to the maintenance of institutional mirages at the expense of development *until such time as a modern concept of*

*sovereignty, incorporating the dimension of economic independence, has been evolved*. Without such an enrichment of international law, which the newly independent States expect, national emblems may be only apparent attributes of sovereignty, under the cloak of which powerful economic freemasonries will continue to dictate their will with impunity.

(68) Just as individuals are equal before the law in a national society, so all States are said to be equal before the international "rules of the game". But in spite of this theoretical equality, flagrant inequalities remain, both between individuals and between States, so long as sovereignty—a system of reference—is not accompanied by economic independence. When the elementary bases of national economic independence do not exist, it is sheer fraud to talk about the principle of the sovereign equality of States.

(69) In addition, the concept of sovereignty is not immutable. Traditional sovereignty, evolved in the nineteenth century by and for the European Powers which dominated the world scene, had no economic connotations. That was the era of the surfeited liberal State, with the subject peoples forming a colonial constellation. In that dichotomic world of subjects and objects of international law, of those who took and those who were taken from, sovereignty was defined exclusively in political and institutional terms.

But such a definition seems singularly inappropriate in today's world. It is inappropriate because of its inability to reflect the necessary relationship between its legal form and its social and economic content. This is precisely why there is an obvious gap between the principle of respect for State sovereignty and its real application. This is also why a neo-colonialist offensive by a dominant State against an underdeveloped country can be waged without formal violation of any of the constituent elements of sovereignty, if the classical concept of sovereignty alone is taken into consideration. The tremendous risks involved are obvious.

(70) If, therefore, the principle of sovereign equality of States is to be really purged of its large element of illusion, it will be necessary to find *a new formulation of this principle capable of restoring to the State the elementary bases of its national economic independence*. To this end, the principle of economic independence, invested with a new and vital legal function and thus elevated to the status of a principle of contemporary international law, must be reflected in particular in the right of peoples to dispose of their natural resources, the prohibition of all forms of unwarranted intervention in the economic affairs of States, and the outlawing of the use of force and of any form of coercion in economic and commercial relations.

(71) It is because international law and international relations are to this day organized to serve the development of dominant States that the economic independence and development of other nations has now become a burning international problem: combating underdevelopment necessitates the legal and structural remaking of the world order. The Charter of the United Nations made underdevelopment and economic backwardness problems of direct concern to the international community. But a great distance separates this affirmation of the principle of

<sup>151</sup> Jean Combacau, "La crise de l'énergie au regard du droit international", in Société française pour le droit international, *La crise de l'énergie et le droit international* (Colloque de Caen (May 1975)) (Paris, Pédone, 1976), pp. 17-31.

economic co-operation among States from its embodiment in specific rules of international law. Tremendous efforts will be necessary to establish rules on this subject, so that the Charter can be made "operational" and the principle of sovereign equality of States can be fully implemented.

(72) In this connexion, a tribute must be paid to the efforts made by the United Nations General Assembly to remedy certain shortcomings in the Charter, where the concept of sovereignty was defined by its political elements to the exclusion of its economic aspects and where, in accordance with this approach, sanctions were envisaged for violation only of the political obligations of States, to the exclusion of their economic duties.

(73) The Charter explicitly condemns only infringements of the *political sovereignty* of States. It is to the credit of the General Assembly that, for the first time in the history of international law, it defined in its important resolution 2131 (XX) of 21 December 1965 some of the types of foreign intervention which undermine the *economic independence* of States. A more systematic formulation is required of the prohibition of all economic measures of pressure, coercion or intimidation enacted by one State against another.

(74) General Assembly resolution 1514 (XV) of 14 December 1960, which did not neglect the right of peoples to dispose of their natural resources, and, more particularly, resolution 1803 (XVII) and other subsequent resolutions which affirmed the principle of the permanent sovereignty of States over their natural resources,<sup>152</sup> provide the basis for appraising the efforts of the General Assembly to make a legal reality of this fundamental aspect of the *principle of economic independence* and to rectify the intolerable fact that today most States of the third world are not "developing countries", as they are called, *but underdeveloping countries*. It is alarming to witness among those countries a development of underdevelopment, for various reasons for which the affluent nations are primarily responsible.

(75) It is by reference to these principles that an appraisal should be made of the validity of so-called "co-operation" or "devolution" agreements and of all bilateral instruments which, under the pretext of establishing "special" or "preferential" ties between the new States and the former colonial Powers, impose on the former excessive conditions which are ruinous to their economies. The validity of treaty relations of this kind should be measured by the degree to which they respect the principles of political self-determination and economic independence. Any agreements which violate these principles should be void *ab initio*, without its even being necessary to wait until the new State is in a position formally to denounce their unfair character. Their invalidity should derive intrinsically from contemporary international law and not simply from their subsequent denunciation.

In addition, a thorough scrutiny of the *rebus sic stantibus* clause should enable any State to release itself from its contractual obligations when its political and economic future is at stake.

(76) The inclusion in the Vienna Convention on the Law of Treaties of various provisions concerning the invalidity of

agreements concluded under the effect of coercion is also a great achievement which should be applauded and welcomed.

The Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties, included in the Final Act of the United Nations Conference on the Law of Treaties,<sup>153</sup> is fully in line with General Assembly resolution 2131 (XX), which prohibits unwarranted foreign intervention in the economic affairs of States. All this foreshadows the formulation of a coherent set of more complete rules concerning the invalidity of certain agreements, in order to preserve the real content of the independence and sovereignty of States in general and of newly independent States in particular.

**Article 15. Succession to State property situated outside the territory of the newly independent State**

**Property of the predecessor State which is situated outside the territory of the newly independent State shall remain the property of the predecessor State unless:**

- (a) the two States otherwise agree; or
- (b) it is established that the territory which has become independent contributed to the creation of such property, in which case it shall succeed thereto in the proportion determined by its contribution; or
- (c) in the case of movable property, it is established that its being situated outside the territory of the newly independent State is fortuitous or temporary and that it has in fact a direct and necessary link with that territory.

COMMENTARY

*A. Property proper to the territory which has become independent*

(1) Here, as elsewhere, the Special Rapporteur does not cover the case of property of a Non-Self-Governing Territory which has acceded to independence, but only that of property of the *predecessor State* situated either in the territory of the predecessor State or in that of a third State, since this is normally the only property affected by a succession of States.

(2) The territory which has become independent may have in what was for it the metropolitan country such property as buildings, administrative premises, rest and recreation facilities or portfolios of securities acquired with its own funds. It may also have owned property in other countries. State succession cannot have the paradoxical effect of conferring on the predecessor State a right of ownership which it did not possess over such property prior to the territory's independence. The fact that the property in question is situated outside the territory which has become independent cannot, on its own, constitute grounds for making an exception to that obvious principle. Ownership

<sup>152</sup> See above, para. (56) and foot-note 149.

<sup>153</sup> *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. 285.

of such property cannot depend on its geographical location.

(3) A distinction should be drawn between property of the territory which is situated in the former metropolitan country and property which is situated in the territory of a third State.

1. *Property which is situated in the former metropolitan country*

(4) The occurrence of State succession does not transfer the right of ownership of property of this kind, and the successor State—in other words, the formerly dependent territory—retains ownership of such property.

Diplomatic practice, however, is not consistent, and the Special Rapporteur found it difficult to characterize. While the principle of the transfer of such property to the newly independent State is not called in question, it often proves difficult to put into practice because the former metropolitan country disputes not the principle but the fact of the right of ownership, because the territory acceding to independence finds it difficult to know exactly how much property, and of what kind, it could rightfully claim, or because of other, political or non-political considerations. For example, various colonial offices of an administrative or industrial and commercial nature, rest and recreation facilities for officials of the colonial territory and their families, administrative premises or residences may have been constructed or purchased in the metropolitan country by the territory now detached, using its own funds or those of public agencies under its jurisdiction (e.g., family allowance or social security funds).

(5) The former Belgian colony of the Congo had in its patrimony a portfolio of Belgian shares situated in Belgium which in 1959, according to Professor D. P. O'Connell, were valued at \$750 million. The independent Congo does not appear to have recovered all these shares.<sup>154</sup>

On the eve of independence, during the Belgian-Congolese Conference at Brussels in May 1960, the Congolese negotiators had requested that the liquid assets, securities and property rights of the Special Committee for Katanga and of the Union minière should be divided in proportion to the assets of the Congo and its provinces, on the one hand, and of private interests, on the other hand, so that the new State could succeed to the sizeable portfolio of stocks and shares situated outside its territory. Numerous complications ensued, in the course of which the Belgian Government, without the knowledge of the prospective Congolese Government, pronounced the premature dissolution of the Special Committee for Katanga so that its assets could be shared out and the capital of the Union minière could be reapportioned. This was all designed to ensure that the Congo no longer had a majority holding in these entities.<sup>155</sup> This first dissolution of the Special Committee, which was the principal shareholder in the Union and in which the State held a two-thirds majority while the rest belonged to the Compagnie du Katanga, was

<sup>154</sup> D. P. O'Connell, *State Succession . . . (op. cit.)*, p. 228.

<sup>155</sup> For an account of all these problems, see R. Kovar, "La 'congolisation' de l'Union minière du Haut-Katanga", *Annuaire français de droit international*, 1967 (Paris), vol. XIII, pp. 742–781.

decided on 24 June 1960 under an agreement signed by the representatives of the Belgian Congo and of the Compagnie du Katanga.<sup>156</sup> The agreement was approved by Decree of the King of the Belgians on 27 June 1960.<sup>157</sup>

As a reaction against this first dissolution by the Belgian authorities, the constitutional authorities of the independent Congo pronounced a second dissolution of the Special Committee by Legislative Decree of 29 November 1964.

(6) Eventually, the Belgian-Congolese agreements of 6 February 1965<sup>158</sup> put an end to these unilateral measures by both parties. These agreements are partly concerned with the assets situated in Belgium—in other words, public property situated outside the territory affected by the change of sovereignty. In exchange for the cession to the Congo of the net assets administered by the Special Committee in that territory, the Congolese party recognized the devolution to the Compagnie du Katanga of the net assets situated in Belgium. Various compensations and mutual retrocessions took place in order to unravel the tangled skein of respective rights. On 8 February 1965, in an official ceremony at Brussels, Mr. Tshombé accepted the first part of the portfolio of the Congo on behalf of his Government.

This was not, however, the end of the affair. After General Mobutu had taken office, and after various upheavals, the Union minière du Haut-Katanga was nationalized on 23 December 1966 because it had refused to transfer its headquarters from Brussels to Kinshasa, believing that the transfer would have the effect of placing under Congolese jurisdiction all the assets of the company situated outside the Congo. A compromise was finally reached on 15 February 1967.

(7) On the occasion of the "disannexation" or "decolonization" of Ethiopia,<sup>159</sup> articles 37 and 75 of the Treaty of Peace of 1947<sup>160</sup> required Italy to restore objects of historical value to Ethiopia, and the Agreement of 5 March 1956 between the two countries<sup>161</sup> contained various annexes listing the objects concerned. Annex C allowed the return to Ethiopia of the large Aksum obelisk, which Italy was obliged to dismount and remove from a square in Rome and transport to Naples at its expense for shipment to Ethiopia.

(8) Some treaty provisions are restrictive, authorizing succession to public property only if it is *situated in the territory*, and not if it is situated elsewhere. This was so, for example, in the case of the resolutions of the General Assembly on economic and financial provisions relating to Libya and Eritrea.<sup>162</sup>

<sup>156</sup> *Moniteur congolais*, 19 September 1960, No. 38, p. 2053.

<sup>157</sup> *Ibid.*

<sup>158</sup> United Nations, *Treaty Series*, vol. 540, p. 227.

<sup>159</sup> The case of Ethiopia, which was annexed by Italy and liberated after the Second World War, is basically a case of decolonization. It is, however, difficult to consider Ethiopia a "newly independent State" unless in this case the term "newly" (*nouvellement*) is interpreted as meaning "again" (*à nouveau*)—in other words, as referring to the reversal of an event.

<sup>160</sup> United Nations, *Treaty Series*, vol. 49, pp. 142 and 157

<sup>161</sup> *Ibid.*, vol. 267, p. 189.

<sup>162</sup> United Nations General Assembly resolutions 388 (V) and 530 (VI), of 15 December 1950 and 29 January 1952 respectively.

In fact, however, such provisions do not conflict with the self-evident principle, because they cover a different situation from the one with which we are concerned here. They involve public property of *the ceding State*—for example, the property of Italy in Libya or in Eritrea—whereas what is under discussion here is the exact opposite, namely, property of (formerly Italian) Libya or Eritrea themselves which is outside their geographical boundaries.

(9) There now remains to be discussed the case of property proper to the territory which has become independent, situated in a third State.

## 2. Property which is situated in a third State

(10) The case in itself does not give rise to any specific problems. The territory that has become independent retains full ownership over public property it possesses in a third country (for example, buildings or premises situated in a neighbouring country or territory or, more frequently, the continuation of a railway line). Sometimes the problems are stated partly in terms of succession of governments. The case of Algerian funds deposited in Switzerland during the Algerian war of liberation is a good example of this.

(11) From 1954 to 1962, the Algerian National Liberation Front (NLF) had collected funds to cover the cost of the armed struggle in Algeria. On 19 September 1958, a Provisional Government of the Algerian Republic (GPRA) was established at Cairo; it was recognized *de facto* or *de jure* by some 30 countries.<sup>163</sup> The National Liberation Front, which was the only liberation party during the war and also the only governing party after independence, stated in its statutes, adopted in 1959, that its resources did not belong to it as a movement but were “national property” in law and in fact (article 39, paragraph 2). At the end of the war, the unexpended balance of the funds intended for use in the struggle amounted to some 80 million Swiss francs; these funds were in various bank accounts in the Middle East in the name of the GPRA and in Europe in the name of the NLF. In 1962, all these funds were deposited together in a Swiss bank, in the name of Mr. Mohammed Khider, General Secretary of the NLF, acting in his official capacity. Political differences arose between the Algerian governmental authorities of the day and Mr. Khider, who was removed from office as General Secretary of the party in power but refused to hand over the funds which were in his possession at Geneva.

(12) To this day, various civil as well as criminal proceedings, including sequestration of the bank account, have still not enabled the Algerian State and the NLF to recover these sums. The problem was not really dealt with from the standpoint of succession of States or governments; it involved criminal matters, because the bank with which the funds were deposited had improperly allowed Mr. Khider to withdraw them quickly, although he had just been dismissed from office and no longer had authority to administer the funds. Consequently, the funds were fraudulently transferred to a destination and for a purpose which are still unknown to this day.

<sup>163</sup> See M. Bedjaoui, *La révolution algérienne et le droit* (Brussels, International Association of Democratic Lawyers, 1961), p. 91 and *passim*.

If this case is considered, from the civil viewpoint, as a problem of succession of governments, it has obvious similarities with the case of the Irish funds considered later.<sup>164</sup> The Algerian liberation movement and its Provisional Government of the day left property to which independent Algeria should normally succeed through its single ruling party and its new Government. From the outset, this property had the status of “national property”, according to the statutes of the NLF.

(13) On 16 July 1964, the Algerian authorities, represented by the leader of the NLF and the Head of the Government, brought a suit before the Swiss courts, which, however, were induced by the defence to evaluate the political legitimacy of the NLF, although they were *judicial* bodies and, moreover, foreign ones. This was because the defendant had stated that he would hand over the funds only to the “legitimate” NLF. Which NLF? According to the defendant, the one that would emerge from a new national Congress of the party. A Congress had in fact been held, but the defendant had not considered it “legitimate”. There is no doubt that, from the strictly juridical point of view, this notion of legitimacy should have been ruled out of the proceedings. The funds had, from the outset, been “Algerian national property”, and upon the attainment of independence should certainly have reverted to the Algerian public authorities, the party and the Government.

It is all the more necessary to bring this case—which has its own special characteristics but which in some respects resembles the case of the Irish funds—to a logical conclusion because Mr. Khider died at Madrid on 4 January 1967, and if the funds are not assigned to the Algerian authorities, to whom they belong, they may become “ownerless property”.

## B. Property of the predecessor State

(14) Subparagraph (b) of article 15, as submitted by the Special Rapporteur, relates to a rule for the apportionment of property according to the respective contributions of the predecessor State and of the territory acceding to independence. It may be noted that property to which this rule would apply could perfectly well be considered “property proper to the dependent territory” in the proportion determined by the territory’s contribution. The remainder is property of the predecessor State.

(15) Only the category of property of the predecessor State is, in fact, normally affected by succession of States. Article 15 relates to the situation under general law and naturally favours the retention of such property by the predecessor State. Obviously, the independence of an overseas territory cannot have the paradoxical effect of depriving the predecessor State of movable or immovable property which it possesses in the territory of a third State, much less in its metropolitan territory. That is the meaning and scope of the words: “Property of the predecessor State which is situated outside the territory of the newly independent State shall remain the property of the predecessor State”.

(16) However, this obvious principle does not of course

<sup>164</sup> See below, commentary to article 17, paras. (64) *et seq.*

prevent the predecessor State and the successor State from agreeing on any other arrangement for a particular category of property. Moreover, the Special Rapporteur has allowed for the case where movable property was removed by the predecessor State, either temporarily or permanently, from the territory which has acceded to independence. He has also covered the case where property is situated outside the territory to which the succession of States relates but to whose acquisition that territory contributed. In both cases, the rights of the successor State should not be disregarded.

(17) The solutions advocated in draft article 15 are justified by the practice of States, some examples of which the Special Rapporteur offers below. However, a distinction should be made between cases where the property of the predecessor State is in the territory of that State and those where it is in the territory of a third State.

1. *Property of the predecessor State which is situated in its own territory*

(18) Let us take the case of archives, distinguishing between those which were removed by the predecessor State and those which were established by it in the metropolitan country but which relate to the dependent territory.

(a) *Archives which have been removed*

(19) There seems to be ample justification for accepting as a rule the fact that the successor State should receive all the archives, historical or other, relating to the territory affected by the change of sovereignty, even if those archives have been removed by the predecessor State. The application of such a principle would considerably help new States to acquire greater mastery of their internal and external problems. A better knowledge of these problems can be gained only through the possession of retired or current archives, which should be left with or returned to the States concerned. For obvious reasons, however, the former colonial Power cannot be expected to agree to hand over all archives, especially those linked to its *imperium* over the territory concerned. Many considerations relating to politics and expediency prevent such Powers from leaving to the new sovereign revealing documents on colonial administration. For that reason, the principle of the transfer of such archives—which the former metropolitan country is careful to remove before independence—is rarely applied in practice.

(20) At this point a distinction must be drawn between the various categories of archives which the former metropolitan country is tempted to evacuate before the termination of its sovereignty. A distinction should be made between (a) historical archives proper, which antedate the beginning of colonization of the territory, (b) archives of the colonial period, relating to the *imperium* and *dominium* of the metropolitan country and to its colonial policy generally in the territory, and (c) purely administrative and technical archives relating to the current administration of the territory.

(21) An international conference on archives has expressed the opinion that the principle of transfer may be difficult

to apply to archives connected with the *imperium* and *dominium* of the former metropolitan country:

There have appeared to be legal grounds for distinguishing in the matter of archives between sovereignty collections and administrative collections: the former, concerning essentially the relations between the metropolitan country and its representatives in the territory, whose competence extended to diplomatic, military and high policy matters, fall within the jurisdiction of the metropolitan country whose history they directly concern.\*<sup>165</sup>

(22) Another author expresses the same opinion:

Emancipation raises a new problem. The right of new States to possess the archives which are indispensable to the defence of their rights, to the fulfilment of their obligations, to the continuity of the administration of the population, remains unquestionable. However, there are other categories of archives kept in a territory, of no immediate practical interest to the successor State, which concern primarily the colonial Power. On closer consideration, such archives are of the same kind as those which, under most circumstances in European history, unquestionably remain the property of the ceding States.<sup>166</sup>

(23) According to this view, the archives connected with *imperium* would absolutely not belong to the territory. This is no doubt an exaggerated point of view in that the exception made to the principle of transfer for archives connected with *imperium* relates less to the principle of belonging than to considerations of expediency and politics: what is involved, of course, is the importance of good relations between the predecessor State and the successor State, and also at times the *viability* of the newly independent State.

In the interest of such relations it may perhaps be advisable to avoid argument on the subject of "political" archives or archives "connected with sovereignty", since they refer to the policy followed by the colonial Power *within* its dependent territory. For example, archives concerning general policy with regard to the territory, or a repressive policy against its liberation movements, are not to be confused with administrative archives or archives concerning the day-to-day management of the territory, but form part of the political archives or archives connected with sovereignty. It is probably unrealistic to expect the predecessor State to hand them over. But the section of the political archives or archives connected with sovereignty which is concerned with policy carried on *outside* the territory and on its behalf by the colonial Power (conclusion of treaties applied to the territory, diplomatic documents concerning the relations between the colonial Power and third States with respect to the territory, and in particular diplomatic documents concerning the delimitation of its frontiers), unquestionably concern *also* (and sometimes even *primarily*, in the event of a dispute or conflict with a third State) the newly independent State.

(24) The information collected by the Special Rapporteur, which although voluminous is not sufficiently complete to permit the formation of a definitive judgement, seems to show that the problem of returning the archives removed by the former metropolitan country to the new independent State has not yet been solved satisfactorily. It can certainly be said that, no matter how sound and well-founded the

<sup>165</sup> France, *Les archives dans la vie internationale* (op. cit.), p. 44.

<sup>166</sup> C. Laroche, *loc. cit.*, p. 130 (the author was Chief Conservator of the Overseas Section of the French National Archives).



principle of the transfer of archives may be, it would be unreasonable to expect the immediate return of all archives connected with *imperium* and *dominium*. Indeed, in the interest of good relations between the predecessor State and the successor State, it may be unrealistic and undesirable for the new independent State to claim them and to start a dispute over them which is bound to be difficult.

(25) However, in the case of historical archives proper, antedating colonization, which may have been removed by the former metropolitan country, the principle of transfer should be firmly and immediately applied. These archives, antedating colonization, are the product of the land and spring from its soil; they are bound up with the land where they came into existence and they contain its history and its cultural heritage.

(26) Similarly, the removal of administrative documents of all kinds, which may have occurred in some cases, is bound to be a source of considerable inconvenience, confusion and maladministration for the young independent State, which already faces considerable difficulties owing to its inexperience and lack of trained personnel. Except in the rare cases where independence resulted from a sharp and sudden rupture of the links between the metropolitan country and the territory, which, compounded by misunderstandings or rancour, led to the malicious destruction or removal of administrative documents, the removal of these archives, which are instruments of administration, has reflected primarily the metropolitan country's desire to retain documents and titles which might concern the minority composed of its own nationals. However, reproduction techniques are now so highly developed that it would be unreasonable and unjustified to retain such administrative or technical archives, as this would entail depriving a majority in order to meet the needs of a minority, which could, moreover, be satisfied in another way.

(27) Generally speaking, it is to be hoped that the formulation of the rule of transfer will lead to better relations between States and open the way for appropriate co-operation in the field of archives. This would enable the new sovereignty to recover the items which express its history, its traditions, its heritage and its national genius and provide it with a means of improving the daily life of its inhabitants, and would also enable the former sovereignty to ease its own difficulties, intangible and material, which inevitably accompany its withdrawal from the territory.

(28) In practice, decolonization has unfortunately not taken all aspects of the problem sufficiently into account. For example Algeria, in the frontier disputes it faced upon gaining its independence, was unable to obtain access to the diplomatic documents held by France relating to the problem during the colonial period. The case mentioned was even more regrettable in that Algeria was also unable to recover its archives which antedated colonization; those archives had been carefully catalogued by the colonial administration and removed by the latter immediately before independence. They comprised what are commonly known as the Arabic collection, the Turkish collection and the Spanish collection. The negotiations between the two Governments have so far resulted in the return of some of

the documents from the Turkish collection and microfilms of part of the Spanish collection.<sup>167</sup>

(29) In another case, France transferred to Viet-Nam the archives established by the Imperial Government before the French conquest together with the archives necessary for the administration of the country,<sup>168</sup> but it retained all the archives connected with its own external and internal sovereignty in diplomatic, military and political matters.<sup>169</sup> France seems to have followed a similar policy with regard to its former dependencies in Africa.

(30) The United Kingdom and Belgium have followed an analogous policy:

In all cases the local archives of the territories were handed over, with the exception of papers relating to the sovereignty of the metropolitan country alone.<sup>170</sup>

(31) Professor Rousseau, discussing the case of the decolonization of Cambodia, writes:

The problem is posed at present in the relations between France and Cambodia, but so far no final settlement seems to have been reached. The logical solution would be the return of all items concerning the history of Cambodia during the period in which France assumed international responsibility for its affairs (1863–1953).<sup>171</sup>

(32) In the case of the decolonization of Ethiopia, Italy was required to restore archives which had been removed from that country. Article 37 of the 1947 Treaty of Peace with Italy provided that

“... Italy shall restore all ... archives and objects of historical value belonging to Ethiopia or its nationals and removed from Ethiopia to Italy since October 3, 1935.”<sup>172</sup>

(33) In the case of the decolonization of Libya, the transfer of archives was particularly limited. Article I, paragraph 2 (a), of General Assembly resolution 388 (V), entitled “Economic and financial provisions relating to Libya”, states that “the relevant archives and documents of an administrative character or technical value *concerning Libya or relating to property*\* the transfer of which is provided for by the present resolution” shall be transferred immediately.

(34) It will have been noted that the examples cited and the solutions advocated by the Special Rapporteur often show how problems relating to archives overlap. Historical archives which antedate colonization are not “property of the predecessor State” but *property proper to the Non-Self-Governing Territory*, which should revert to the newly independent State without regard to any question of State succession. The only reason why the Special Rapporteur had to bring in this question of historical archives proper to the territory is the overlapping which occurs with other categories of archives removed from the territory. However,

<sup>167</sup> Exchange of notes between Algeria and France, which took place at Algiers on 23 December 1966. In April 1975, on the occasion of the visit to Algeria of Mr. Valéry Giscard d'Estaing, President of the French Republic, an additional 155 boxes of Algerian historical archives were returned by the French Government.

<sup>168</sup> Agreement of 15 June 1950 concerning the apportionment of the archives of Indo-China.

<sup>169</sup> C. Laroche, *loc. cit.*, p. 132.

<sup>170</sup> France, *Les archives dans la vie internationale (op. cit.)*, p. 45.

<sup>171</sup> Ch. Rousseau, *op. cit.*, p. 136.

<sup>172</sup> United Nations, *Treaty Series*, vol. 49, p. 142.

these comments should be read in conjunction with those made concerning "property proper to the territory which has become independent".<sup>173</sup>

(35) The Special Rapporteur points out that the question of archives which have been removed is particularly important in this type of succession, given the frequency with which archives are repatriated by the former metropolitan country. The symposium on African archives and history held at Dakar from 1 to 8 October 1965 recognized its importance and therefore made the following recommendation:

Considering the successive disruptions of the political and administrative structures of African countries, the participants hope that wherever transfers have infringed the principles of the territoriality of archives and the indivisibility of collections, the situation will be remedied by restitution or by other appropriate measures.<sup>174</sup>

(36) UNESCO has also taken action in this field. Its resolution was mentioned earlier.<sup>175</sup> Its intervention is clearly beneficial, coming as it does from the international organization which is concerned more than any other with the preservation of historical and cultural patrimonies and is free of any preoccupation with national pride.

(36) In addition, a Cartographic Seminar of African countries and France recently adopted a recommendation in which it welcomed the statement by the Director of the National Geographic Institute on the *recognition of State sovereignty over all cartographic archives\** and proposed that such archives should be transferred to States on request. However, documents relating to frontiers should be handed over simultaneously to the States concerned.<sup>176</sup>

(b) *Archives established outside the territory which has become independent*

(38) The Special Rapporteur has not found any specific information covering this field and this type of succession. However, the problem of the ownership of the India Office library furnishes an example of an "unresolved" case. It will be recalled that in 1801 the British East India Company established a library which now contains 280,000 volumes and some 20,000 unpublished manuscripts, constituting the finest treasury of Hinduism in the world. In 1858 this library was transferred to the India Office in Whitehall. After the partition in 1948, the Commonwealth Relations Office assumed responsibility for the library. On 16 May 1955 the two successor States, India and Pakistan, asked the United Kingdom Government to allow them to divide the library on the basis of the percentages (82.5 per cent for India, 17.5 per cent for Pakistan) used in 1947 for dividing all assets between the two Dominions.

The problem would assuredly be quite difficult to solve, since the Government of India Act, 1935, allocated the contents of the library to the Crown. Since the Commonwealth Relations Office could not find a solution, the case

was referred in June 1961 to arbitration by three Commonwealth jurists, who were members of the Judicial Committee of the Privy Council.

## 2. *Property belonging to the predecessor State which is situated in a third State*

(39) In the draft article under consideration, the Special Rapporteur has suggested a subparagraph (b) concerning apportionment between the predecessor State and the successor State of property to the creation of which the formerly dependent territory contributed. The subparagraph relates to such State property regardless whether it is situated in the territory of the predecessor State or in that of a third State.

(40) One writer notes that "countries coming into existence through decolonization do not seem to have claimed any part of the subscriptions of the States which were responsible for their international relations",<sup>177</sup> including, in particular, their representation in international or regional financial institutions. But the fact that these newly independent countries—and particularly those which were deemed in law to form an integral part of the colonial Power—did not think of claiming a part of these assets proportionate to their contribution, or were unable to do so, should not cast any doubt on the value and fairness of the suggested rule. The latter seems all the more justified in view of the fact that participation in various intergovernmental bodies of a technical nature is open to dependent territories as such and that problems of the type described above may thus arise.

(41) The Special Rapporteur would, however, stress the fact that he has found no trace of any precedents regarding apportionment of such property between the predecessor State and the newly independent State.

### SUB-SECTION 3.

#### UNITING AND SEPARATION OF STATES

##### *Article 16. Uniting of States*

1. On the uniting of two or more States in one State, movable and immovable property situated in the territory of the State thus formed shall remain the property of each constituent State unless:

(a) the constituent States have otherwise agreed; or

(b) the uniting of States has given rise to a unitary State; or

(c) in the case of a union, the property in question has a direct and necessary link with the powers devolving upon the union and it thus appears from the constituent acts or instruments of the union or is otherwise established that retention by each constituent State of the right of ownership of such property would be incompatible with the creation of the union.

<sup>173</sup> See above, para. (1) *et seq.*

<sup>174</sup> C. Laroche, *loc. cit.*, p. 139.

<sup>175</sup> See above, para. (65) of the commentary to article 12.

<sup>176</sup> Cartographic Seminar of African Countries and France, Paris, 21 May–3 June 1975, *General Report*, recommendation No. 2, "Basic cartography".

<sup>177</sup> L. Focsaneanu, "Les banques internationales intergouvernementales", *Annuaire français de droit international*, 1963 (Paris), vol. IX, p. 133.

**2. Movable and immovable property situated outside the territory of the State formed by the uniting of two or more States and belonging to the constituent States shall, unless otherwise agreed or decided, become the property of the successor State.**

#### COMMENTARY

##### A. Definition and types of uniting of States

(1) For the purposes of this article, the Special Rapporteur will take for granted the *definition of the uniting of States*, which, according to article 26 of the 1972 draft and article 30 of the 1974 draft on succession in respect of treaties, means “the uniting of two or more States in one State”. The commentary on both the aforementioned articles explains that they deal with “a succession of States arising from the uniting in one State of two or more States, which had separate international personalities at the date of the succession”.<sup>178</sup>

(2) To render the wording of the article as submitted by the Special Rapporteur less cumbersome, the Commission could, if it so desires, describe the “State formed by the uniting of two or more States” as the *uniting State*, in contrast to the constituent States, which could be called *united States*. In simpler terms, the “uniting” or “constituted” State becomes the *successor State*, while the “united” or “constituent” States are the *predecessor States*.

(3) In paragraph (2) of its commentary on article 26 of the 1972 draft articles on succession of States in respect of treaties (almost identical with paragraph (2) of the commentary to article 30 of the 1974 draft articles on the same subject), the Commission was at pains to point out that it did not matter.

what may be the particular form of the internal constitutional organization adopted by the successor State. The uniting may lead to a wholly unitary State, to a federation or to any other form of constitutional arrangement. In other words, the degree of separate identity retained by the original States after their uniting, within the constitution of the successor State, is irrelevant for the operation of the provisions set forth in the article.<sup>179</sup>

(4) Where succession to public property in general and to State property in particular is concerned, however, the constitutional form assumed by the uniting successor State is of decisive importance. If the uniting of two or more States results in the creation of a unitary State, the constituent States cease to exist completely, from the standpoint both of international law and of internal public law. All powers inevitably pass to the successor State, and the latter should obviously receive all the property of the constituent States. If, on the other hand, the uniting of States leads to the creation of a confederation or a federation, each constituent State retains, in varying degrees, a certain autonomy, and the new State’s constitutional instrument must in any event

effect an apportionment of powers, with some matters being assigned to the federal or confederal authorities and others remaining within the jurisdiction of the member States. Such a situation must be taken into account in the context of succession to State property, not all of which can be attributed to the uniting successor State.

(5) The case of a *uniting* of States leading to the formation of a *unitary State* should be carefully distinguished from the case of the *total annexation* of one State by another, which is prohibited by contemporary international law. In times past some authors, in dealing with succession to public property, found it all the easier to confuse the two cases because the solution with regard to the devolution of such property is the same in each. Thus, Bustamante y Sirvén wrote that

upon the total annexation of one State by another, the property, the rights and the public domain of the State which ceases to exist pass to the successor. They are national assets and cannot remain without an owner because they are necessary to the attainment of State ends.<sup>180</sup>

In that connexion, he makes reference to a draft code submitted to the Institute of International Law in 1934 by Arrigho Cavaglieri, article 4 of which read as follows:

The *annexing\** or *new\** State automatically becomes the owner of all property, in both the public domain and the private domain, belonging to the State which has ceased to exist . . .<sup>181</sup>

(6) Apart from the fact that annexation differs from the creation of a unitary State by the uniting of States because it is illegal, it must be pointed out that the two cases are dissimilar in that annexation does not lead to the creation of a *new* State while the uniting of States inevitably does. Thus, when Cavaglieri refers to the “annexing or new State”, he is approximating annexation to the uniting of States in a unitary State, or is confusing the two.

##### B. Special aspects of succession to property in the case of uniting States

(7) Where succession to State property in the case of the uniting of States is concerned, the Special Rapporteur suggests that the Commission should depart from the tentative model in articles 30 to 32 of the 1974 draft on succession in respect of treaties and take into account the constitutional organization of the successor State. This is something that complicates, or “enriches”, the parameters of the problem to be solved, but it cannot be evaded.

As Fauchille puts it:

Since the unitary State . . . has ceased to exist, not as a State but only as a unitary State, it should retain its own patrimony: the existence of this patrimony is in fact in no way incompatible with the new regime to which it is subject. There is no reason for attributing to the authorities of the federation or the union . . . ownership of the property of the newly incorporated State: in fact, although this State has lost its original independence it nevertheless to a certain degree retains its legal personality in the political system to which it henceforth belongs.<sup>182</sup>

<sup>178</sup> *Yearbook . . . 1972*, vol. II, p. 286, document A/8710/Rev. I, chap. II, sect. C, article 26 and para. (1) of the commentary; *Yearbook . . . 1974*, vol. II (Part One), pp. 252–253, document A/9610/Rev. I, chap. II, sect. D, article 30 and para. (1) of the commentary.

<sup>179</sup> *Yearbook . . . 1972*, vol. II, p. 286, document A/8710/Rev. I, chap. II, sect. C, article 26, para. (2) of the commentary.

<sup>180</sup> A. S. de Bustamante y Sirvén, *Derecho Internacional Público* (La Havana, Carasa, 1936), vol. III, p. 310. vol. III, p. 328.

<sup>181</sup> *Annuaire de l'Institut de droit international, 1934* (Brussels), vol. 38, pp. 477–479.

<sup>182</sup> Fauchille, *op. cit.*, p. 390.

Professor Castrén shares the same opinion:

Since the members of the union of States retain their statehood, their public property continues as a matter of course to belong to them.<sup>183</sup>

(8) Thus, both international treaty instruments and instruments of internal law, such as constitutions or basic laws, effect and define the uniting of States, stating the degree of integration. It is on the basis of these various expressions of will that the devolution of State property must be determined.

### C. State property in the territory to which the succession of States relates

#### 1. Functional criterion for the allocation of property (according to the type of constitutional organization of the successor State)

(9) The most frequent outcome of the uniting of States in the contemporary world seems to be the creation of a federal or confederal union, rather than a unitary State. The Special Rapporteur therefore felt that he should construct the first paragraph of his article on that basis. Accordingly, the rule which he has enunciated expresses a "fact of non-succession" to the property of the constituent States which form themselves into a federal or confederal union. However, such a rule clearly had to allow for major exceptions, based essentially on the will of the States which have united. Thus, exception (a) concerns the material act of agreement between the constituent States, which can freely decide what is to become of their respective property. Exception (b), also based on the will of the States or of their peoples (e.g., by referendum), provides for the case in which they decide to create a unitary State, to which all the property of the constituent States must inevitably and logically be transferred. Exception (c) relates to the case of a federal or confederal union, the basic case envisaged in the article, but with a reference to the degree of integration of the constituent States in the union which has been created. Once States agree to constitute a union among themselves, it must be presumed that they intend to provide it with the means (including property) necessary for its functioning and viability. That is the simple idea behind this last exception. Property therefore passes to the successor State if it is found to be necessary for the exercise of the powers devolving upon that State under the constituent act of the union. This linkage to the nature and extent of powers seems to be the only logical and sure criterion in this case.

(10) This criterion makes it clear why some items of State property are transferred to the union while others remain the property of each constituent State. Here, as has been noted, it does not matter whether the property is movable or immovable; for it will have been noticed that the proposed article does not provide differential treatment for State property on that basis. What is more to the point is rather the degree of utility of such property, whether movable or immovable, for the attainment of the ends assigned to the union. It will thus be seen that in this particular type of State succession—the uniting of States—there are great

differences in the extent to which property is transferred according, first, to the constitutional organization resulting from the uniting and, secondly, to categories of property, the only possible guideline being needs, defined in terms of the purposes of the uniting. From archives to State funds, from Treasury to currency, the differences in devolution are considerable.

(11) Take, for instance, *the case of archives*. If the archives of the constituent State are historical in character, they are of interest to it alone and of relatively little concern to the union (unless it is decided by treaty, for reasons of prestige or other reasons, to transfer them to the seat of the union or to declare them to be its property). Any change of status or application, particularly a transfer to the union of other categories of archives needed for the direct administration of each State, would be not only unnecessary for the union but highly prejudicial for the administration of the States forming it. In this connexion, an old but significant example may be recalled, that of the *unification of Spain* during the fifteenth and sixteenth centuries. That union was effected in such a way that the individual kingdoms received varying degrees of autonomy, embodied in appropriate organs such as councils and viceroalties. Consequently, there was no centralization of archives. The present organization of Spanish archives is still profoundly influenced by that system.<sup>184</sup>

(12) It is a different matter for public funds and Treasuries, the transfer of which to the union must be presumed unless there are treaty provisions to the contrary, since there is no question but that they must be the subject and the necessary instruments of a unified policy within the union. The union receives the assets of the institution of issue and the gold and foreign exchange reserves of each of its constituent States, except where the degree of their integration in the union or treaty provisions allow each State to retain all or part of such State property. The Union receives as its patrimony the State funds and Treasuries of each of its constituent States, except where the degree of their integration in the Union or treaty provisions allow each State to retain all or part of such property.

#### 2. Old and recent examples of the uniting of States and the attribution of property

(13) The most notable examples of the uniting of States are old ones, namely, the formation of the United States of America, of the Swiss Confederation, of the German Confederation of 1871, of the Republic of Central America (El Salvador, Honduras, Nicaragua) in 1897 and of the Federation of Central America (Costa Rica, El Salvador, Guatemala and Honduras) in 1921.

(14) There are few recent examples, since many unions have been formed from territories one or more of which were not independent prior to the establishment of the union: the union between Sweden and Norway of 1815, the union between Denmark and Iceland of 1918, the Federation of Malaya of 1957, the Federation of Malaysia of 1963, or the establishment of the Somali Republic in

<sup>183</sup> E. Castrén, "Aspects récents de la succession d'Etats", *Recueil des cours* . . . , 1951-I (Paris, Sirey, 1952), vol. 78, p. 451.

<sup>184</sup> France, *Les archives dans la vie internationale*, *op. cit.*, p. 13.

1960. Nevertheless, we shall consider these before moving on to examples more directly relevant to the draft article, namely, the uniting of Egypt and Syria in 1958 under the name of the United Arab Republic and of Tanganyika and Zanzibar in 1964 under the name of the United Republic of Tanzania.

(15) As regards succession to property, examples from the older constitutions cannot be considered authoritative, since the issue as it presents itself to contemporary jurists is dealt with only incidentally.

(16) Thus, the only provision relating to public property to be found in the United States Constitution appears in article IV, section 3, which states that

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or *other property*\* belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.<sup>185</sup>

The Constitution thus gives us no indication of how, and on the basis of what criterion, property was apportioned between the federated States and the federation.

(17) The status of the Swiss Confederation was defined successively by various instruments, the major ones being the Treaty of Alliance of 16 August 1814 between the cantons of the Confederation and the Act of Acceptance of 8 September 1814 annexed thereto, the Constitution of 1848, and the Constitution of 29 May 1874.

The Treaty of Alliance of 1814 contains a provision requiring contributions from the cantons for the purpose of establishing a war fund for the maintenance of federal troops and meeting other expenses of the Confederation. The Treaty lists the contributions payable for that purpose, which differ from canton to canton.<sup>186</sup>

The 1848 Constitution includes an article 33, dealing with postal services, which provides as follows:

(d) The Confederation shall have the right and the obligation to acquire, in return for fair compensation, material belonging to the postal administration, *provided that it is suited to the use for which it is intended and is needed by the administration*\*.

(e) The federal administration shall have the right to utilize buildings at present used for postal purposes, in return for compensation, by purchase or by lease.<sup>187</sup>

The 1874 Constitution contains an article 22, reading as follows:

In return for fair compensation, the Confederation shall have the right to use or to acquire the ownership of existing parade-grounds and *buildings used for military purposes*\* in the cantons, and property accessory thereto.

The terms of compensation shall be regulated by federal law.<sup>188</sup>

(18) The tenor of these provisions indicates that succession to public property is not automatic, inasmuch as the States members of a confederation retain a large measure of

<sup>185</sup> Constitution of 17 September 1787, in A. J. Peaslee, *Constitutions of Nations*, rev. 3rd ed. (The Hague, Nijhoff, 1970), vol. IV, *The Americas*, p. 1204.

<sup>186</sup> G. F. de Martens, ed., *Nouveau recueil de traités* (Göttingen, Dieterich, 1887), vol. II (1814–1815), p. 70.

<sup>187</sup> C. Hilty, *Les Constitutions fédérales de la Suisse* (Neuchâtel, Attinger, 1891), p. 451.

<sup>188</sup> *Ibid.*, p. 443.

autonomy. It will have been noted that while in both the Swiss Constitution of 1848 and that of 1874, the principle implicitly expressed is that property remains the property of the cantons, those entities, which together make up the Confederation, may decide otherwise, as they in fact do in those two basic laws of the union, provided that the property in question is suited to the use for which it is intended "and is needed by the administration". Here again we find the essential criterion for the devolution of property which has been identified by the Special Rapporteur.

(19) Similarly, the Constitution of the German Confederation of 1871 contains scattered provisions relating to certain categories of property. Article 41 provides that

Railways which are considered necessary for the defence of Germany, or for the sake of the common intercourse, may, by virtue of an Imperial law, even against the opposition of the members of the Confederation whose territory is intersected by the railways, *but without prejudice to the prerogatives of the country*, be constructed on account of the empire...<sup>189</sup>

Article 53 of the same Constitution states that "the harbour of Kiel and that of Jade are Imperial military harbours".<sup>190</sup> Thus, to meet what would be called "national defence" needs, some property automatically devolves to the Confederation.

Taking these two articles together, it is clear that the principle is to allow each State to retain its territory, its "sovereignty" and its property, although the exigencies of the union may justify the surrender of property by the States to the Confederation.

(20) During the nineteenth and twentieth centuries, the States of Central America attempted several times to unite. The most notable examples are the Republic of Central America, in 1897, and the Federation of Central America, in 1921.

(21) The States constituting the Republic of Central America retained substantial autonomy, to judge from article III of the Treaty of Union of 15 June 1897:

[They] retain their autonomic system in regard to their internal administration; their union having for its one object the maintenance in its international relations of a single entity in order to guarantee their common independence, rights and due respect.<sup>191</sup>

Accordingly, each State retained its own finances while contributing to common expenses in accordance with article XIII of the Treaty of Union. Among the functions of the President were:

(d) To fix, when necessary, the mode and the resources with which each of the States should contribute to the defence of the territory...

(i) To fix the amount and the manner in which the States shall share in the common expenses.<sup>192</sup>

<sup>189</sup> English text in *British and Foreign State Papers, 1870–1871*, (London, William Ridgway, 1877), vol. LXI, p. 67.

<sup>190</sup> *Ibid.*, p. 70.

<sup>191</sup> English text in *British and Foreign State Papers, 1899–1900* (London, William Ridgway, 1903), vol. XCII, p. 235.

<sup>192</sup> *Ibid.*, p. 236.

Lastly, each State retained its own responsibilities with regard to currency and finances. Article XXXVII provided that

The pecuniary or other obligations contracted, or which may be contracted in the future, by any of the States are matters of individual responsibility.<sup>193</sup>

(22) The Treaty of Union of the Federation of Central America of 19 January<sup>194</sup> contains similar provisions. Here for the first time, however, reference is made to a real succession of States in respect of property. Thus, article 5, paragraph (a), provides that

... The Assembly shall designate and delimit the territory of which [the Federal District] shall consist and shall designate within it the town or place which will be the political capital of the Federation. The State, or States, from whom territory is taken in order to constitute the Federal District, shall cede it forthwith to the Federation without payment.<sup>195</sup>

Article 5, paragraph (j), makes provision for succession to movable property:

The [Federal] Council shall have the free disposal of such armaments and military stores as at present exist in the States, after having provided them with the quantity required for the police forces.<sup>196</sup>

(23) From the constituent instruments of the union between Sweden and Norway of 31 July and 6 August 1815<sup>197</sup> and of the union between Denmark and Iceland of 30 November 1918,<sup>198</sup> the general conclusion may be drawn that each kingdom retained its territory, its sovereignty and the ownership of its property. In any event, these instruments contain no provisions calling for the devolution to the union of the property of the constituent States.

(24) Further information may be derived from an examination of cases where unions were formed from territories one or more of which were not independent prior to the establishment of the union.

(25) The 1957 Constitution of the Federation of Malaya<sup>199</sup> contains a lengthy passage entitled "Succession of property", the most important provisions of which are as follows:

... all property and assets which immediately before Merdeka Day [the date of the union] were vested in Her Majesty for the purposes of the Federation or of the colony or Settlement of Malacca or the colony or Settlement of Penang, shall on Merdeka Day vest in the Federation or the State of Malacca or the State of Penang, as the case may be.

The Constitution refers to the criterion of the use of the property concerned for purposes assigned to the union:

(5) All property and assets which immediately before Merdeka Day were vested in the Federation Government or some other person on its

<sup>193</sup> *Ibid.*, p. 238-239.

<sup>194</sup> M. O. Hudson, *International Legislation* (Washington, Carnegie Endowment for International Peace, 1931), vol. I (1919-1921), pp. 600 *et seq.*

<sup>195</sup> *Ibid.*, p. 602.

<sup>196</sup> *Ibid.*, p. 606.

<sup>197</sup> G. F. de Martens, ed., *Nouveau Recueil de traités* (Göttingen, Dieterich, 1887), vol. II, p. 608.

<sup>198</sup> *British and Foreign State Papers, 1917-1918* (London, H.M. Stationery Office, 1921), vol. CXI, p. 703.

<sup>199</sup> United Nations, *Materials on Succession of States (op. cit.)*, pp. 84 *et seq.*

behalf for purposes which on that day continue to be federal purposes\*, shall on that day vest in the Federation.

...

(7) Property and assets other than land which immediately before Merdeka Day were used by a State for purposes which on that day become federal purposes\* shall on that day vest in the Federation.

It is this same criterion of the allocation and use of the property which allows the States making up the Federation to retain the property they need in order to perform their functions. Paragraph 6 does in fact vest such property in the States.<sup>200</sup>

(26) This rational criterion was again the basis for the apportionment of movable and immovable property between the Federation of Malaysia and the constituent States. The Malaysia Act, 1963, which is the Constitution of Malaysia, provides as follows (section 75, paragraph 3):

Property and assets other than land which immediately before Malaysia Day [the date of the union] were used by the government of a Borneo State or of Singapore in maintaining government services shall be apportioned between the Federation and the State with regard to the needs of the Federal and State governments respectively to have the use of the property and assets for Federal or State services\*...<sup>201</sup>

<sup>200</sup> *Ibid.*, pp. 85-86. The text deserves to be quoted in full:

"Succession of property

"166. (1) Subject to the provisions of this Article, all property and assets which immediately before Merdeka Day were vested in Her Majesty for the purposes of the Federation or of the colony or Settlement of Malacca or the colony or Settlement of Penang, shall on Merdeka Day vest in the Federation or the State of Malacca or the State of Penang, as the case may be.

"(2) Any land in the State of Malacca or the State of Penang which immediately before Merdeka Day was vested in Her Majesty shall on that day vest in the State of Malacca or the State of Penang as the case may be.

"(3) Any land vested in the State of Malacca or the State of Penang which immediately before Merdeka Day was occupied or used by the Federation Government or Her Majesty's Government or by any public authority for purposes which in accordance with the provisions of this Constitution become federal purposes shall on and after that day be occupied, used, controlled and managed by the Federal Government or, as the case may be, the said public authority, so long as it is required for federal purposes, and—

"(a) shall not be disposed of or used for any purposes other than federal purposes without the consent of the Federal government, and

"(b) shall not be used for federal purposes different from the purposes for which it was used immediately before Merdeka Day without the consent of the Government of the State.

"(4) Any State land which, immediately before Merdeka Day, was occupied or used, without being reserved, by the Federation Government for purposes which become federal purposes on that day, shall on that day be reserved for those federal purposes.

"(5) All property and assets which immediately before Merdeka Day were vested in the Federation Government or some other person on its behalf for purposes which on that day continue to be federal purposes, shall on that day vest in the Federation.

"(6) Property and assets which immediately before Merdeka Day were vested in the Federation Government or some person on its behalf for purposes which on that day become purposes of any State shall on that day vest in that State.

"(7) Property and assets other than land which immediately before Merdeka Day were used by a State for purposes which on that day become federal purposes shall on that day vest in the Federation.

"(8) Any property which was, immediately before Merdeka Day, liable to escheat to Her Majesty in respect of the government of Malacca or the government of Penang shall on that day be liable to escheat to the State of Malacca or the State of Penang, as the case may be."

<sup>201</sup> *Ibid.*, pp. 92-93. Sect. 75 reads as follows:

"Succession to property

"75. (1) Subject to sections 78 and 79, any land which on Malaysia

(Continued on next page.)

(27) Article 4, paragraph 1, of the constituent instrument of the Somali Republic reads as follows:

All rights lawfully vested in or obligations lawfully incurred by the *independent* Governments of Somaliland and Somalia or by any person on their behalf, shall be deemed to have been transferred to and accepted by the Somali Republic upon the establishment of the Union.<sup>202</sup>

However, inasmuch as there was never an *independent* Government of Somalia, this article in effect makes the Somali Republic the successor of Somaliland only.

(28) The recent examples of the United Arab Republic and the United Republic of Tanzania are more relevant.

(29) The constituent instrument of the United Arab Republic<sup>203</sup> devotes an article (article 69) to succession to treaties, but makes no provision concerning succession to federal property. However, in his commentary, E. Cotran gives some interesting information on the United Arab Republic's relations with the International Monetary Fund.<sup>204</sup> The United Arab Republic was never considered

by the Fund to be a new member.<sup>205</sup> The Governors simply came to the conclusion, on 16 July 1958 that, as a result of the uniting of Egypt and Syria into a single State, the United Arab Republic constituted one member of the Fund with a single quota. The author also quotes a letter addressed to him on 17 December 1958 by the General Council of IMF stating that the United Arab Republic should be considered to have succeeded to the rights and obligations of Egypt and Syria under the Fund Agreement with a single quota equal to the two former quotas combined. However, as Egypt and Syria were for an interim period to maintain separate currencies and separate monetary reserves, the operations of the Fund would continue to be conducted on a regional basis.<sup>206</sup>

(30) The Constitution of the United Republic of Tanzania,<sup>207</sup> which was formed by the uniting of Tanganyika and Zanzibar on 26 April 1964, contains nothing relating to State succession, except perhaps article 6, which provides, *inter alia*, that:

... The said President shall make such provision for the constitution of offices in the service of the United Republic, and for appointments to such offices\* (including appointments by way of transfer of persons who, immediately before Union Day, held office in the service of the Republic of Tanganyika or the People's Republic of Zanzibar) ...<sup>208</sup>

The constitution of the federal offices in question and appointments to them could probably not have taken place without at least some transfer of property from the States of Tanganyika and Zanzibar to the federation.

(31) All the examples cited above lead one to the conclusion that *the question whether the property is movable or immovable has no bearing on the devolution of State property* in the case of this type of succession of States, unlike the others considered previously.

The criterion in the case of a uniting of States has always been: to which party is the property useful and necessary for the exercise of its powers, the constituted or uniting State (successor State) or the constituent or united State (predecessor State)? This is the justification for the wording of paragraph 1 of the article proposed above by the Special Rapporteur.

#### D. State property situated outside the territory to which the succession of States relates

(32) Paragraph 2 of the draft article proceeds from the simple and obvious idea that States, once they agree to unite, cannot fully retain either their internal autonomy or their independence at the international level. If they did, their uniting would lack reality and be practically meaningless. That is why, as a rule, the uniting of States leads either to the creation of a unitary State which, as the successor State, will have sole responsibility for the international relations of the constituent States as a whole or to the creation of a federal or confederal entity whose internal powers may be

(Foot-note 201 continued.)

Day is vested in any of the Borneo States or in the State of Singapore, and was on the preceding day occupied or used by the government of the United Kingdom or of the State, or by any public authority other than the government of the State, for purposes which on Malaysia Day become federal purposes, shall on and after that day be occupied, used, controlled and managed by the Federal Government or, as the case may be, the said public authority, so long as it is required for federal purposes; and that land—

“(a) shall not be disposed of or used for any purposes other than federal purposes without the consent of the Federal Government; and

“(b) shall not by virtue of this sub-section be used for federal purposes different from the purposes for which it was used immediately before Malaysia Day without the consent of the government of the State and, where it ceases to be used for those purposes and that consent is not given, shall be offered to the State accordingly.

“(2) For the purposes of sub-section (1) ‘federal purposes’ includes the provision of government quarters for the holders of federal office or employment; but that sub-section shall not apply to any land by reason of its having been used by any government for providing government quarters other than those regarded by that government as institutional quarters.

“(3) Property and assets other than land which immediately before Malaysia Day were used by the government of a Borneo State or of Singapore in maintaining government services shall be apportioned between the Federation and the State with regard to the needs of the Federal and State governments respectively to have the use of the property and assets for Federal or State services, and subject to any agreement to the contrary between the governments concerned a corresponding apportionment as at that date shall be made of other assets of the State (but not including land) and of the burden, as between the Federation and the State, of any financial liabilities of the State (including future debt charges in respect of those liabilities); and there shall be made all such transfers and payments as may be necessary to give effect to any apportionment under this sub-section.

“(4) In this section references to the government of a State include the government of the territories comprised therein before Malaysia Day.”

<sup>202</sup> E. Cotran, “Legal problems arising out of the formation of the Somali Republic” in *International and Comparative Law Quarterly* (London), vol. 12, July 1963, p. 1016.

<sup>203</sup> English text in E. Cotran, “Some legal aspects of the formation of the United Arab Republic and the United Arab States,” *ibid.*, vol. 8, April 1959, pp. 374–387. French text in: France, Présidence du Conseil et Ministère des Affaires étrangères, *La documentation française—Articles et documents* (Paris), 13 March 1958, No. 0.629, Textes du jour: Documents de politique internationale, DCCLXXI.

<sup>204</sup> E. Cotran, “Some legal aspects . . .” (*loc. cit.*), pp. 362–363.

<sup>205</sup> IMF, *Annual Report of the Executive Directors for the fiscal year ended April, 30, 1958*, p. 16.

<sup>206</sup> E. Cotran, “Some legal aspects . . .” (*loc. cit.*), p. 363.

<sup>207</sup> In A. J. Peaslee, *Constitutions of Nations*, rev. 3rd ed. (The Hague, Nijhoff, 1965), vol. I, *Africa*, pp. 1101 *et seq.*

<sup>208</sup> *Ibid.*, pp. 1103–1104.



shared among, and exercised concurrently by, the member States but whose powers in external affairs usually devolve upon the union or, in other words, upon the successor State.

(33) Practical experience shows that in both these cases, which are the commonest ones, the successor State resulting from the uniting of States is most often vested with responsibility for the international relations of the constituent States. This does not, of course, mean that the constituent States cannot own property abroad. Generally, however, it is the union which then assumes responsibility for such property, because it is best situated to handle transactions and relations of any kind with the rest of the world.

(34) Thus, under the rule enunciated in paragraph 2 of the article, property of the constituent States situated abroad passes to the successor State. This rule is self-evident in the case of a uniting of States which led to the creation of a unitary State. It is also widely observed when the successor State, being organized along federal or confederal lines, assumes sole responsibility for the international relations of the union.

(35) There is no doubt, however, that such a rule is not an absolute one and may quite well be subject to a number of exceptions, not only in cases of the two types of constitutional organization mentioned above but also, and especially, in those where the uniting of States has not affected, externally, the "international personality" of the constituent States. The rule enunciated could not, therefore, be realistic if it did not allow for such exceptions. For that reason, its wording has taken duly into account any treaty provisions to the contrary.

(36) As for practical illustrations of the rule, the Special Rapporteur would recall the example of the United Arab Republic and the International Monetary Fund mentioned above.<sup>209</sup> The respective participations of Syria and Egypt in the Fund were credited to the United Arab Republic, which was considered to be one member of the Fund with a single quota.<sup>210</sup>

(37) On the occasion of the uniting of the Soviet Union and the Baltic States, which became Republics within the Union of Soviet Socialist Republics, some countries, including the United Kingdom and the United States of America, did not recognize this situation and refused to accept the Union of Soviet Socialist Republics as the successor State to the Baltic States with respect to property situated abroad. The Western countries which did not recognize the situation continued for a number of years to accept the credentials of the former representatives of those States, whom they recognized as possessing the right of ownership, or at least of management, over property situated outside the frontiers of the Baltic Republics. For a long time, premises of legations and consulates, and Baltic ships,<sup>211</sup> were not

recognized as being the property of the successor. The situation was normalized later.

Professor Guggenheim reports the decision of the Swiss Federal Council of 14 November 1946<sup>212</sup>

placing under the trusteeship of the Confederation the public property of the Baltic States, as well as the archives of their former diplomatic missions in Switzerland, those missions having ceased to be recognized as from 1 January 1941.<sup>213</sup>

#### *Article 17. Succession to State property in cases of separation of parts of a State*

**When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:**

**1. its immovable property shall, except where otherwise specified in treaty provisions, be attributed to the State in whose territory the property is situated;**

**2. its movable property shall:**

**(a) be attributed to the State with whose territory it has a direct and necessary link, or**

**(b) be apportioned in accordance with the principle of equity among successor States so formed, or among them and the predecessor State if it continues to exist;**

**3. Movable and immovable property of the predecessor State situated outside the territory of that State shall be apportioned equitably among the successor States and the predecessor State if the latter continues to exist, or otherwise among the successor States only.**

#### COMMENTARY

##### *A. Definition and types of separation of parts of a State*

(1) Draft article 17 is designed to cover two cases which are quite distinct, at least in theory. First of all, as the counterpart of the preceding article (Uniting of States), it provides for the reverse process, namely, the dissolution of the State thus formed and a return to the situation prior to the uniting of States when the latter has proved a failure. It makes little difference whether the uniting of States resulted in the creation of a unitary State or of a federal or confederal State; what matters is the return to the *status quo ante*, through the total elimination of the international personality of the State which resulted from the uniting of States. However, it may be noted that, historically, dissolutions have not usually involved a unitary State so much as a union of States whose members often had a certain international personality and, in any case, most of the internal State powers.

The article also covers a second case, namely, that in which one or more parts of a State detach themselves from it in order to set up a new State or States. Such a separation

<sup>209</sup> See para. (29) above.

<sup>210</sup> This case also touches on the problem of succession of States in international organizations.

<sup>211</sup> Eleven ships flying the flag of the Baltic nations remained in United States ports for a long time as "refugees". See H. W. Briggs, "Non-Recognition in the Courts: the Ships of the Baltic Republics", *American Journal of International Law* (Washington, D.C.), vol. 37, No. 4 (October 1943), pp. 585-596. The United Kingdom had requisitioned 34

Baltic ships during the Second World War, but entered into negotiations on the subject with the USSR, which it finally recognized as the owner of the ships.

<sup>212</sup> Switzerland, *Rapport du Conseil fédéral à l'Assemblée fédérale sur sa gestion en 1946*, No. 5231, 1 April 1947, p. 119.

<sup>213</sup> P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1953), vol. I, p. 466, foot-note 1.

of one or more parts of the territory of a State leaves intact the international personality of the State concerned.

(2) In the 1972 draft articles on succession of States in respect of treaties, the Commission distinguished very clearly between the case of dissolution and that of separation of States.

(3) *Dissolution* occurs, according to the definition given in article 27 of the Commission's 1972 draft, "when a State is dissolved and parts of its territory become individual States" or "where parts of its territory become separate independent States and the original State ceases to exist".<sup>214</sup>

However, one ambiguity should be cleared up. The 1972 draft seems thus to be referring literally to the case of the dissolution of a State, and not to that of the termination of a union, with the consequent risk of reducing the problem under consideration to one of the total dismemberment of a unitary State which breaks up and is replaced in each part of its territory by one of a number of new States. Yet the examples cited at length in the commentary clearly indicate that what is meant is the dissolution of unions.<sup>215</sup> Furthermore, the Commission "recognized that almost all the precedents of a disintegration of a State resulting in its extinction have concerned the dissolution of a so-called union of States".<sup>216</sup>

(4) As regards the definition of *separation*, the Commission associated it also with that of *secession*, by stating in its 1972 draft that it occurs "if part of the territory of a State separates from it and becomes an individual State". Moreover, the commentary to draft article 28, which dealt with that case, specified that it "is concerned with ... the case where a part of the territory of a State separates from it and becomes itself an independent State, but the State from which it has sprung, the predecessor State, continues its existence unchanged except for its diminished territory".<sup>217</sup>

(5) However, this distinction between dissolution and separation was disputed by a number of States in their comments concerning the 1972 draft on succession of States in respect of treaties. The United States of America, for example, pointed out that "the distinction between the dissolution of a State (article 27) and the separation of part of a State (article 28) was quite nebulous. The principal criterion appeared to be that, in dissolution, the predecessor State ceased to exist, while in separation of part of a State, the remaining part continued to be the predecessor State. This differentiation seemed largely nominal."<sup>218</sup>

<sup>214</sup> *Yearbook ... 1972*, vol. II, p. 292, document A/8710/Rev. 1, chap. II, sect. C, article 1, para. 1, and commentary, para. (1).

<sup>215</sup> The dissolution in 1829-1831 of Great Colombia, formed earlier by the uniting of New Grenada, Venezuela and Quito (Ecuador); the dissolution of the union of Norway and Sweden in 1905; the termination of the Austro-Hungarian Empire in 1919; the breakdown of the union between Denmark and Iceland in 1944; the dissolution of the United Arab Republic and of the Federation of Mali, etc.

<sup>216</sup> *Yearbook ... 1972*, vol. II, p. 295, document A/8710/Rev. 1, chap. II, sect. C, article 27, para. (12) of the commentary.

<sup>217</sup> *Ibid.*, pp. 295-296, article 28, para. 1, and commentary, para. (1).

<sup>218</sup> *Yearbook ... 1974*, vol. II (Part One), p. 69, document A/CN.4/278 and Add.1-6, para. 391. See also the observations of the Special Rapporteur (Sir Francis Vallat) (*ibid.*, p. 70, paras. 394-396).

### B. *Special aspects of succession to property in the case of separation*

(6) Nevertheless, the distinction, which does after all have some implications where succession to treaties is concerned, probably has some also in the case of succession to State property. It is not superfluous or irrelevant to know whether the original State ceases or continues to exist, because in the latter case it cannot be deprived of all its property, which is needed for the continued exercise of its essential functions.

(7) Even when the International Law Commission, in its 1974 draft, had to take into account the comments of States which sought some welcome simplification in this highly complex matter, it was obliged, while putting dissolution and separation under the same heading, to single out the case in which the predecessor State continues to exist. Although article 33 of the 1974 draft does not make any distinction, article 34, on the other hand, is concerned with what happens to treaties involving the predecessor State when that State survives the separation.<sup>219</sup>

(8) When the question is studied more thoroughly, however, it is clear that in the last analysis dissolution and separation can be dealt with simultaneously, under a single heading, even in the case of succession to State property. This is so for at least three reasons.

First of all, the distinctive criterion for distinguishing between separation and dissolution being whether or not the predecessor State survives, there is at least one case in which this difference disappears. This is seen to be so when the example of dissolution of a union is compared with the case of total dismemberment of a unitary State, all the parts of the territory of that State setting themselves up as individual States. In both bases—dissolution and dismemberment-separation—the predecessor State disappears.

Secondly, in both dissolution and separation, the basic criterion for the attribution of State property remains, as will be shown, the equitable apportionment of such property among *all* the States concerned, without the status of predecessor or successor ultimately playing a decisive role one way or the other, since equity simply means that each of the States should be viable and should not be deprived of the property which it normally needs. That being so, it seems pointless to try to determine whether the predecessor State has been extinguished or continues to exist. In other words, for the purposes of the attribution of State property, *the predecessor State is in a sense treated as one successor State among all the others*. In the case either of dissolution or of the separation of one or more territories to form one or more States, the property is apportioned impartially among all the recipients or, in other words, among all the States concerned. The problem of succession in respect of State property is in this case simply a matter of apportioning a common patrimony among two or more States, their status, if any, having no effect on the key to apportionment, which is equity.

Thirdly, if in the case of succession to treaties the difference between dissolution, where the predecessor State ceases to exist, and separation, where it may continue to

<sup>219</sup> *Ibid.*, p. 260, document A/9610/Rev. 1, chap. II, sect. D.

exist, is deemed to be purely nominal, this difference will certainly be found to be even less significant in the case of succession to State property, where the problem of the existence of a certain international personality of the State is even less relevant than it is in the matter of succession to treaties.

(9) For these reasons, and especially because, for the attribution of property, the solutions are practically identical in the case of dissolution and in that of separation, the Special Rapporteur ultimately decided to combine the two cases in a single article, thus conforming to the final choice made by the Commission for the draft articles on succession in respect of treaties.

### C. Criteria of "equity" and "equitable principles" in the apportionment of property

(10) A reading of draft article 17 will show that the Special Rapporteur drew basically on the *notion of equity*. Now is perhaps the time to make clear what is meant by that.

(11) Charles de Visscher considered equity to be "an independent and autonomous source of law".<sup>220</sup>

(12) A resolution of the Institute of International Law states:

(1) . . . equity is normally inherent in a sound application of the law;

(2) . . . the international judge can base his decision on equity, without being bound by the applicable law, only if all the parties clearly and expressly authorize him to do so.<sup>221</sup>

In fact, under article 38, paragraph 2, of its Statute, the International Court of Justice may decide a case *ex aequo et bono* only if the parties agree thereto.

(13) The Court has, of course, had occasion to deal with this problem. In the *North Sea Continental Shelf* cases, it sought to establish a distinction between *equity* and *equitable principles*. The Federal Republic of Germany had submitted to the Court, in connexion with the delimitation of the continental shelf, that the "equidistance method" should be rejected, since it "would not lead to an equitable apportionment". The Federal Republic asked the Court to refer to the notion of equity by accepting the "principle that each coastal State is entitled to a just and equitable share".<sup>222</sup> Of course, the Federal Republic made a distinction between deciding a case *ex aequo et bono*, which could be done only with the express agreement of the parties, and invoking *equity* as a general principle of law. In its judgment, the Court ruled that positive law, conventional or customary, and in particular the equidistance principle, was not applicable in the cases before it. It is for that reason that the Court recommended the parties to apply the principle of equity in the subsequent negotiations called for by the Federal Republic of Germany.

(14) The Court stated:

. . . 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 régime of the continental shelf in this field.<sup>223</sup>

In the view of the Court, "equitable principles" are "actual rules of law" founded on "very general precepts of justice and good faith".<sup>224</sup> These "equitable principles" are distinct from "equity" viewed "as a matter of abstract justice". The decisions of a court of justice

must by definition be *just*\*, and *therefore*\* in that sense *equitable*\*. 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*\*.<sup>225</sup>

(15) In cases of State succession, the apportionment of State property among the successor States and the predecessor State, if the latter continues to exist, or, if not, among the successor States alone, should be effected by agreement among the parties. In the opinion of the Special Rapporteur such agreement should be based both on "equitable principles" and on "equity" as those terms were defined, if only somewhat approximately, by the Court.

(16) Paragraphs 92 and 93 of the judgment of the Court give a fairly good indication of the direction in which to look. One need only replace the words "determination" or "delimitation of the continental shelf" by the words "apportionment of State property":

. . . it is a truism to say that the determination must be equitable; rather is the problem above all one of defining the means whereby the delimitation can be carried out in such a way as to be recognized as equitable . . . it would . . . be insufficient simply to rely on the rule of equity without giving some degree of indication as to the possible ways in which it might be applied in the present case . . .

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*.<sup>226</sup>

The predecessor State and the successor States could usefully be guided by these observations of the Court when seeking agreement on the apportionment of property.

### D. Solutions proposed in draft article 17

(17) With regard to the wording of the article, it was thought necessary to differentiate once again between movable and immovable property. As will be shown, the solutions adopted both in the literature and in practice are different in the two cases.

It is worth pointing out that the property involved in succession is State property belonging to the predecessor State. Succession therefore excludes property proper to each of the States of which the Union was composed before its dissolution.

<sup>220</sup> *Annuaire de l'Institut de droit international, 1934* (Brussels), vol. 38, p. 239.

<sup>221</sup> *Annuaire de l'Institut de droit international, 1937* (Brussels), vol. 40, p. 271.

<sup>222</sup> *North Sea Continental Shelf cases, judgment, I.C.J. Reports 1969*, p. 9.

<sup>223</sup> *Ibid.*, p. 47.

<sup>224</sup> *Ibid.*, p. 46.

<sup>225</sup> *Ibid.*, p. 48.

<sup>226</sup> *Ibid.*, p. 50.

1. *Separation of parts of a State when the predecessor State ceases to exist*

(a) *Property situated in the territory of the State which has ceased to exist*

(18) Immovable property must logically be attributed to that one of the successor States in whose territory it is situated.

(19) Thus, in the opinion of Fauchille, since the predecessor State has ceased to exist, the property in its domain must be transferred to the successor States.<sup>227</sup> For instance, article 15 of the Treaty of 19 April 1839 dividing the Netherlands into two separate kingdoms, Belgium and Holland, provided as follows:

Public or private utilities, such as canals, roads or others of a similar nature, *constructed, in whole or in part, at the expense of the Kingdom of the Netherlands,\** shall belong, with the benefits and charges attaching thereto, to the country in which they are situated.<sup>228</sup>

It will be noted that the treaty article quoted above identifies the property subject to succession as being only that acquired at the expense of the Kingdom of the Netherlands. State property proper to Belgium or to Holland could not be affected by the succession of States.

(20) Bustamante adopts the same solutions as Fauchille:

In cases where a State is divided into two or more States and none of the new States retains or perpetuates the personality of the State which has ceased to exist, the doctrines with which we are already familiar<sup>229</sup> must be applied to public and private property which is within the boundaries of each of the new States . . .<sup>230</sup>

(21) These old solutions have been applied in modern cases of succession, since, upon the dissolution of the Federation of Rhodesia and Nyasaland in 1963, "freehold property of the Federation situate in a Territory would vest in the Crown in right of the Territory", as was noted by one author.<sup>231</sup>

(22) Nevertheless, there might be cases where inequality would result from the fact that all or nearly all of the immovable property belonging to the union was situated in the territory of one State even though it had been acquired with common funds. In such cases, the other States should perhaps be compensated, proportionately to their contribution if it can be determined, or in a just and equitable proportion if the share which they contributed cannot be evaluated.

(23) Practice seems to have tended in this direction. For example, in the case of Senegal, a threefold succession was necessary: to France, to former French West Africa and to the Federation of Mali. An inter-State conference met in Paris and decided, unanimously, on 5 and 6 June 1959, to adopt the principle of geographical apportionment of

immovable (and movable) assets, subject to compensatory payments to equalize the portions.<sup>232</sup>

(24) Paragraph 1 of the article proposed by the Special Rapporteur in fact makes provision for this criterion of geographical apportionment, subject, however, to treaty provisions, which may always exclude it or modify its application to suit individual cases—for instance through compensatory equalization payments of this kind, or the relinquishment of some movable property.

(25) In the case of movable property, the solution appears to be somewhat more complicated. First, the whereabouts of movable property may be entirely fortuitous, being due solely to the movable nature of the property, and its presence in the territory of a State is not, therefore, a valid criterion for devolution. Secondly, if the requirement of a direct and necessary link with the territory is involved, several of the successor States may be equally affected and may assert the existence of such a link with the aim of obtaining the property in question. In such cases equity must be applied, according to different principles, which will vary according to the movable property involved in the succession.

(26) For instance, in the case of debt-claims (*créances*), there is a category consisting of claims belonging as of right to the separated part of territory; the debtor, the title or the pledge (if any) may be situated either within that territory or outside its geographical boundaries. In this case, the debt-claims must normally be attributed to the territory with which they have such a link. However, there are also debt-claims which belong to the predecessor State and arise out of its activity or sovereignty in the territory concerned. The only solution in this case is an apportionment based on equity. Lastly, there are debt-claims of yet another type, namely, those of the predecessor State which have no particular link with any of the parts of territory that have become successor States. Here more than ever the extinction of the predecessor State makes the criterion of equity necessary.

(27) In the case of *assets of the institution of issue*, paragraph 2 of the article makes it possible to apply a geographical key for apportionment. The apportionment of the assets of the joint institution of issue and of gold and foreign exchange reserves must, to be fully equitable, be made in proportion to the volume of currency circulating or held in each territory of the predecessor State which becomes a successor State. However, the practical solution of these problems is always extremely complex.

(28) This form of apportionment was used at the dissolution of the Federation of Rhodesia and Nyasaland.<sup>233</sup> With one variation, the same method was used at the dissolution of the East African Currency Board, following the establishment of the institutions of issue of Kenya, Tanzania and Uganda.<sup>234</sup> Once again, the principle of a *pro rata* distribution of assets according to the volume of currency

<sup>227</sup> Fauchille, *op. cit.*, p. 374.

<sup>228</sup> *British and Foreign State Papers, 1838-1839* (London, Harrison, 1856), vol. XXVII, pp. 997-998.

<sup>229</sup> That is to say, the principle that property passes to the successor State.

<sup>230</sup> A. S. de Bustamante y Sirvén, *op. cit.*, p. 316.

<sup>231</sup> D. P. O'Connell *op. cit.*, p. 230.

<sup>232</sup> See J.-Cl. Gautron, "Sur quelques aspects de la succession d'Etats au Sénégal, *Annuaire français de droit international*, 1962 (Paris), vol. VIII, 1963, p. 840.

<sup>233</sup> D. P. O'Connell, *op. cit.*, p. 196.

<sup>234</sup> *Ibid.*, p. 197.

in circulation proper to each territory seems to be authoritative in this respect.

(29) However, a *pro parte* distribution eschews all economic, financial or even geographical considerations, relying only on the principle of legal equality. Yet this equality would be destroyed if one territory within a union contributing more than another territory to the economic life of that union found, upon the apportionment of assets, that it had been deprived of a portion of the results of its capacity. Hence, it appears inadvisable for the International Law Commission to venture further into the details of "equitable" or *pro parte* distribution, which is a matter for special agreements, in between the different successor States.

(30) As to the *circulation*, in the strict sense, of paper money, each successor State obviously possesses its own right of issue, but in practice the old money remains in circulation for some time.

(31) The peace treaties of Saint-Germain-en-Laye and Trianon, which sanctioned the dismemberment of the Austro-Hungarian monarchy, had to take account of the wish of the successor States to exercise their privilege of issue, and to cease accepting the Austro-Hungarian paper money that the Bank of the Austro-Hungarian Empire had continued to issue for a short period. This bank was liquidated, and for the most part the successor States overprinted the old paper money during an initial period as outward evidence of their power to issue currency.<sup>235</sup>

(32) Thus, when Czechoslovakia was established after the First World War as a result of the detachment of several territories of the former Austro-Hungarian Empire, the currency of Czechoslovakia was created in 1919 simply by overprinting the Austrian notes in circulation in the territory of the new Republic and reducing their value by 50 per cent.

(33) The Polish State, reconstituted after the First World War from territories recovered from Germany, Austria, Hungary and Russia, introduced the zloty, a new national currency, without initially prohibiting the circulation of the currencies formerly in use. Accordingly, for a time four different currencies were in circulation simultaneously in Poland. Subsequently, various legislative measures required the exchange of German marks, Russian roubles and Austro-Hungarian crowns (cf., in particular, the Act of 9

May 1919) or declared that those currencies had lost their value as legal tender (cf., in particular, the Act of 29 April 1920).

(34) When applied to the case of *public funds and Treasury*, paragraph 2 of the proposed article again appears to be an acceptable rule for the balanced apportionment of such common property among all the successor States.

International practice has sanctioned this formula of liquidation in accordance with the principles of equity. The Special Rapporteur has not deemed it necessary to complicate the text of the article with a painstaking description of the criteria of equity in a question which is extremely technical. While he believes that the principle of equity should and must be fully applied, he also believes that any apportionment, if it is to be equitable, must take into account a great many factual data which vary from country to country and situation to situation and which defy codification. In other words, equity means everything and means nothing, and it is as well to leave its exact content to be spelt out in individual agreements.

(35) The dissolution of the short-lived Federation of Mali was regulated, so far as public funds and debt-claims are concerned, by a Senegalese-Malian Resolution No. 11, which allowed each State to take over assets according to their geographical location. The proportion in which movable assets were divided between the two States was set (as in the case of immovable assets) at 62 per cent for Senegal and 38 per cent for Mali. The State which received a larger portion of assets than was due to it was subject to an equalization payment, charged against its share in the Reserve Fund.<sup>236</sup>

(36) Where *archives* are concerned, the link with the territory is the determining factor. Each of the successor States receives the archives and public documents of every kind belonging or rather relating to its territory, on condition that it hands over copies of them to the other successor States, upon the request and at the expense of the latter. The central archives of the union are apportioned between the successors if they are divisible or placed in the charge of the successor State they concern most directly if they are indivisible, on condition that in both cases the beneficiary will make or authorize copies for the other States upon their request and at their expense.

(37) As examples, one might consider the dissolution of the union between Sweden and Norway, the dismemberment of Austria-Hungary and the dissolution of the union between Denmark and Iceland.

(38) Sweden and Norway concluded several conventions for the disposal of property "*formerly held in common*".<sup>237</sup> Thus the Declaration of 27 April 1906 attributes the archives of the former joint consulates to the territory to which they relate.<sup>238</sup>

<sup>235</sup> For the details, somewhat complicated, of the measures taken in respect of currency, see the two long articles 189 of the Treaty of Trianon and 206 of the Treaty of Saint-Germain-en-Laye in *British and Foreign State Papers, 1920*, vol. 113, pp. 561-564, and *ibid.*, 1919, vol. 112, pp. 410-412. These articles resolved the problem as follows: (a) "Each one of the States to which territory of the former Austro-Hungarian monarchy is transferred and each one of the States arising from the dismemberment of that monarchy, including Austria and Hungary" were given two months to overstamp the currency notes issued in their respective territories by the former Austro-Hungarian institution. (b) The same States were given 12 months to replace the overprinted notes with their own currency or with a new currency under conditions to be determined by them. (c) These same States were either to overstamp the currency notes which they had already withdrawn from circulation or to hold them at the disposal of the Reparation Commission. These articles contain other provisions and set up a very complex system for liquidating the Austro-Hungarian Bank. (See Monès del Pujol, "La solution d'un grand problème monétaire: la liquidation de la banque d'émission de l'ancienne monarchie austro-hongroise", *Revue des sciences politiques* (Paris), vol. XLVI, April-June 1923, pp. 161-195.)

<sup>236</sup> See J.-Cl. Gautron, *loc. cit.*, p. 861.

<sup>237</sup> The Special Rapporteur emphasizes once again that the object of succession is the apportionment of property formerly held in common, i.e., the property of the predecessor State and not that proper to each State of the union.

<sup>238</sup> E. Descamps, *Recueil international des traités du XXe siècle, 1906* (Paris, Rousseau), p. 1050. This Convention will be discussed in greater detail in section (b) below. (Property situated outside the territory of the State which has ceased to exist.)

(39) Following the dismemberment of the Austro-Hungarian monarchy, the Republic of Austria concluded with Italy, on 4 May 1920, a special Convention for the settlement of disputes relating to the historical and artistic patrimony of the former Austro-Hungarian monarchy. The Convention contained the following provisions:

*Article 1:* The Kingdom of Italy recognizes the desirability, in the higher general interest of civilization, of avoiding the dispersal of Austria's historical, artistic and archaeological collections, which in their totality constitute an indivisible and renowned body of aesthetic and historical material . . .<sup>239</sup>

Accordingly, Italy relinquished certain items, for example a German manuscript which was in Vienna and which contained the secret instructions of the Emperor Ferdinand to the imperial ambassador at Constantinople in 1553.

Article 5 of the same Convention states:

... the Republic of Austria undertakes to restore all archival, historical, artistic, archaeological, bibliographical and scientific material originating in the territories transferred to Italy . . . with the exception of:

(3) Objects which, according to their origin, do not form part of the historical and intellectual patrimony of Italy or of the provinces transferred to Italy<sup>240</sup>.

The link between the transferred territory and the archives is thus clearly brought out.

(40) Similarly, article 1 of the Treaty to resolve certain questions raised by the dissolution of the Austro-Hungarian monarchy, concluded between Czechoslovakia, Italy, Poland, Romania and the Serb-Croat-Slovene State on 10 August 1920 at Sèvres provides as follows:

Allied States to which territory of the former Austro-Hungarian monarchy has been or will be transferred, or which were established as a result of the dismemberment of that monarchy, undertake to restore to each other any of the following objects which may be in their respective territories:

1. Archives, registers, plans, title-deeds and documents of every kind of the civil, military, financial, judicial or other administrations of the transferred territories . . .

2. Records, documents, antiques, *objets d'art* and all scientific and bibliographical material removed from the invaded territories . . .<sup>241</sup>

(41) The other territories which were detached from the Austro-Hungarian Empire to form new States, such as Czechoslovakia, arranged for the archives concerning them to be handed over to them.<sup>242</sup>

(42) Yugoslavia and Czechoslovakia subsequently obtained from Hungary, after the Second World War, by the Treaty of Peace of 1947, all historical archives which had come into being under the Austro-Hungarian monarchy between 1848 and 1919 in those territories. Under the same Treaty, Yugoslavia was also to receive from Hungary the archives concerning Illyria, which dated from the eighteenth century.<sup>243</sup>

Article 11, paragraph 1, of the same Treaty specifically states that the detached territory which had formed a State, such as Czechoslovakia, was entitled to the objects "constituting [its] cultural heritage . . . which originated in those territories<sup>244</sup>"; thus, the article was based on the link existing between the archives and the territory. In the same case, moreover, paragraph 2 of the same article rightly stipulates that Czechoslovakia would not be entitled to archives or objects "acquired by purchase, gift or legacy and original works of Hungarians", which is a perfectly correct solution.

(43) Following the dissolution in 1944 of the union between Denmark and Iceland, the High Court of Justice of Denmark ruled, in a decision of 17 November 1966,<sup>244</sup> that some 1,600 priceless parchments and manuscripts containing old Icelandic legends should be restored to Iceland. It should be noted that these items were not public archives, since they did not really concern the history of the Icelandic public authorities and administration, and were not the property of Iceland since they had been put into a collection constituted in Denmark by an Icelander who was Professor of History at the University of Copenhagen. He had saved them from destruction in Iceland, where they were said to have been used on occasion to block up holes in the doors and windows in the houses of Icelandic fishermen. These parchments, whose value has been estimated by experts at 600 million Swiss francs, had been bequeathed in perpetuity by their owner to a university foundation in Denmark.

The Special Rapporteur is obliged to his colleague in the International Law Commission, Professor Tammes, for providing information concerning these archives. Among the 1,600 fragments and sheets which constitute the so-called Magnusson collection was a two-volume manuscript (the Flatey Book) written in the fourteenth century by two monks on the Island of Flatey, an integral part of Iceland, which traces the history of the kingdoms of Norway. The agreement reached ended a long and bitter controversy between the Danes and the Icelanders, who both felt strongly about this collection, which is of the greatest cultural and historical value to them. On 21 April 1971 the Danish authorities returned the Flatey Book and other documents; over the next 25 years the entire collection of documents will join the collection of Icelandic manuscripts at the Reykjavik Institute. At the time of the official handing-over ceremony, when the first documents left the Royal Library at Copenhagen, the Library flew the flag at half-mast.<sup>245</sup>

(b) *Property situated outside the territory of the State which has ceased to exist*

(44) Paragraph 3 of the article proposed by the Special Rapporteur deals with the problem of property situated abroad, whether movable or immovable.

(45) Writers generally take the view that the predecessor State, having completely ceased to exist, no longer has the

<sup>239</sup> G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Weicher, 1928), 3rd series, vol. XIX, p. 683.

<sup>240</sup> *Ibid.*, pp. 686-687.

<sup>241</sup> *British and Foreign State Papers, 1920*, vol. 113 (London, H.M. Stationery Office, 1923), p. 960.

<sup>242</sup> Article 93 of the Treaty of Saint-Germain-en-Laye (*British and Foreign State Papers, 1919*, vol. 112, p. 361) and article 77 of the Treaty of Trianon (*ibid.*, 1920, vol. 113, p. 518).

<sup>243</sup> Article 11 of the Treaty of Peace with Hungary of 10 February 1947 (United Nations, *Treaty Series*, vol. 41, p. 178).

<sup>244</sup> *Revue générale de droit international public* (Paris), 3rd series, vol. XXXVIII, No. 2 (April-June 1967), p. 401.

<sup>245</sup> A. E. Pederson: "Scandinavian sagas sail back to Iceland", *International Herald Tribune*, 23 April 1971, p. 16.

legal capacity to own property and that its property abroad would become ownerless if it were not transferred to the successor State. Consequently, there would be no reason for refusing to attribute such property to the successor States. However, to say that in the case of total succession the successor receives the State property of the predecessor because the property would otherwise become abandoned and ownerless is not a fully explicative argument. Abandonment of the property is not the reason for the right to succeed; at the most, it is the occasion for it. After all, ownerless property may be appropriated by anyone, and not necessarily by the successor. Indeed, if abandonment were the only consideration, it might seem more natural, or at least more expedient, to attribute the property to the third State in whose territory it is situated.

(46) Both in the case of the dissolution of a union and in that of the complete dismemberment of a unitary State, common property owned abroad can in fact only be apportioned "equitably" among all the successor States. Here again, the Special Rapporteur has not ventured to seek a variety of more or less precise criteria for equitable apportionment, since the whole matter depends on circumstances. In practice, such property is apportioned under special agreements between the successor States.

(47) Thus, in the Agreement concerning the settlement of economic questions arising in connexion with the dissolution of the union between Sweden and Norway, the following provisions are to be found:

*Article 6. (a)* Sweden shall repurchase from Norway its . . . half-share in movable property at legations abroad which was *purchased on joint account*\*. An expert appraisal of such property shall be made and submitted for approval to the Swedish and Norwegian Ministries of Foreign Affairs.

*(b)* Movable property at consulates which was purchased on joint account shall be apportioned between Sweden and Norway, without prior appraisal, as follows:

There shall be attributed to Sweden the movable property of the consulates-general in . . .

There shall be attributed to Norway the movable property of the consulates-general in . . . .<sup>246</sup>

With regard to immovable as opposed to movable property, article 7 states:

The right of occupation of the consular premises in London, which was acquired on behalf of the "*Joint Fund for Consulates*"\* in 1877 to have effect until 1945, and which is at present enjoyed by the Swedish Consul-General in London, shall be sold by the Swedish Consul-General. The sale shall become final only after approval by the Swedish and Norwegian Ministries of Foreign Affairs. The proceeds of the sale shall be apportioned equally between Sweden and Norway.<sup>247</sup>

(48) In addition, the Declaration of 27 April 1906 by Sweden and Norway concerning apportionment of the archives of former joint legations and consulates provides that:

(1) . . . documents relating exclusively to Norwegian affairs, and compilations of Norwegian laws and other Norwegian publications, shall be handed over to the Norwegian diplomatic agent accredited to the country concerned . . . .<sup>248</sup>

This is followed by a list of the consulates whose archives were to revert to Norway and Sweden respectively.

<sup>246</sup> E. Descamps, *op. cit.*, pp. 860-861.

<sup>247</sup> *Ibid.*, pp. 861-862.

<sup>248</sup> *Ibid.*, p. 1050.

(49) The diplomatic practice followed by Poland when it was reconstituted as a State upon recovering territories from Austria-Hungary, Germany and Russia was, as is known, to claim ownership, both within its boundaries and abroad, of property which had belonged to the territories it regained or to the acquisition of which those territories had contributed. Poland claimed its share of such property in proportion to the contribution of the territories which it recovered.

(50) However, this rule apparently has not always been followed in diplomatic practice. Upon the fall of the Hapsburg dynasty, Czechoslovakia sought the restitution of a number of vessels and tugs for navigation on the Danube. An arbitral award was made.<sup>249</sup>

In the course of the proceedings, Czechoslovakia had submitted a claim to ownership of a part of the property of certain shipping companies which had belonged to the Hungarian monarchy and to the Austrian Empire or received a subvention from them, on the ground that

these interests were bought with money obtained from all the countries forming parts of the former Austrian Empire and of the former Hungarian Monarchy, and that such countries contributed thereto in proportion to the taxes paid by them, and therefore, were to the same proportionate extent the owners of the property.<sup>250</sup>

The position of Austria and Hungary was that, in the first place, the property was not *public* property, which alone could pass to the successor States, and, in the second place, even admitting that it did have such status because of the varying degree of financial participation by the public authorities, "*the Treaties themselves do not give Czechoslovakia the right to State property except to such property situated in Czecho-Slovakia*"\*.<sup>251</sup>

The arbitrator did not settle the question, on the ground that the treaty clauses did not give him jurisdiction to take cognizance of it. There is no contradiction between this decision and the principle of succession to public property situated abroad. It is obviously within the discretion of States to conclude treaties making exceptions to a principle.

(51) In connexion with a more recent case, D. P. O'Connell reports that, upon the dissolution of the Federation of Rhodesia and Nyasaland in 1963, agreements were concluded for the devolution of property situated outside the territory of the union, under which Southern Rhodesia was given Rhodesia House in London and Zambia the Rhodesian High Commissioner's house.<sup>252</sup>

(52) A marginal case will be mentioned here purely as a reminder. It is difficult to place in the typology of succession and, moreover, it concerns an unsuccessful attempt to

<sup>249</sup> Case of the cession of vessels and tugs for navigation on the Danube, Allied Powers (Greece, Romania, Serb-Croat-Slovene Kingdom, Czechoslovakia) v. Germany, Austria, Hungary and Bulgaria (Decision: Paris, 2 August 1921; Arbitrator: Walker D. Hines (USA)). See United Nations, *Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No. 1948. V. 2), pp. 97-212.

<sup>250</sup> *Ibid.*, p. 120.

<sup>251</sup> *Ibid.*, pp. 120-121. The reference was to article 208 of the Treaty of Saint-Germain-en-Laye (*British and Foreign State Papers, 1919*, vol. 112, pp. 412-414) and article 191 of the Treaty of Trianon (*ibid.*, 1920, vol. 113, pp. 564-565).

<sup>252</sup> D. P. O'Connell, *op. cit.*, p. 231.



dissolve a union. This is *the McRae case*, which arose in connexion with the American War of Secession. After the failure of the secession of the Southern states of the United States, the Federal Government claimed from a Southern agent who had settled in England funds which he had deposited there on the instructions of the secessionist authorities. The agent in question refused to hand over these funds to the Federal Government, arguing that he himself had various claims against the erstwhile Southern government.

(53) The judgment rendered by the Court of Equity of England in 1869 recalled the principle that the property of an insurrectionary government must, if that government is defeated, revert to the legal government as the successor. Since, however, the successor State could not have more rights than the entity in which the rights were formally vested, the counterclaim of the agent McRae must be allowed and the amount of his claims, if they were justified, must be deducted from the funds claimed.

The judgment of the Court therefore confirmed the principle of the transfer to the successor State of public property situated abroad; it stated that it is:

the clear public universal law that any government which *de facto* succeeds to any other government, whether by revolution or restoration, conquest or reconquest, *succeeds to all the public property . . . and to all rights in respect of the public property of the displaced power*.<sup>253</sup>

(54) According to some writers, this is a case of succession of States and not of succession of governments, since the Southern Confederate Government, which represented a number of states, had been recognized, at least as a belligerent, by various foreign States because it had exercised effective authority for a number of years over a clearly defined territory.

## 2. Separation of parts of a State when the predecessor State continues to exist

### (a) Property situated in the territory to which the succession of States relates

(55) Prior to the establishment of the United Nations, most examples of secession were to be found among cases of the "secession of colonies" because colonies were considered, through various legal and political fictions, as forming "an integral part of the metropolitan country". These cases are therefore not relevant to the situation being considered here, that of the separation of parts of a State since, according to contemporary international law these are newly independent States resulting from decolonization under the Charter of the United Nations.

(56) Since the establishment of the United Nations, there have been very few cases of secession which were not cases of decolonization. According to Sir Humphrey Waldock, the Special Rapporteur for succession of States in respect of treaties, only two can be cited: the separation of Pakistan from India and the withdrawal of Singapore from Malaysia. To these cases should be added the secession of Bangladesh. However, the Special Rapporteur has been able to obtain very little information regarding these three examples.

(57) In the case of Pakistan, D. P. O'Connell reports that an Expert Committee was appointed on 18 June 1947 to consider the problem of apportionment of the property of British India. He states that:

The presumption guiding its deliberations was that India would remain a constant international person, and Pakistan would constitute a successor State.<sup>254</sup>

Thus, Pakistan was regarded as a successor by a pure fiction.

On 1 December 1947, an agreement was concluded between India and Pakistan under which each of the Dominions would become the owner of the immovable property situated in its territory. Where movable property was concerned, a great deal of equipment, especially arms, was attributed to India, which undertook to pay Pakistan a certain sum for the construction of munitions factories.

The expression "just and equitable" is frequently used in the official documents relating to the case. The following formula for apportionment was finally adopted: 82.5 per cent for India and 17.5 per cent for Pakistan in respect of all common movable property.

(58) The secession of Singapore in 1965 is a special case because, inasmuch as Singapore had separated not from a unitary State but from a federation (the Federation of Malaysia), it was agreed that all property which had belonged to Singapore before the creation of the Federation should revert to it after its secession.<sup>255</sup>

(59) In the case of Bangladesh, the Special Rapporteur has no information concerning succession to State property. All that could be found was a little information concerning the treatment of Pakistan's debt following the secession of Bangladesh; the Government of Pakistan agreed to accept continued responsibility, after 1 July 1973 and up to 30 June 1974, for the debt of the former Pakistan State. During that period, the two Governments were to undertake negotiations with a view to apportioning the debt.<sup>256</sup>

(60) This subject has not been given much attention in the literature. The writings of Bustamante may, however, be cited. On the question of secession, he stated that

In the sphere of principles, there is no difficulty about the general principle of the passing of public property, except where the devolution of a particular item is agreed on for special reasons.<sup>257</sup>

Bustamante also refers to the draft code of public international law by Mr. Epitacio Pessoa (source not indicated), article 10 of which provides that "if a State is formed through the emancipation of a province [or] region . . . , property in the public and private domain situated in the detached territory passes to it".<sup>258</sup>

(61) Theoretically, one can take it that property used in the public service of the territory—in other words, having a

<sup>254</sup> *Ibid.*, p. 220.

<sup>255</sup> *Ibid.*, p. 232.

<sup>256</sup> *Annuaire français de droit international*, 1973 (Paris), vol. XIX, (1974), p. 1074. The information is taken from a reply by the Minister of Economic Affairs and Finance to a written question from Mr. Raymond Offroy (France, *Journal officiel de la République française, Débats parlementaires: Assemblée nationale* (Paris), 8 September 1973, year 1973, No. 62 A.N., p. 3672).

<sup>257</sup> Bustamante y Sirvén, *op. cit.*, p. 292.

<sup>258</sup> *Ibid.*, p. 265.

<sup>253</sup> *Ibid.*, p. 208.

direct and necessary link with the detached territory—must belong to the sovereignty which thereafter governs that territory. This brings us back to the explanations which were given in connexion with succession in respect of part of territory and the emergence of a newly independent State. The Special Rapporteur therefore refers the reader to his commentaries in that connexion,<sup>259</sup> since the situation is fundamentally the same.

(b) *Property situated outside the territory to which the succession of States relates*

(62) With respect to the ownership of property abroad, it should again be mentioned in connexion with this problem that *property proper* to the detached territory which is situated outside that territory is not affected by the succession of States. Where a State is formed as a result of the detachment of part of the territory of a State, the ownership of property belonging to that territory and situated outside its borders is not affected by the succession of States.

(63) This rule does not give rise to any doubt, although the courts left room for some uncertainty in a case known as the case of Irish funds deposited in the United States of America.<sup>260</sup>

(64) Irish revolutionary agents of the Sinn Fein movement had deposited in the United States funds collected by a republican political organization, the Dáil Eireann, which had been established at the end of the First World War with the aim of forcibly overthrowing the British authorities in Ireland and proclaiming the independence of the country. During the Irish uprising of 1920–1921, these movements brought forth a revolutionary republican *de facto* government, headed by E. De Valera.

<sup>259</sup> See above, sub-sections 1 and 2.

<sup>260</sup> See E. D. Dickinson, "The case of the Irish Republic's funds", *American Journal of International Law* (Concord, N.H., 1927), vol. 21, pp. 747–753; J. W. Garner, "A question of State succession", *ibid.*, pp. 753–757; D. P. O'Connell, *op. cit.*, pp. 208–209; Ch. K. Uren, "The succession of the Irish Free State", *Michigan Law Review* (Ann Arbor, Mich., University of Michigan Law School, 1930), vol. XXVIII (1929–1930), p. 149; Ch. Rousseau: "Les transformations territoriales . . .", *op. cit.*, pp. 145–146.

(65) When a Government of the "Irish Free State" was constituted by the Treaty between Great Britain and Ireland of 6 December 1921, this new authority claimed the funds from the United States, as the successor of the insurrectionary *de facto* government. An Irish court upheld this claim, ruling that the Government of the Irish Free State was "absolutely entitled to all the property and assets of the [*de facto*] Revolutionary Government upon which as a foundation it had been established".<sup>261</sup>

(66) However, an American court dismissed the claim. The two judgments to this effect rendered by the Supreme Court of New York (New York County)<sup>262</sup> stated that, although the case involved a problem of succession of State or government, the Court considered that the Irish Free State was the successor of the British State and that consequently the Government of the Free State was not the successor of the "insurrectionary government", which was only a political organization and not a government recognized as such by the British authorities or by any foreign State. The Supreme Court of New York therefore held that only Great Britain could be entitled to claim the funds.

(67) Although the case does not concern a succession of States, it affords an occasion to reaffirm that the ownership of property which is proper to a detached territory (as is the case here) should not be affected by the secession of the territory in question.

(68) The only real problem that arises is what becomes of property owned by the predecessor State and situated abroad. Since the predecessor State continues to exist, equity and common sense require that it should not be deprived of its property abroad. However, if the detached territory contributed to the constitution of such property, it is entitled to claim its share in proportion to its contribution. In this case too, as in all the others, the major element for a solution must be sought in the principle of equity.

<sup>261</sup> Supreme Court of the Irish Free State, *Fogarty and others v. O'Donoghue and others*, 17 December 1925. See A. D. McNair and H. Lauterpacht, *Annual Digest of Public International Law Cases, 1925–1926* (London, Longmans, Green and Co., 1929), case No. 76, pp. 98–100.

<sup>262</sup> Supreme Court of New York (New York County), *Irish Free State v. Guaranty Safe Deposit Company*, *ibid.*, case No. 77, pp. 100–102.

# MOST-FAVOURLED-NATION CLAUSE

[Agenda item 4]

DOCUMENT A/CN.4/293 AND ADD.1

Seventh report on the most-favoured-nation clause, by Mr. Endre Ustor, Special Rapporteur

Draft articles with commentaries (continued)\*

[Original: English]  
[25 March 1976]

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\* For the draft already proposed by the Special Rapporteur, see the third, fourth, fifth and sixth reports (*Yearbook . . . 1972*, vol. II, p. 161, document A/CN.4/257 and Add.1; *Yearbook . . . 1973*, vol. II, p. 97, document A/CN.4/266; *Yearbook . . . 1974*, vol. II (Part One), p. 117, document A/CN.4/280; and *Yearbook . . . 1975*, vol. II, p. 1, document A/CN.4/286).

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## ABBREVIATIONS

CMEA	Council for Mutual Economic Assistance	MFN	Most favoured nation
EEC	European Economic Community	OAS	Organization of American States
EFTA	European Free Trade Association	OECD	Organisation for Economic Co-operation and Development
GATT	General Agreement on Tariffs and Trade	UNCTAD	United Nations Conference on Trade and Development
GSP	Generalized system of preferences		

## I. GENERAL PROVISIONS

## 1. Introduction

1. The role of the most-favoured-nation clause in the relations of States and particularly in their economic and trade relations is a matter of importance. Thus, in the Final Act of the Conference on Security and Co-operation in Europe, adopted at Helsinki on 1 August 1975, under the heading "General Provisions" of the first section "Commercial Exchanges" of the part devoted to "Co-operation in the Field of Economics, of Science and Technology and of the Environment", the participating States

recognize the beneficial effects which can result for the development of trade from the application of most-favoured-nation treatment.<sup>1</sup>

2. The role of the most-favoured-nation clause in trade among countries of different levels of development was an issue thoroughly examined at the various sessions of UNCTAD and is still a matter of concern to UNCTAD, to GATT and to the world of the science of political economy.

3. It has to be pointed out, however, that the study undertaken by the International Law Commission belongs to a special sphere of research, owing to the general nature of the Commission's tasks and particularly to the fact that its present work is conceived as the elaboration of a part of the law of treaties. In simple words, the Commission is not, at this juncture, seeking answers to the important question of whether or not certain relations of States ought to be placed on the basis of treaties containing most-favoured-nation clauses. Its attention is focused on the question of what special rules within the framework of the general rules of the law of treaties are applicable to the most-favoured-nation clauses actually stipulated in treaties.

4. This being the case, it is not intended to take issue with statements such as that of a representative in the Sixth Committee of the General Assembly at its thirtieth session, who stated that the most-favoured-nation clause was clearly an institution that corresponded to past economic realities, which were being superseded by new realities that required an adjustment of rules.<sup>2</sup> Beside the document of the Helsinki

<sup>1</sup> Conference on Security and Co-operation in Europe, Co-ordinating Committee, document CSCE/CC/64, p. 30.

<sup>2</sup> Statement by the representative of Ecuador (see *Official Records of the General Assembly, Thirtieth Session, Sixth Committee, 1540th meeting, para. 29*).

Conference already mentioned, reference could be made, among many others, to General Principle Eight in annex A.I.1 of the recommendations adopted by UNCTAD at its first session, which contains a summary of UNCTAD's basic philosophy. It begins as follows:

International trade should be conducted to mutual advantage on the basis of the most-favoured-nation treatment and should be free from measures detrimental to the trading interests of other countries.<sup>3</sup>

5. In view of the foregoing and of the fact that the use of the clause is not restricted to international trade, a fact which some are at times inclined to forget, it may be thought that the statement made in the Committee of Experts for the Progressive Codification of International Law in the League of Nations: "But the nations do not seem able to escape the use of the clause",<sup>4</sup> has not lost its validity.

6. Hence, it is felt that the study of the most-favoured-nation clause is still topical and, perhaps, even more so now than it was before, for at least two reasons: it gives a chance for the legal confirmation of developments which have taken place in respect of the role of the clause in the field of international trade between States at different levels of development and, apart from the intrinsic merits of every codification, it will give assistance to the chancelleries, and among them to the many quite recently established, to foresee the sometimes far-reaching effects of the clause and to draft their treaties in accordance with their own interest.

## 2. General character of the draft articles

7. Under this heading, the Commission stated in the report on the work of its twenty-seventh session:

The articles on the most-favoured-nation clause are designed to be supplementary to the Vienna Convention on the Law of Treaties<sup>5</sup> . . . the draft articles on the most-favoured-nation clause presuppose the

<sup>3</sup> For the full text of General Principle Eight, see *Proceedings of the United Nations Conference on Trade and Development, vol. I, Final Act and Report* (United Nations publication, Sales No. 64.II.B.11), p. 20.

<sup>4</sup> League of Nations document C.205.M.79.1927.V, p. 12.

<sup>5</sup> 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. 289. The Convention will be referred to hereafter in the present report as "the Vienna Convention".

existence of the provisions of that Convention and are conceived as supplementary to the Vienna Convention "as an essential framework". The general rules pertaining to treaties having been stated in the Vienna Convention, the draft articles contain particular rules applicable to a certain type of treaty provisions, namely to most-favoured-nation clauses.<sup>6</sup>

8. This stand of the Commission was generally approved by the representatives of States in the Sixth Committee of the General Assembly at its thirtieth session. According to the report of the Sixth Committee:

... The close relationship between the most-favoured-nation clause and the Vienna Convention made the clause well suited for codification. The Commission's work would greatly help to clarify the often controversial situations arising out of the application and interpretation of the clause in international relations.<sup>7</sup>

9. On the basis of the foregoing the following new article is proposed:

*Article A. Relationship of the present articles to the Vienna Convention on the Law of Treaties*

The present articles are intended to supplement the Vienna Convention on the Law of Treaties done at Vienna, on 23 May 1969. The provisions of these articles shall not affect those of the said Convention.

*Commentary*

(1) A most-favoured-nation clause being part of a treaty, it is evidently subject to the law of treaties. The provisions of the articles on the most-favoured-nation clause do not detract from the provisions of the Vienna Convention regarding the conclusion, entry into force, observance, application, interpretation, invalidity, termination, etc. of a treaty including the clause and the clause itself. It is not intended here to theorize on the question of which set of provisions has priority over the other; in each particular case involving a most-favoured-nation clause the provisions of both the present articles and the Convention have to be taken into consideration.

(2) There are several treaties which contain a provision on the relationship of that treaty to another. A good and systematic selection is offered by *The Treaty Maker's Handbook*,<sup>8</sup> section 15 of which contains some 39 clauses providing partly for the priority of the given treaty over one or more others (e.g., Article 103 of the Charter of the United Nations), partly for the priority of any other treaty over that which contains the provision (e.g., article 73 of the Vienna Convention on Consular Relations).<sup>9</sup>

(3) The proposed article, in its first sentence, states the obvious by providing that the present articles are intended to supplement the Vienna Convention. The second sentence is couched in terms which can be found in many provisions of treaties that give priority to another treaty (e.g., article 30 of the Convention on the High Seas).<sup>10</sup> However, the ex-

pression "shall not affect" does provide for priority only in case of conflict of the two instruments. In the absence of such conflict—as is assumed in the present case—it means that both instruments equally apply.

### 3. Form of codification

10. From the assumption that the articles on the most-favoured-nation clause constitute a supplement to the Vienna Convention, it follows, in the belief of the Special Rapporteur, that the supplement should take the same form as the instrument it completes, that is, it should serve as the basis for a convention.

11. It may be recalled that the Commission, when preparing the draft articles on the law of treaties, considered the possibility of adopting a mere expository statement of the law but ultimately decided to submit the articles in a form that could be the basis for a convention. This decision was explained as follows by the Commission in the report on the work of its fourteenth session in 1962:

First, an expository code, however well formulated, cannot in the nature of things be so effective as a convention for consolidating the law; and the consolidation of the law of treaties is of particular importance at the present time when so many new States have recently become members of the international community. Secondly, the codification of the law of treaties through a multilateral convention would give all the new States the opportunity to participate directly in the formulation of the law if they so wished; and their participation in the work of codification appears to the Commission to be extremely desirable in order that the law of treaties may be placed upon the widest and most secure foundations.<sup>11</sup>

12. In submitting the final text of the draft articles on the law of treaties in the report on its eighteenth session, the Commission maintained the view which it accepted at the outset of its work on the topic and which it had expressed in its reports since 1961.<sup>12</sup> Its corresponding recommendation was accepted by the General Assembly and resulted ultimately in the adoption of the Vienna Convention.

13. Although the question of the form of the codification was not directly discussed with respect to the articles on the most-favoured-nation clause in the Sixth Committee, at the thirtieth session of the General Assembly, some representatives seemed already to assume that it should take the form of a convention by statements such as "a treaty with a possible life of many years".<sup>13</sup>

14. The above remarks on the form of the codification of the rules relating to the most-favoured-nation clause are of a preliminary nature, this being a matter to be decided definitively by the Commission in the course of the second reading of the articles.

### 4. Codification and progressive development

15. The articles on the most-favoured-nation clause constitute both codification and progressive development of

<sup>6</sup> *Yearbook* ... 1975, vol. II, p. 119, document A/10010/Rev.1, para. 116.

<sup>7</sup> *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, para. 121.

<sup>8</sup> H. Blix and J. H. Emerson, eds. (Dobbs Ferry, Oceana, 1973).

<sup>9</sup> For the text of this Convention, see United Nations, *Treaty Series*, vol. 596, p. 261.

<sup>10</sup> *Ibid.*, vol. 450, p. 83.

<sup>11</sup> *Yearbook* ... 1962, vol. II, p. 160, document A/5209, para. 17.

<sup>12</sup> *Yearbook* ... 1966, vol. II, p. 176, document A/6309/Rev.1, part II, paras. 23–27.

<sup>13</sup> Statement by the representative of the United States of America (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1545th meeting, para. 39).

international law in the sense in which those concepts are defined in article 15 of the Commission's Statute. The Commission may, however, in conformity with its previous practice, not wish to determine into which category each provision falls. Some of the commentaries, and particularly those relating to provisions involving rights of developing States, will indicate the novelty of the rule proposed.

### 5. National treatment

16. At the twenty-seventh session of the Commission, some members supported the Special Rapporteur's earlier proposal to extend the scope of the draft to national treatment clauses and national treatment beyond articles 16 and 17 which deal with the right to national treatment under a most-favoured-nation clause and the case where most-favoured-nation treatment, national or other treatment has been granted with respect to the same subject matter to the same beneficiary. Other members held opposing views and consequently the pronouncement of the General Assembly was asked on the question.<sup>14</sup> At the thirtieth session of the Assembly, divergent views were expressed by the representatives of States in the Sixth Committee. Against some support for the extension of the scope of the draft articles concern was voiced over the extension of the Commission's terms of reference and practical difficulties were foreseen. In view of the division of opinion and because of lack of time the Special Rapporteur now suggests the draft articles, at least for their first reading, should be left in their present framework.

### 6. Terminology

17. The Special Rapporteur submits to the consideration of the Commission the following text for insertion in article 2:

#### *Article 2. Use of terms*

For the purposes of the present articles:

...

(e) "material reciprocity" means the extension by one State to another State or to persons or things in a determined relationship with that State of the same treatment in kind as the treatment extended by the latter State to the former or to persons or things in the same relationship with that former State.

#### *Commentary*

(1) In the course of the discussion during the twenty-seventh session of the Commission, it was held by some members that it would be useful if article 2 on the use of terms contained an explanation as to the meaning of the term "material reciprocity".

(2) Some explanation on the meaning of this expression was given by the Special Rapporteur in his fourth report. The best example of a clause conditional on material reciprocity, article 46 of the Consular Convention between the Polish People's Republic and the Federal People's Republic of Yugoslavia, signed on 17 November 1958, was

<sup>14</sup> *Yearbook* ... 1975, vol. II, p. 118, document A/10010/Rev.1, para. 108.

quoted there. It was pointed out that the drafters of a most-favoured-nation clause combined with the condition of material reciprocity do not aim at treatment of their compatriots in foreign lands equal to that of nationals of other countries. What they are interested in is a different kind of equality: equal treatment by the contracting States granted to each other's nationals.<sup>15</sup> Equality with competitors is of paramount importance in matters of trade and particularly as regards customs duties.

(3) As to the meaning of the expression, a simple definition is given by I. Szászy, according to which material reciprocity (*materialnaia vzaimnost, réciprocité trait pour trait*) exists when the citizen of a country is treated in a foreign country in the same way as the country to which the citizen in question belongs treats the citizen of the other country. This is to be distinguished from formal reciprocity (*formalnaia vzaimnost, réciprocité diplomatique*) which subsists when a foreign country treats the citizen of another country as it treats its own citizens.<sup>16</sup>

(4) A fuller explanation is given by J.-P. Niboyet, according to whom:

...  
Material reciprocity means that a given right claimed by one party cannot be accorded to it unless that party itself executes a consideration which must be identical.

... material reciprocity may be defined as the mutual consideration stipulated by States in a treaty, where such consideration relates to a certain specific right which must be the same for both parties. This is somewhat like a vehicle that needs two wheels; each State supplies one wheel, but the two must match to within a fraction of an inch.<sup>1</sup>

<sup>1</sup> Some "tolerance" must, of course, be allowed; otherwise, the condition could not be met. Each party therefore allows that equivalence is sufficient, but the outer limits of equivalence are impossible to specify in advance. This will depend on the factual circumstances and on the liberality of those who will have to interpret the treaty.<sup>17</sup>

(5) It is believed that for the present purposes it is not necessary to enter into further discussion of the niceties of material reciprocity. Obviously, because of the difference in individual national legal systems, cases may occur where doubts arise whether the treatment offered by the beneficiary State is materially "the same" as that extended by the granting State. Such doubts have to be dispelled by the parties themselves, and the possible disputes settled.

(6) As stated above, material reciprocity is stipulated when treatment of nationals or things like ships and possibly aircraft is in question. In commercial treaties dealing with the exchange of goods material reciprocity is, by the nature of things, never required.

### 7. Scope of the draft articles

18. In the course of preparation of the draft articles on the most-favoured-nation clause the Commission had occasion to consider the scope of application of those articles. It decided to limit that scope to clauses contained *in treaties*

<sup>15</sup> *Yearbook* ... 1973, vol. II, pp. 99-101, document A/CN.4/266, paras. 15 and 17 of the commentary to article 6.

<sup>16</sup> I. Szászy, *International Civil Procedure (A Commercial Study)* (Budapest, Akadémiai Kiadó, 1967), pp. 187-188.

<sup>17</sup> J.-P. Niboyet, *Traité de droit international privé français*, 2nd ed. (Paris, Sirey, 1951), vol. II, pp. 308-309.

between States, to the exclusion of clauses contained in agreements between States and other subjects of international law, and it also decided not to deal with clauses contained in international agreements not in written form. These decisions, explained in the Commission's report on the work of its twenty-fifth session,<sup>18</sup> were generally not questioned by representatives in the Sixth Committee. There are, however, certain matters which require further explanation and, possibly, further action.

#### MATTERS NOT WITHIN THE SCOPE OF THE PRESENT ARTICLES

##### (a) *Treaties of hybrid unions*

19. The expression "a subject of international law other than a State" used in article 3 clearly covers associations of States having the character of intergovernmental organizations, such as the United Nations, the specialized agencies, OAS, the Council of Europe and the CMEA. However, it may be recalled that for the purposes of the topic of succession of States in respect of treaties the Commission took the stand that certain hybrid unions of States appeared to keep on the plane of intergovernmental organizations. One example of such a hybrid, the Commission stated, was EEC, as to the precise legal character of which opinions differed.<sup>19</sup>

20. Because the definition of the exact scope of the articles seems to be desirable and because the kind of unions mentioned above do conclude treaties embodying most-favoured-nation clauses vis-à-vis States and vice versa,<sup>20</sup> the

<sup>18</sup> *Yearbook ... 1973*, vol. II, pp. 213–217, document A/9010/Rev.1, chap. IV, sect B, commentaries to articles 1–4.

<sup>19</sup> See *Yearbook ... 1974*, vol. II (Part One), p. 253, document A/9610/Rev.1, chap. II, sect. D, paras. 3 and 4 of the Commentary to articles 30–32 of the draft article on succession of States in respect of treaties.

<sup>20</sup> See for example, the Accord commercial entre la Communauté économique européenne et la République socialiste fédérative de Yougoslavie du 19 mars 1970\*, article I of which reads as follows:

"The Community and Yugoslavia shall accord to each other most-favoured-nation treatment with respect to customs duties and charges of any kind imposed on or in connexion with importation or exportation or imposed on the international transfer of payments for imports or exports, with respect to the method of levying such duties and charges and with respect to the formalities and procedures applied in the customs clearance of goods.

The foregoing provisions shall be binding upon the Community to the extent that it exercises its powers in the aforesaid matters."

Article II refers to customs unions and other exceptions. A similar clause is contained in the "Accord sur les échanges commerciaux et la coopération technique CEE-Liban du 18 juin 1968", published in *Journal officiel des Communautés européennes* (Luxembourg) no. L 146 of 27 June 1968. Clauses in which EEC is the beneficiary of a most-favoured-nation grant appear in the Convention of Association between the European Economic Community and the African and Malagasy States associated with that Community, signed at Yaoundé on 20 July 1963 (article 7), in the second Yaoundé Convention of 29 July 1969 (article 11), in the Agreement establishing an Association between the European Economic Community and the United Republic of Tanzania, the Republic of Uganda and the Republic of Kenya, signed at Arusha, Tanzania, on 24 September 1969 (article 8), in the Agreement establishing an Association between the European Economic Commu-

Commission may wish to take a stand in this connexion. A simple solution to the question would be for the commentary to article 3 to explain that for the present purposes the Commission considered the expression "a subject of international law other than a State" as covering the case of hybrid unions. A proviso may be added in the sense that the Commission does not wish thereby to enter into the controversy as to the precise legal character of such unions.<sup>21</sup>

21. A further point follows from the foregoing: although the Special Rapporteur is still unable to offer an example where a treaty containing a most-favoured-nation clause has been concluded between two hybrid unions, such a case seems now to him less hypothetical and somewhat more likely than at the time when paragraph 3 of the commentary to article 3 was drafted. He submits therefore for the consideration of the Commission the following text for insertion in article 3 before the words "shall not affect":

##### *Article 3. Clauses not within the scope of the present articles*

The fact that the present articles do not apply ... or (4) to a clause contained in an international agreement by which a subject of international law other than a State undertakes to accord most-favoured-nation treatment to another such subject of international law.

22. An insertion of this kind would also clarify the situation for those who in the Sixth Committee were of the opinion that the draft should also take into account "agreements which might be concluded between two communities or two economic integration areas".<sup>22</sup>

##### (b) *Cases of State succession, State responsibility and outbreak of hostilities*

23. Article 73 of the Vienna Convention explicitly omits the cases mentioned in the heading from the regulation of

ity and the Republic of Tunisia, signed at Tunis on 28 March 1969 (article 4, para. 1), in the Agreement establishing an Association between the EEC and the Kingdom of Morocco, signed at Rabat on 31 March 1969 (article 4, para. 1), in the Agreement between the EEC and the Arab Republic of Egypt signed at Brussels on 18 December 1972 (article 3) and in the Convention between the EEC and the 46 countries forming the ACP (African, Caribbean and Pacific) group, signed at Lomé on 28 February 1975. The most-favoured-nation clause included in article 7 of the last mentioned convention reads as follows:

"...  
"2. (a) In their trade with the Community, the ACP States shall not discriminate among the Member States [of the Community], and shall grant to the Community treatment no less favourable than the most-favoured-nation treatment.

(b) The most-favoured-nation treatment referred to in subparagraph (a) shall not apply in respect of trade or economic relations between ACP States or between one or more ACP States and other developing countries."

It has to be noted that in some of these agreements, as in those concluded with Tunis, Morocco and Egypt, the contracting party on behalf of EEC is the Council of EEC, while in others (Yaoundé, Arusha, Lomé), a mixed formula is used: the Member States themselves are contracting parties alongside the Council which is also a contracting party.

<sup>21</sup> This point may be re-examined in respect of article 21 taking into account the comment made in the Sixth Committee of the General Assembly at its thirtieth session, to the effect that that article should also reflect the situation where a community of States operated a system of preferences (statement made by the observer for EEC (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1549th meeting, para. 52).

<sup>22</sup> Statement made by the representative of Guatemala (*ibid.*, 1548th meeting, para. 28).

\* Published in the *Journal officiel des Communautés européennes* No. L 58 of 13 March 1970, quoted by D. Vignes, "La clause de la nation la plus favorisée et sa pratique contemporaine: Problèmes posés par la Communauté économique européenne", *Recueil des cours de l'Académie de droit international de la Haye, 1970-II* (Leiden, Sijthoff, 1971), tome 130, vol. II, p. 305.



the Convention. It is felt that the inclusion of a similar provision in the present articles would not be made superfluous by the adoption of the proposed article A. The following article is therefore tentatively proposed:

*Article B. Cases of State succession, State responsibility and outbreak of hostilities*

The provisions of the present articles shall not prejudice any question that may arise in regard to a most-favoured-nation clause from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

*Commentary*

(1) As to the case of State succession, it is believed that the draft prepared by the Commission on succession of States in respect of treaties covers also the problems which may arise in cases when a succession occurs in respect of a treaty embodying a most-favoured-nation clause, that is, a treaty between the granting State and the beneficiary State or between more than one of each. Any change that may occur in the life of a treaty by way of succession between a granting State and a third State, if that treaty serves as a basis for the beneficiary State's most-favoured-nation rights, can of course have its effect on those rights by force of the contingent nature of the clause.

(2) There is one point, however, which perhaps deserves special mention: in the case of a uniting of States between the granting State and the third State resulting in the termination of a treaty which assured the extension of the "relevant treatment" to the third State, the right of the beneficiary State to that treatment will terminate by virtue of article 19. This obvious rule could be embodied in a separate article, or it may just be mentioned in the commentary to article 19.

(3) As to State responsibility, just as the Vienna Convention does not contain provisions concerning the question of the international responsibility of a State with respect to a failure to perform a treaty obligation, so the draft articles on the most-favoured-nation clause do not deal with situations where the granting State through a direct breach or indirect circumvention of its obligation violates the treaty rights of the beneficiary State. Such situations, which were mentioned in the 1968 working paper of the Special Rapporteur<sup>23</sup> and in his first report,<sup>24</sup> under the heading "violations of the clause" and in connexion with "attempts to avoid the effects of the clause", as well as the possible consequences thereof, involving questions of responsibility, are discarded from the draft articles.

(4) The draft articles do not contain any provisions concerning the effect on the operation of the clause of the outbreak of hostilities between the granting State and the beneficiary State or between the granting State and the third State. Because the consideration of such situations was omitted by the Commission in connexion with the study of the general law of treaties it would be out of place to deal

with them here, in the restricted field of the most-favoured-nation clause.<sup>25</sup> It may be noted that the outbreak of hostilities between the beneficiary State and the third State probably does not affect the operation of the clause as there is no treaty relation between them or if there is one, as in a multilateral context, it has no bearing on the most-favoured-nation rights of the beneficiary.

*(c) Rights and obligations of individuals*

24. In presenting its draft articles on the law of treaties, the Commission reported to the General Assembly that no provision regarding the application of treaties providing for obligations or rights to be performed or enjoyed by individuals had been included in the draft.<sup>26</sup> The Commission then recalled the following passage of its 1964 report:

Some members of the Commission desired to see a provision on that question included in the present group of draft articles, but other members considered that such a provision would go beyond the present scope of the law of treaties, and in view of the division of opinion the Special Rapporteur withdrew the proposal.<sup>27</sup>

25. The Vienna Convention, based on the draft of the Commission, consequently does not contain provisions of the kind mentioned. In this situation the Special Rapporteur felt that, although most-favoured-nation clauses do very often contain provisions for rights to be enjoyed by individuals, in the absence of a codification as to the general rules in this respect, it would be improper in this context to attempt to break the barriers of the Vienna Convention.<sup>28</sup>

*(d) Other specific matters*

26. The Special Rapporteur admits that the provisions adopted by the Commission hitherto and those which may be adopted later will not provide a prompt and automatic solution to all questions which may arise in connexion with the application of most-favoured-nation clauses. Reference can be made at random to the following matters which came up during the study of the clause: whether a most-favoured-nation clause stipulated in a commercial treaty in favour of a neutral country will attract benefits promised by an aggressor State to the victorious Powers in a peace treaty?<sup>29</sup> Whether in case sanctions are applied under Chapter VII of the United Nations Charter against a State and trade advantages withdrawn from it, will the right of a beneficiary State to such advantages under a most-favoured-nation clause automatically cease, or will that State be entitled to claim the continuation of the advantages as of right?<sup>30</sup> How far is the granting State permitted to classify its tariff schedules? When does such classification

<sup>25</sup> See [report of the International Law Commission on the work of its eighteenth session] *Yearbook ... 1966*, vol. II, p. 176, document A/6309/Rev.1, part II, para 29.

<sup>26</sup> *Ibid.*, p. 177, para. 33.

<sup>27</sup> *Yearbook ... 1964*, vol. II, p. 176, document A/5809, para. 22.

<sup>28</sup> See *Yearbook ... 1968*, vol. II, p. 168, document A/CN.4/L.127, para. 22. Cf. the opposing views expressed in the Commission (*ibid.*, vol. I, pp. 188 and 189, 976th meeting, paras. 30 and 45).

<sup>29</sup> See *Yearbook ... 1973*, vol. II, p. 107, document A/CN.4/266, para. 14 of the commentary to article 7.

<sup>30</sup> See *Yearbook ... 1974*, vol. II (Part One), document A/CN.4/280 *in fine*.

<sup>23</sup> *Yearbook ... 1968*, vol. II, p. 165, document A/CN.4/L.127.

<sup>24</sup> *Yearbook ... 1969*, vol. II, pp. 171-172, document A/CN.4/213, paras. 85-89.

amount to a covert discrimination and a breach of the most-favoured-nation pledge?<sup>31</sup> Questions of this kind cannot be explicitly answered within the framework of a codification of general rules unless the Commission, contrary to its traditions, wishes to embark upon a "case" approach.

27. The Special Rapporteur believes that the case brought up in the Sixth Committee by one representative belongs also to the category of questions mentioned above. That representative objected that neither article 7 nor article 20 dealt with the temporal aspect of the treatment extended by the granting State to the third State.<sup>32</sup> The Special Rapporteur believes that this element is covered by articles 18 and 19, which indicate that unless the treaty otherwise provides, the rights of the beneficiary are always contingent upon the most-favoured-nation treatment extended by the granting State to the third State, that is, any third State. This means that the clause applies to all favours which have been granted to a third State at the time of the entry into force of the clause or at any time in the future. A graphic illustration of the operation of the clause may be recalled in this respect:

... the clause can be pictured as a float, which enables its possessor to maintain itself at the highest level of the obligations accepted towards foreign States by the grantor State; if that level falls, the float cannot turn into a balloon so as to maintain the beneficiary of the clause artificially above the general level of the rights exercised by other States.<sup>33</sup>

As to the example put forward by the representative in the Sixth Committee, the Special Rapporteur imagines that the problem raised might lend itself to the following solution: if the granting State accords different treatments to nationals of different States, because of the non-retroactive discontinuance of a certain policy and if in this situation it is generous enough to conclude a treaty with a beneficiary State promising *most-favoured-nation* treatment, and forgetful enough not to include an appropriate proviso in the treaty, then the latter State may *prima facie* have a good case when insisting on fulfilment of the *most-favoured-nation* pledge.

(e) *Other limitations of the topic*

28. It has been stated in the Sixth Committee that the Commission had in the course of its study of the most-favoured-nation clause attempted to reaffirm traditional, pre-war rules of international law and neglected most of the following fundamental changes which had taken place after the Second World War: (a) the emergence of GATT; (b) the emergence of State-owned trading enterprises and the application of the clause between countries with different

<sup>31</sup> See the controversy concerning the Swiss cow case described in the Special Rapporteur's first report (*Yearbook ... 1969*, vol. II, p. 171, document A/CN.4/213, para. 85) and fifth report (*Yearbook ... 1974*, vol. II (Part One), pp. 123-124, document A/CN.4/280, para. 9 of the commentary article 7 *bis*). See also the report of the International Law Commission on the work of its twenty-seventh session (*Yearbook ... 1975*, vol. II, pp. 132-133, document A/10010/Rev.1, chap. IV, sect. B, para. 20 of the commentary to articles 11 and 12).

<sup>32</sup> The representative of Australia (see *Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1541st meeting, para. 6).

<sup>33</sup> Cf. Rossillion, "The most-favoured-nation clause in case-law of the International Court of Justice", *Journal du droit international* (Paris), vol. 82, No. 1 (Jan-Mar. 1955), p. 106.

economic systems; (c) the trend that customs unions and free trade areas constitute exceptions to the operation of the clause; and (d) the needs of developing countries for new rules facilitating their access to the markets of developed countries.<sup>34</sup> It is of course the purpose of all codification to reaffirm all valid rules pertinent to the subject, whether old or new. On the other hand, the delimitation of the scope of a topic for codification is a delicate matter and here legitimate views may differ as to the limits to be observed. The Special Rapporteur feels that he tried to follow the instructions of the Commission, which wished to base its studies on the broadest possible foundations, without, however, dealing with matters not included in its functions.<sup>35</sup> On this basis a full treatment was given to the system of the GATT in the second report of the Special Rapporteur, its provisions on State trading enterprises were discussed and two sections were devoted to the so-called problems of East-West trade.<sup>36</sup> In the judgment of the Special Rapporteur, however, the line between law and economics was properly drawn by the Commission, which was always careful not to tackle questions of a highly technical nature before at least the contours of a generally accepted law did not come to sight. There are other similar matters, too, not mentioned in the Sixth Committee, which have emerged during the debates in the Commission, like the application of the most-favoured-nation clause vis-à-vis quantitative restrictions, the problem of the so-called anti-dumping and countervailing duties, etc.,<sup>37</sup> but all these, the Special Rapporteur feels, belong to fields outside the functions of the Commission. It may be recalled that when these matters were raised in the Commission, one of the members called them "... the pitfalls which the Commission would have to avoid".<sup>38</sup>

## 8. Non-retroactivity

29. The Special Rapporteur submits to the consideration of the Commission the following article:

*Article C. Non-retroactivity of the present draft articles*

Without prejudice to the application of any rule set forth in the present articles to which most-favoured-nation clauses would be subject under international law independently of the articles, the articles apply only to most-favoured-nation clauses embodied in treaties which are concluded by States after the entry into force of the present articles with regard to such States.

*Commentary*

(1) This article is based on article 4 of the Vienna Convention. It is well known that article 4 of the Convention was not proposed by the Commission, having

<sup>34</sup> Statement by the representative of the Netherlands (see *Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1543rd meeting, para. 36).

<sup>35</sup> See the report of the International Law Commission on the work of its twenty-seventh session (*Yearbook ... 1975*, vol. II, p. 117, document A/10010/Rev.1, para. 103).

<sup>36</sup> *Yearbook ... 1970*, vol. II, pp. 235 *et seq.* and 239 *et seq.*, document A/CN.4/228 and Add.1, paras. 202-206 and annex II.

<sup>37</sup> *Yearbook ... 1968*, vol. I, p. 187, 976th meeting, para. 22.

<sup>38</sup> *Ibid.*, p. 189, 976th meeting, para. 44.

been added by the representatives of States assembled at the United Nations Conference on the Law of Treaties, and adopted at the 30th plenary meeting by 81 votes to 5, with 17 abstentions.

(2) It is not intended in this report to discuss in detail the philosophy of article 4.<sup>39</sup> It seems enough to refer to the fact that the provisions of the Vienna Convention, inasmuch as they represent codification of international law, do not seem to have lost their authority by the inclusion of article 4. If the articles on the most-favoured-nation clause are intended to become a supplement to the Vienna Convention, then, it is submitted, it would be appropriate that the supplement should follow the legal nature of the instrument which it supplements.

(3) The inclusion of a provision of this type in the draft articles was suggested in the course of the debate in the Commission,<sup>40</sup> and in the Sixth Committee of the General Assembly at its thirtieth session.<sup>41</sup> It may help to settle the controversy concerning the nature of the customs union exception.<sup>42</sup>

### 9. Freedom of the parties to draft the clause and restrict its operation

30. The Special Rapporteur submits to the consideration of the Commission the following article:

*Article D. Freedom of the parties to draft the clause and restrict its operation*

The present draft articles are in general without prejudice to the provisions which the granting State and the beneficiary State may agree to in the treaty containing the most-favoured-nation clause or otherwise. Such provisions or agreements may in particular withhold from the beneficiary State right to treatment extended by the granting State to a specified third State or States, or to persons and things in a determined relationship with such States, or to most-favoured-nation treatment in respect of a specified subject matter.

#### *Commentary*

(1) The origin and the purpose of this article is twofold. The first sentence of the article is intended to respond to the question raised in the Commission's report on its twenty-seventh session.<sup>43</sup> It chooses to express in a general way the idea that most-favoured-nation clauses can be drafted in the most diverse ways, that parties to the clause, that is, the granting and the beneficiary State, are generally free to agree on whatever they wish and that such agreement prevails over the provisions of the draft articles. Article 53 of the Vienna Convention obviously sets a limit to the

<sup>39</sup> In this connexion, see S. Rosenne, *The Law of Treaties—A guide to the legislative history of the Vienna Convention* (Leiden, Sijthoff, 1970), p. 76.

<sup>40</sup> By Mr. Tsuruoka (see *Yearbook . . . 1975*, vol. I, p. 204, 1343rd meeting, para. 35).

<sup>41</sup> By the representative of Japan (see *Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1546th meeting, para. 26).

<sup>42</sup> See sect. 11 below.

<sup>43</sup> See *Yearbook . . . 1975*, vol. II, p. 119, document A/10010/Rev.1, para. 117.

freedom of the parties, although it is not easy to imagine how a most-favoured-nation clause could conflict with a peremptory norm of general international law.

(2) It is admitted that the drafting of the first sentence of the article can be described as somewhat loose, in that it refers to the "present articles", namely to all articles of the draft. Having examined the individual articles one by one, however, the Special Rapporteur has come to the conclusion that it would be a very difficult task to establish precisely and to select those articles from which the granting State and the beneficiary State could absolutely not contract out. He believes that the drafting presented not only avoids a cumbersome punctiliousness, but, supposing a fair and reasonable interpretation, it expresses with sufficient clarity the idea that the draft articles are not intended to inhibit the contractual freedom of the granting and the beneficiary State.

(3) The second sentence is an elaboration of the first and could be considered, strictly speaking, as superfluous. However, the Special Rapporteur is very much in favour of its maintenance. He recalls the tentative proposal put forward by Mr. Pinto in the Drafting Committee in 1975, on "conditions and exclusions".<sup>44</sup> The present proposal contained in the second sentence of the article adopts the basic idea of Mr. Pinto's proposal, thus recognizing the value of a statement which, while not necessary from a strictly legal point of view, has a distinct educative character.

(4) According to the second sentence, the parties are free to exclude certain favours from the operation of the clause. Such exclusions may be *ratione personae* or *ratione materiae*.

### 10. Exceptions to the operation of the clause

31. One representative in the Sixth Committee "wondered if all the customary exceptions to the application of the most-favoured-nation clause had really been covered"<sup>45</sup> [by the study of the Commission]. This point is well taken.

32. To deal properly with the problem raised by the representative, it must be first clarified what is understood by the expression "customary exception". The expression can mean two things: an exception which is customarily included in the clause or the treaty containing it or an exception which by virtue of the rules of customary international law excepts certain favours from the operation of the most-favoured-nation clause without explicit stipulation. The former may be briefly called a conventional exception and the latter an implied exception.

33. To begin with the latter, it can be safely said that there is no rule of customary international law which would except certain favours from all kinds of most-favoured-nation promises whether they apply to consular immunities, to intellectual property or to international trade. What is

<sup>44</sup> In this connexion, see also *Yearbook . . . 1975*, vol. I, p. 174, 1337th meeting, para. 38.

<sup>45</sup> Statement by the representative of France (see *Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1549th meeting, para. 36).

alleged by some is that in the field of international trade, and only there, certain exceptions are so often stipulated in treaties that they have become international custom, or perhaps that by the way of progressive development they could be elevated to a general rule.

34. The main contention here is the case of customs unions and similar groupings of States. In this respect the Special Rapporteur has had the opportunity to expound his views, in his sixth report,<sup>46</sup> both from the point of view of the existing legal situation (*de lege lata*) and from that of a possible change (*de lege ferenda*). He will revert to the matter below.<sup>47</sup>

#### FRONTIER TRAFFIC

35. One of the exceptions which is often included in commercial treaties containing a most-favoured-nation clause relates to frontier traffic. Thus, article XXIV, paragraph 3 of GATT contains a cursory statement providing that:

The provisions of this Agreement shall not be construed to prevent:

(a) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic;

...<sup>48</sup>

The text of this provision is similar to that included in paragraph 7 of the 1936 resolution of the Institute of International Law:

The most-favoured-nation clause does not confer the right:

To the treatment which is or may hereafter be granted by either contracting country to an adjacent third State to facilitate the frontier traffic;

...<sup>49</sup>

36. The frontier traffic exception was already discussed in the League of Nations Economic Committee. The Committee stated in its conclusion *inter alia* that:

... in most commercial treaties, allowance is made for the special situation in these [frontier] districts by excepting the Customs facilities granted to frontier traffic from the most-favoured-nation régime... In any case, it must be admitted that the exception concerning frontier traffic is rendered necessary, not merely by long-standing tradition but by the very nature of things, and that it would be impossible, owing to differences in the circumstances, to lay down precisely the width of frontier zone which should enjoy a special régime...<sup>50</sup>

37. Indeed, it seems to be quite general practice for commercial treaties concluded between States with no common frontier to except from the operation of the most-favoured-nation clause advantages granted to neighbouring countries in order to facilitate frontier traffic.<sup>51</sup> Commercial treaties concluded between neighbouring countries constitute a different category, inasmuch as the countries may

or may not have a uniform regulation of the frontier traffic with their different neighbours.

38. According to R. C. Snyder, there is almost universal agreement that free trade or freer trade must be allowed within a restricted (frontier) zone and that the generalization of this concession does not fall within the requirements of equality of treatment.<sup>52</sup> Snyder quotes from a 1923 Convention between France and Czechoslovakia, which exempts concessions granted within a 15-kilometre frontier zone "such régime being confined exclusively to the needs of the populations of that zone or dictated by the special economic situations resulting from the establishment of new frontiers".<sup>53</sup>

39. While recognizing that the frontier traffic exception is very general in commercial treaties, the Special Rapporteur does not propose the adoption of a provision in this respect. His reasons are as follows: the practice of States has not produced, to the best of his knowledge, an instance where a dispute has arisen over the question whether, in the absence of a specific stipulation, the advantages granted in the frontier traffic ought or ought not to be extended to a non-adjacent beneficiary State. States seem to be satisfied with the present situation in which they themselves decide upon and define the scope of the exception. They do not claim that such exception is implied in a commercial treaty without express stipulation. A rule of such sweeping character as that included in the 1936 resolution of the Institute of International Law would have little value, if any, the more so as it does not envisage the situation where the beneficiary State is itself one of the neighbours of the grantor.

#### 11. The customs-union issue

40. The stipulation of an exception as to the advantages granted within a customs union, free-trade area, etc. is very common in *commercial* treaties. It stands to reason that it is only in respect of tariff and non-tariff *trade* barriers that the contracting parties to a treaty containing such a clause agree to make an exception in the sense that they will not extend to each other *these types* of advantage in their mutual trade.<sup>54</sup>

41. A customs union, etc. may be formed not only by a multilateral but also by a bilateral treaty. This is self-evident, but, as an example, the case may be recalled of the German-Austrian attempt. Hence, the problem does not revolve around article 15 and its casting "in too rigid a form".<sup>55</sup>

<sup>52</sup> *The Most-Favored-Nation Clause: An Analysis with Particular Reference to Recent Treaty Practice and Tariffs* (New York, King's Crown Press, Columbia University, 1948), p. 157, foot-note 5, quoting from R. Riedl and H. P. Whidden with the remark that the practice of States in this respect has changed little in 100 years.

<sup>53</sup> Commercial Convention between France and Czechoslovakia, signed at Paris on 17 August 1923, article 13 (League of Nations, *Treaty Series*, vol. XLIV, p. 29).

<sup>54</sup> There is no significant practice of States in the sense that in fields other than trade, advantages granted within "a community" or "an integration" are excepted from the operation of the clause. See in this sense D. Vignes, *loc. cit.*, p. 284.

<sup>55</sup> See *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, para. 146.

<sup>46</sup> *Yearbook* ... 1975, vol. II, pp. 9–20, document A/CN.4/286, paras. 9–63.

<sup>47</sup> See sect. 11.

<sup>48</sup> GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No. GATT/1969–1), p. 41.

<sup>49</sup> *Yearbook* ... 1969, vol. II, p. 181, document A/CN.4/213, annex II.

<sup>50</sup> *Ibid.*, pp. 178–179, annex I.

<sup>51</sup> S. Basdevant "Clause de la nation la plus favorisée", in A. G. de Lapradelle and J.-P. Niboyet, *Répertoire de droit international* (Paris, Sirey, 1929), vol. III, pp. 476–477, para. 55.

42. The question debated in the Sixth Committee can be reduced to the following: should the draft articles on the most-favoured-nation clause elevate the customs union exception by way of codification or progressive development to a general rule with respect to commercial treaties? Or expressed in other words, should the draft articles establish a rule reversing the presumption which, in the view of the Special Rapporteur, presently exists? He believes that, today, if there is no exception written in the treaty, then a most-favoured-nation pledge means that the beneficiary State is entitled to the treatment of the most-favoured third State irrespective of the relationship between that State and the granting State. Is it, then, feasible or desirable to change the situation in the direction of a devaluation of the meaning of the expression "*most-favoured-nation*", that is to reduce the meaning of this notion, even if the treaty is silent on this, to "*most-favoured-nation minus the one or more nations which have entered into a customs union or similar groupings with the granting State*", this, of course, only with respect to treaties on commerce in general and customs tariffs in particular?

43. One representative in the Sixth Committee at the thirtieth session of the General Assembly held this latter view with a certain qualification. He thought that the implied exception rule should apply in cases where the customs union or free-trade area had been established *after* the conclusion of the agreement containing the most-favoured-nation clause, while in cases where the granting State was already a member of such a union at the time of the conclusion of the agreement, the clause would extend to union-benefits unless otherwise agreed.<sup>56</sup> This view, however, does, in essence, not differ from the view of those who favour the implied exception rule, the case of a union-member promising most-favoured-nation treatment and not excepting union-benefits being more hypothetical than practical.

44. The purpose of the following considerations is to take account of the main elements of the discussion which has taken place in the Sixth Committee at the thirtieth session of the General Assembly and to offer some thoughts which may, perhaps, make it easier to adopt a common stand on the matter.

45. Taking the discussion as a whole, it can be ascertained that several representatives supported purely and simply the position of the Special Rapporteur.<sup>57</sup> Several representatives from developing countries voiced concern about a solution which would not include an exception from the operation of the clause in regard of benefits granted within customs unions and other groupings of *developing States*.<sup>58</sup> While many representatives did not take a stand on the matter, strong disapproval of the Special Rapporteur's position was expressed by the spokesmen for EEC,<sup>59</sup> and by several,

although not all, of the representatives of States members of EEC.

46. It is first proposed to concentrate here on customs unions or other groupings of developed States. Later, under the heading "*Most-favoured-nation clause in relation to trade among developing countries*" there will be an examination of the question whether there is a possibility of offering in this broader context a different solution in favour of developing countries.<sup>60</sup>

47. As their main argument, those representatives who spoke in favour of a provision establishing a general rule of an implied customs-union, etc. exception referred to the current trend towards regional co-operation, and expressed fears that if the articles did not embody such an implied exception, States would be wary of granting most-favoured-nation treatment for fear that their hands would be tied if they wished in the future to form an economic union or to conclude agreements for economic integration.<sup>61</sup>

48. This argument is felt to be unconvincing and to be even less tenable if the two newly proposed provisions (articles C and D) are adopted. States were and will always be, with a little amount of foresight, in the position to provide for an appropriate exception in their commercial treaties, and practice shows that this is very often the case. The purpose of draft article D is to draw the attention of States to this fact. States are also in the position to write into their treaties provisions which entitle them to terminate the whole or part of their treaty obligations at relatively short notice if they feel that this serves their interest. It was felt that to state this in a separate article would go too far in giving advice to States.

49. Those arguing for an implied customs-union, etc. exception look at one side of the coin only. On the other side, however, the State which has received a most-favoured-nation pledge with no reservations, that is, a position of equal opportunity and non-discrimination on its partner's market, and which (or whose nationals), relying on the subsistence of this situation may have made heavy investments in its own industries, etc., may one day find that it has lost its non-discriminative position because one of the competitors receives special advantages as a partner of the granting State in a customs union or a free trade area.

50. Such a situation would not correspond to distributive justice. Reference may be made in this connexion to a distinguished writer who, himself a protagonist of the exception (though admittedly in another context), ventilated the following idea:

It is another question whether, should the occasion arise, an arbitrator ruling in accordance with equity would not feel bound to hold it desirable that some compensation should be made by the Government participating in the union to the third State benefiting from the most-favoured-nation clause.<sup>62</sup>

<sup>56</sup> The representatives of Sweden (*ibid.*, Sixth Committee, 1545th meeting, para. 24).

<sup>57</sup> E.g. the representatives of Brazil (*ibid.*, 1538th meeting, para. 27), the Ukrainian Soviet Socialist Republic (*ibid.*, 1542nd meeting, para. 5), the USSR (*ibid.*, 1544th meeting, para. 14).

<sup>58</sup> E.g. the representatives of Peru (*ibid.*, 1539th meeting, para. 24), Guatemala (*ibid.*, 1548th meeting, para. 28), Bolivia (*ibid.*, 1548th meeting, para. 34), Nicaragua (*ibid.*, 1549th meeting, para. 18).

<sup>59</sup> See the statements by the representative of Italy (*ibid.*, 1544th

meeting, paras. 37–45) and the observer for EEC (*ibid.*, 1549th meeting, paras. 47–53).

<sup>60</sup> See paras. 108–131 below.

<sup>61</sup> See the statement by the representative of Italy, speaking on behalf of EEC (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1544th meeting, paras. 39–40).

<sup>62</sup> A.-Ch. Kiss, "La convention européenne d'établissement et la clause de la nation la plus favorisée", *Annuaire français de droit international*, 1957 (Paris), vol. III, p. 489.

51. Another argument referring to the "sometimes very extensive duties" linked to the advantages gained in an economic union<sup>63</sup> loses sight of the basic philosophy of the unconditional most-favoured-nation clause as set out in article 13 of the draft.

52. There follows the argument on the disruptive effect of article 15 (in reality not of article 15 but of the absence of a provision concerning an implied customs-union exception) on the current relationships between States members of existing customs unions or similar associations and third States with which those members had previously entered into agreements containing a most-favoured-nation clause, in case that such clause did not carry with it an express customs-union exception. This argument carries under the same breath the proper answer to it when it refers to the practice of EEC "where negotiation of mutually acceptable arrangements with third States had been a practical solution to the question of the effect of pre-existing most-favoured-nation clauses".<sup>64</sup>

53. The above reference reflects precisely the present state of the law and reveals that (a) most-favoured-nation clauses, unless explicitly otherwise agreed, do attract benefits granted within customs unions or associations like EEC, and (b) this situation, if it is too onerous for the respective members of the union, can be remedied by "mutually acceptable arrangements", that is, by arrangements which take into account the equitable interest of both parties: of the granting State, which has chosen to join a union and to grant preferential rights to the other members of the union and wishes to be freed from its obligation to extend the same treatment to the beneficiary State; and of the beneficiary State which is in possession of an acquired right to non-discriminative treatment based on the clause and which may be willing to give up the whole or part of this right if, as this follows from the nature of the trade relations of States, a mutually satisfactory solution can be found to reconcile the two conflicting interests. This is the present state of the law, as clearly admitted by those speaking on behalf of an important union, and in the circumstances it would be extremely difficult for the Special Rapporteur to propose a change in the existing law, the more so, as seen from the records of the Sixth Committee, a substantial weight of opinion would firmly oppose such a change.

54. One additional remark may be made: no representative in the Sixth Committee referred to the passage in the commentary to article 15 in the Commission's report on the work of its twenty-seventh session, in which the Special Rapporteur asked the theoretical question as to how the article on the customs-union exception should be framed, if it still seemed desirable: should it follow the complicated pattern of GATT, or should it, by means of similar drafting, be made more generous and hence less legal in character?<sup>65</sup>

<sup>63</sup> Statement by the representative of Italy, speaking on behalf of EEC (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1544th meeting, para. 41).

<sup>64</sup> *Ibid.*, para. 43.

<sup>65</sup> See *Yearbook . . . 1975*, vol. II, p. 153, document A/10010/Rev.1, chap. IV, sect. B, para. 64 of the commentary to article 15.

## ECONOMIC BACKGROUND AND CONCLUSIONS

55. It could be said that the economic background is not the Commission's business. It is not the intention of the Special Rapporteur to embark upon economic reasoning. It is, however, desirable that lawyers should not be complete strangers to the field which they wish, through the adoption of rules, to regulate. Moreover, if it comes to proposing new laws, they have to be in a position to judge if there are economic or other extralegal reasons for doing so. It was for this purpose that the Special Rapporteur, in his sixth report, quoted a short passage from a recognized authority. The conclusion of this passage was that "one of the great attractions of regional economic groupings [based on a customs union or the like] to their members is precisely that they do divert trade away from non-members".<sup>66</sup> Translated into plain English this means that such groupings serve, maybe only in the short run, the interest of members and harm those of the outsiders.

56. Incidentally, the literature of the science of economics is very rich in studies on the effects of customs unions, free-trade areas, etc. Some of these operate with an arsenal of devices: higher mathematics, diagrams, symbolic curves and the like, which do not make their reading easier for the layman in the field, as the Special Rapporteur himself admits to be.

57. From a recent scholarly study, the following brief passages, admittedly drops from an ocean of literature on the subject, may be quoted:

Customs union theory has come a long way since Jacob Viner, of Princeton University, first used the terms "trade diversion" and "trade creation" in 1950.<sup>2</sup> These terms are now so familiar that they warrant the briefest possible treatment. Trade creation and trade diversion, according to Professor Viner, may be summarized as follows. To the extent that a customs union or, for that matter a free trade area discriminates against low-cost world suppliers, and causes imports from the rest of the world to decline, it is trade-diverting. The trade flows which are thus cancelled between the union and "world" countries are taken up by less efficient union producers which were not able to compete with "world" producers as long as both were subject to non-discriminatory tariffs before the formation of the union. The formation of the union, however, causes discrimination in the conditions of access to partner markets, which gives union suppliers a tariff advantage over "world" suppliers. This is trade diversion.

...

By the mid-1960's, thinkers like C. A. Cooper and B. F. Massell,<sup>8</sup> of the University of Cambridge, and Harry Johnson<sup>9</sup> began analysing why countries pursued protection policies and formed customs unions.

...

They concluded that possibly the greatest attraction for governments in joining customs unions was that they made it possible to extend the protected market for inefficient domestic producers, . . . thus allowing for

<sup>2</sup> J. Viner, *The Customs Union Issue* (New York, Carnegie Endowment for International Peace, 1950).

<sup>8</sup> Cooper and Massell, "A New Look at Customs Union Theory", *Economic Journal*, Cambridge, vol. LXXV, 1965, pp. 742-7.

<sup>9</sup> Harry G. Johnson, "An Economic Theory of Protectionism, Tariff Bargaining, and the Formation of Customs Unions", *Journal of Political Economy*, Chicago, vol. XXVIII, 1965.<sup>67</sup>

<sup>66</sup> G. G. Patterson, "The Most-Favored-Nation Clause and Economic Integration", *Annuaire européen*, 1965 (The Hague), vol. XIII (1967), p. 149 (quoted in *Yearbook . . . 1975*, vol. II, p. 19, document A/CN.4/286, para. 60).

<sup>67</sup> V. Curzon, *The Essentials of Economic Integration: Lessons of EFTA Experience* (London, Macmillan, 1974), pp. 253 and 260.

their survival and, indeed, expansion, by persuading other countries to share the cost of supporting them.

58. What remains of all this, and much more reading, in the mind of the Special Rapporteur, is as follows: there does not seem to be any compelling economic reason to propose a change in the existing law on the most-favoured-nation clause and thereby promote, to however minuscule an extent, the formation of customs unions, at least among developed countries.

59. In this connexion, may it be permitted to quote from an UNCTAD document a passage which caught the Special Rapporteur's eye:

The difficulties faced by developing countries in exporting have been heightened with the formation of regional groupings among developed countries and the consequential removal of barriers to intra-trade. Among the countries outside these groupings, the developing countries tend to be most vulnerable to the resultant tariff and non-tariff treatment, given their initial competitive disadvantages. As a result of the formation of such groupings and other preferential arrangements, almost two fifths of the intra-trade in manufactured and semi-manufactured products among the developed market economy countries are already on a preferential basis ...<sup>68</sup>

60. Another, and the last, quotation offered which has relevance with respect to the economic and legal problems involved, is from chapter II, article 12 of the Charter of Economic Rights and Duties of States, adopted and solemnly proclaimed by the General Assembly in resolution 3281 (XXIX) of 12 December 1974, paragraph 1 of which reads as follows:

States have the right in agreement with the parties concerned, to participate in subregional, regional and interregional co-operation in the pursuit of their economic and social development. All States engaged in such co-operation have the duty to ensure that the policies of those groupings to which they belong correspond to the provisions of the present Charter and are outward looking, consistent with their international obligations\* and with the needs of international economic co-operation, and have full regard for the legitimate interests of third countries, especially developing countries.\*

61. The foregoing is, of course, a refined version of the idea already expressed in General Principle Nine contained in annex A.I.1 of the recommendations adopted by UNCTAD at its first session:

Developed countries participating in regional economic groupings should do their utmost to ensure that their economic integration does not cause injury to, or otherwise adversely affect, the expansion of their imports from third countries and, in particular, from developing countries, either individually or collectively.<sup>69</sup>

62. Article 12 of the Charter of Economic Rights and Duties of States is, in the submission of the Special Rapporteur, a clear statement of the present state of the law and is in complete accordance with his allegedly "rigid" position.<sup>70</sup>

\* Italics supplied by the Special Rapporteur.

<sup>68</sup> Operational Guide to the Generalized System of Preferences (GSP): a report by the UNCTAD secretariat" (TD/B/AC.5/41), para. 13.

<sup>69</sup> *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No. 64.II.B.11), p. 20.

<sup>70</sup> Statement by the representative of Italy, speaking on behalf of EEC (see *Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1544th meeting, para. 39).

63. In conclusion, the Special Rapporteur submits the following: The adoption of article C on the non-retroactivity of the present articles will furnish a prophylactic device against all possible ills caused by most-favoured-nation clauses included in future treaties, inasmuch as the parties to such treaties will be, as indeed they always have been, in the position to restrict the operation of the clause at their will. Article D on the freedom of the parties in drafting the clause and restricting its operation is intended to make States realize their rights. If they will avail themselves of those rights, this will further prevent disputes and difficulties.

64. To close this section of the report, the Special Rapporteur would like to refer to the commentary to article 15 in the Commission's report on the work of its twenty-seventh session<sup>71</sup> and once again to draw attention to the fact that the whole question has very limited practical significance. As he sees it, there is *de lege lata* no such thing as an implied customs-union exception, but by the many stipulations in bilateral treaties and mainly by the one in article XXIV of GATT, the exception is, under the terms and conditions of those stipulations, very widely expressly conventionally assured.

## 12. Other conventional exceptions

65. A State granting most-favoured-nation rights to another can restrict its obligation in two ways: (a) *ratione personae*, that is, by specifying certain States by name or otherwise and stating that the treatment extended to them will not be claimable by the beneficiary State, when the latter so agrees; and (b) *ratione materiae*. This can be done either by agreeing that the most-favoured-nation obligation will apply only to a restricted field, for instance, consular immunities, access to the courts, etc., or if the clause covers a wide field such as trade, shipping or the like, by excepting certain subject-matters which will fall outside the operation of the clause.

66. The customs-union exception is an example of the first type mentioned, as are those provisions which except the benefits granted to neighbouring countries, for instance, article 3 of the Trade and Payments agreement of 2 June 1961 between the Union of Soviet Socialist Republics and the Somali Republic which excludes from the operation of the clause: "... advantages which have been or which may hereafter be accorded by either Contracting Party to contiguous countries ..."<sup>72</sup>

67. The frontier traffic exception is based on both grounds because it applies to specific countries (neighbours) but only in certain matters (frontier traffic).

68. An example of treaties which exclude benefits extended to particular countries is the Agreement on Commerce of 19 July 1963, between Japan and El Salvador, paragraph 3 of the Protocol to which specifies that the clause shall not apply to the advantages accorded by El Salvador to the

<sup>71</sup> See *Yearbook ... 1975*, vol. II, p. 153, document A/10010/Rev.1, chap. IV, sect. B, para. 65 of the Commentary to article 15.

<sup>72</sup> United Nations, *Treaty Series*, vol. 493, p. 186.



countries of the isthmus of Central America, namely Costa Rica, Guatemala, Honduras, Nicaragua and Panama.<sup>73</sup>

69. Stipulations of exceptions *ratione materiae* are infinitely various. They are very often couched in terms which reserve the right of the granting State to adopt domestic laws and regulations contrary to the equality of treatment obligation. Treaties of commerce, of establishment and of shipping are typical of those including clauses of exceptions.

70. Article XX of the GATT embodies a long list of exceptions and these are worth mentioning not only because of the importance of the Agreement but also because they are based on a certain practice of States reflected in bilateral treaties concluded before the adoption of the GATT. Among the exceptions enumerated by article XX of the Agreement are measures necessary to protect public morals (according to R. C. Snyder: "Every nation protects itself against obscene literature ...";<sup>74</sup>) also mentioned are measures: necessary to protect human, animal or plant life or health; relating to the importation or exportation of gold and silver; necessary to secure compliance with laws or regulations, which are not inconsistent with the Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under article II, paragraph 4 and article XVII of the Agreement, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices; relating to the products of prison labour; imposed for the protection of national treasures of artistic, historic or archaeological value; relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; undertaken in pursuance of obligations under intergovernmental commodity agreements which conform to the principles approved by the Economic and Social Council in its resolution 30 (IV) of 28 March 1947; involving restrictions on exports of domestic materials necessary to assure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a government stabilization plan; and essential to the acquisition or distribution of products in general or local short supply.

71. All the exceptions enumerated are subject, also according to article XX, to the requirement that they should not be applied in a manner "which would constitute a means of *arbitrary*\* or *unjustifiable*\* discrimination between countries *where the same conditions prevail*,"\* or a *disguised restriction on international trade*"\*. These conditions reduce somewhat the freedom of the granting State, which consequently is not supposed to set aside its most-favoured-nation obligations unless it is in a manner which would be "justifiable" etc.

72. Further exceptions are contained in article XXI of the General Agreement as well as in some bilateral treaties. According to article XXI a contracting party may take any action which it considers necessary for the protection of its

essential security interests relating to fissionable materials or the materials from which they are derived; to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment and taken in time of war or other emergency in international relations. Finally a contracting party may take any action in pursuance of its obligations under the Charter of the United Nations for the maintenance of international peace and security.

73. This brief description of the exceptions embodied in the General Agreement has served the purpose of giving a picture of contemporary practice in respect of stipulations restricting the operation of the clause. It is believed that these exceptions are representative also of those embodied in bilateral treaties. It has to be stressed that the enumeration of these exceptions does not possess an exhaustive character. There are some others which are frequent, for instance, coastal trade and inland navigation in shipping agreements, and States are free to create new ones.

74. It is believed that these exceptions operate only if expressly stipulated. The Special Rapporteur accepts the thesis of D. Vignes: "... *on ne peut reconnaître à une exception faite expressément le caractère d'une exception de plein droit que le jour où son acceptation s'est tellement généralisée qu'elle ne devient plus qu'une "clause de style"...*"<sup>75</sup> None of the reservations enumerated belong to this category.

75. Of course, if the obligations of a granting State under a most-favoured-nation clause conflict with its duties under the United Nations Charter, these duties prevail under Article 103 of the Charter. This applies, however, to any treaty obligation and it does not therefore seem necessary to spell it out in respect of the most-favoured-nation clause.

76. That actions taken in accordance with decisions of a world organization may cause complications can be illustrated by the following case which arose in the League of Nations period. Hungary asked the United Kingdom in 1935 under a most-favoured-nation clause to accord to imports of Hungarian poultry the same customs concessions as had been granted to Yugoslavia. These concessions, however, were granted by the United Kingdom to Yugoslavia as a compensation for losses incurred by the operation of sanctions against Italy. The Hungarian claim was rejected on the ground that the concessions to Yugoslavia had been made "in virtue of a decision of the League of Nations of which Hungary was also a member and the decisions of which Hungary was also obliged to carry out."<sup>76</sup>

### 13. The case of the land-locked States

77. Several representatives in the Sixth Committee at the thirtieth session of the General Assembly raised the *sui*

<sup>73</sup> D. Vignes, *loc. cit.*, p. 284.

<sup>76</sup> *The Times* (London), 9 January 1936, p. 9 (d), quoted by G. Schwarzenberger. "The most-favoured-nation standard in British State practice", in *The British Year Book of International Law*, 1945, vol. 22, p. 111 (London).

\* Italics supplied by the Special Rapporteur.

<sup>73</sup> *Ibid.*, vol. 518, p. 167.

<sup>74</sup> R. C. Snyder, *op. cit.*, p. 163.

*generis* case of the land-locked States, believing that it merited exceptional treatment in the codification of the rules pertaining to the application of the most-favoured-nation clause.<sup>77</sup> The Chairman of the Commission promised that the Commission would study the matter.<sup>78</sup> The representatives recalled the commentary to article 14 as it appeared in the Commission's report on its twenty-seventh session. For the convenience of readers, the relevant passage is reproduced below:

(9) The Convention on Transit Trade of Land-Locked States of 8 July 1965 contains the following provision (article 10) on the relation to the most-favoured-nation clause:

"1. The contracting States agree that the facilities and special rights accorded by this Convention to land-locked States in view of their special geographical position are excluded from the operation of the most-favoured-nation clause. A land-locked State which is not a party to this Convention may claim the facilities and special rights accorded to land-locked States under this Convention only on the basis of the most-favoured-nation clause of a treaty between that land-locked State and the contracting State granting such facilities and special rights.

2. If a contracting State grants to a land-locked State facilities or special rights greater than those provided for in this Convention, such facilities or special rights may be limited to that land-locked State, except in so far as the withholding of such greater facilities or special rights from any other land-locked State contravenes the most-favoured-nation provision of a treaty between such other land-locked States and the contracting State granting such facilities or special rights."<sup>512</sup>

(10) The preamble of the 1965 Convention reaffirms principle VII relating to transit trade of land-locked countries adopted by the United Nations Conference on Trade and Development:

"The facilities and special rights accorded to land-locked countries in view of their special geographical position are excluded from the operation of the most-favoured-nation clause."<sup>513</sup>

This principle stems from a proposal for an article on exclusion of the application of the most-favoured-nation clause included in a set of draft articles on access to the sea of land-locked countries submitted by Czechoslovakia to the Preliminary Conference of Land-Locked States in February 1958. The proposal was explained as follows:

"The fundamental right of a land-locked State to free access to the sea, derived from the principle of the freedom of the high seas, constitutes a special right of such a State, based on its natural geographical position. It is natural that this fundamental right belonging only to a land-locked State cannot be claimed, in view of its nature, by any third State by virtue of the most-favoured-nation clause. The exclusion from the effects of the most-favoured-nation clause of agreements concluded between land-locked States and countries of transit on the conditions of transit is fully warranted by the fact that such agreements are derived precisely from the said fundamental right."<sup>514</sup>

It was principle VII on which the drafters of the Convention relied and article 10 is seemingly nothing else but the translation of the principle into practical measures. Hence the question of the validity of article 10 vis-à-vis States not parties to the Convention turns on the nature of the "principle" on which it relies. Is it a principle derived from existing positive law or a principle derived from a conceptual postulate? Does the consensus expressed in UNCTAD suffice to establish the principle as customary law or is the principle no more than an inchoate rule of law, "a

<sup>512</sup> United Nations, *Treaty Series*, vol. 597, p. 42.

<sup>513</sup> *Ibid.*, p. 46.

<sup>514</sup> *Official Records of the United Nations Conference on the Law of the Sea*, vol. VII, *Fifth Committee (Question of Free Access to the Sea of Land-Locked Countries)* (United Nations publication, Sales No. 58.V.4, vol. VII), p. 77, document A/CONF.13/C.5/L.1, annex 6, commentary to article 8. See also the report of the Working Party to the Fifth Committee (*ibid.*, p. 84, document A/CONF.13/C.5/L.16, para. 13).

<sup>77</sup> See the statements by the representatives of Lesotho (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1545th meeting, para. 18); Botswana (*ibid.*, 1547th meeting, para. 36); Hungary (*ibid.*, para. 44) and Zambia (*ibid.*, 1550th meeting, para. 5).

<sup>78</sup> *Ibid.*, para. 29.

'stage' in the progressive development and codification of the principles of international law", which needs to be made concrete in the practice of individual States before it can acquire the character of a fully fledged rule of international law?"<sup>515</sup>

<sup>515</sup> See M. Virally, "Le rôle des 'principes' dans le développement du droit international" and S. Bastid, "Observations sur une 'étape' dans le développement progressif et la codification des principes du droit international", in *Faculté de droit de l'Université de Genève and Institut universitaire de hautes études internationales, Genève, Recueil d'études de droit international: en hommage à Paul Guggenheim* (Geneva, Imprimerie de la Tribune de Genève, 1968), pp. 531 and 132 [original text: French].<sup>79</sup>

78. The foregoing paragraphs were originally part of the commentary to article 8 as proposed by the Special Rapporteur in his fourth report.<sup>80</sup> Since that report was written, however, a new element in the development of the legal regulation of the situation of land-locked States has emerged. The problem has been dealt with by the Third United Nations Conference on the Law of the Sea and there are some signs which indicate that a consensus might be reached in respect of certain rules involving the special rights of land-locked States and also in respect of a rule excepting those special rights from the operation of the most-favoured-nation clause.

79. In the course of the 1975 session of that Conference an "Informal single negotiating text" was prepared for the purpose of providing a further basis for negotiation. The following nine articles are taken from the text presented by the Chairman of the Second Committee of the Conference and attention is drawn particularly to article 110.

#### PART VI. LAND-LOCKED STATES

##### Article 108

1. For the purposes of the present Convention:

(a) "Land-locked State" means a State which has no seacoast;

(b) "Transit State" means a State, with or without a seacoast, situated between a land-locked State and the sea through whose territory "traffic in transit" passes;

(c) "Traffic in transit" means transit of persons, baggage, goods and means of transport across the territory of one or more transit States, when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk or change in the mode of transport is only a portion of a complete journey which begins or terminates within the territory of the land-locked State;

(d) "Means of transport" means:

- (i) Railway rolling stock, sea and river craft and road vehicles;
- (ii) Where local conditions so require, porters and pack animals.

2. Land-locked States and transit States may, by agreement between them, include as means of transport pipelines and gas lines and means of transport other than those included in paragraph 1.

##### Article 109

1. Land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in the present Convention including those relating to the freedom of the high seas and the principle of the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territories of transit States by all means of transport.

2. The terms and conditions for exercising freedom of transit shall be agreed between the land-locked States and the transit States concerned through bilateral, subregional or regional agreements, in accordance with the provisions of the present Convention.

<sup>79</sup> *Yearbook . . . 1975*, vol. II, pp. 137-138, document A/10010/Rev.1, chap. IV, sect. B.

<sup>80</sup> *Yearbook . . . 1973*, vol. II, pp. 110-111, document A/CN.4/266, para. 12 of the commentary to article 8.

3. Transit States, in the exercise of their full sovereignty over their territory, shall have the right to take all measures to ensure that the rights provided for in this Part for land-locked States shall in no way infringe their legitimate interests.

#### Article 110

Provisions of the present Convention, as well as special agreements which regulate the exercise of the right of access to and from the sea, establishing rights and facilities on account of the special geographical position of land-locked States, are excluded from the application of the most-favoured-nation clause.

#### Article 111

1. Traffic in transit shall not be subject to any customs duties, taxes or other charges except charges levied for specific services rendered in connexion with such traffic.

2. Means of transport in transit used by land-locked States shall not be subject to taxes, tariffs or charges higher than those levied for the use of means of transport of the transit State.

#### Article 112

For the convenience of traffic in transit, free zones or other customs facilities may be provided at the ports of entry and exit in the transit States, by agreement between those States and the land-locked States.

#### Article 113

Where there are no means of transport in the transit States to give effect to the freedom of transit or where the existing means, including the port installations and equipment, are inadequate in any respect, transit States may request the land-locked States concerned to co-operate in constructing or improving them.

#### Article 114

1. Except in cases of *force majeure* all measures shall be taken by transit States to avoid delays in or restrictions on traffic in transit.

2. Should delays or other difficulties occur in traffic in transit, the competent authorities of the transit State or States and of land-locked States shall co-operate towards their expeditious elimination.

#### Article 115

Ships flying the flag of land-locked States shall enjoy treatment equal to that accorded to other foreign ships in maritime ports.

#### Article 116

Land-locked States may, in accordance with the provisions of Part III, participate in the exploitation of the living resources of the exclusive economic zone of adjoining coastal States.<sup>81</sup>

80. By the time the present report is discussed by the Commission it will be seen what turn events have taken in the 1976 session of the Conference on the Law of the Sea. In any case the Special Rapporteur believes that a provision on the line of article 110 quoted above could find its place among the articles on the codification and progressive development of the rules pertaining to the operation of most-favoured-nation clauses. Such a provision would go a step further than the corresponding provision of the Convention on Transit Trade of Land-Locked States of 8 July 1965 (article 10). As seen from the records of the Law

<sup>81</sup> *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. IV (United Nations publication, Sales No. E.75.V.10), p. 168 document A/CONF.62/WP.8, document A/CONF.62/WP.8/part II.

of the Sea Conference, however, there seems to prevail a trend to remedy as far as possible the disadvantages suffered by the land-locked States. The proposed article 110 would slightly contribute to this trend.

81. There are at present 29 sovereign States that are land-locked—that is, one fifth of the members of the international community. These States are: Afghanistan, Austria, Bhutan, Bolivia, Botswana, Burundi, Byelorussian SSR, Central African Republic, Chad, Czechoslovakia, Hungary, Laos, Lesotho, Liechtenstein, Luxembourg, Malawi, Mali, Mongolia, Nepal, Niger, Paraguay, Rwanda, San Marino, Swaziland, Switzerland, Uganda, Upper Volta, Vatican City and Zambia. Twenty of these are developing countries, some of them being among the least developed countries.

82. It is not proposed that the Commission enter into the study of the rights and facilities which are needed by the land-locked States.<sup>82</sup> It seems unquestionable that some such rights and facilities are needed by the land-locked States in order to exercise their right of access to the sea. A rule excepting such rights and facilities from the operation of the most-favoured-nation clause would indirectly assist those States in enjoying the benefits of the freedom of the seas. A tentative text of such a rule, based on article 110 quoted above, would run as follows:

#### *Article E. Most-favoured-nation clauses in relation to treatment extended to land-locked States*

A beneficiary State, unless it is a land-locked State, is not entitled under a most-favoured-nation clause to any treatment extended by a granting State to a land-locked third State if that treatment serves the purpose of facilitating the exercise of the right of access to and from the sea of that third State on account of its special geographical position.

## II. PROVISIONS IN FAVOUR OF DEVELOPING STATES

### I. Introduction

83. The Commission can take note with satisfaction that representatives of States in the Sixth Committee at the thirtieth session of the General Assembly were generally in agreement with the principle contained in article 21 as provisionally adopted in the course of the Commission's twenty-seventh session. The study of the comments of representatives reveal, however, that this general agreement was expressed in various ways, the spectrum of comments extending from enthusiastic approval on the one extreme to doubts as to the appropriateness of embodying such provision in the draft, on the other. To narrow and, possibly, close the gap of the opinions which seem to agree on the substance and differ only on method, some clarification may be needed.

### 2. The Commission's approach

84. It will be useful to recall *in extenso* what the Commission stated on the matter when it originally decided

<sup>82</sup> On these see: L. C. Caffisch, "The Access of Land-Locked States to the Sea", *Iranian Review of International Relations*, 1975-76 (Teheran), Nos. 5-6 (Winter, 1975-76), p. 53.

to study the impact of the different levels of economic development of States upon the operation of the most-favoured-nation clause. In its report on the work of its twenty-fifth session, the Commission stated:

120. The Commission, though at an early stage of its work, took cognizance of the problem which the application of the most-favoured-nation clause creates in the field of international trade when a striking inequality exists between the development of the States concerned. It recalled the report on "International trade and the most-favoured-nation clause" prepared by the secretariat of UNCTAD (the UNCTAD memorandum) which states, *inter alia*:

"To apply the most-favoured-nation clause to all countries regardless of their level of development would satisfy the conditions of formal equality, but would in fact involve implicit discrimination against the weaker members of the international community. This is not to reject on a permanent basis the most-favoured-nation clause. . . . The recognition of the trade and development needs of developing countries requires that for a certain period of time, the most-favoured-nation clause will not apply to certain types of international trade relations."<sup>317</sup>

121. It also recalled General Principle Eight of annex A.I.1. of the recommendations adopted by UNCTAD at its first session, which states, *inter alia*:

"International trade should be conducted to mutual advantage on the basis of the most-favoured-nation treatment and should be free from measures detrimental to the trading interests of other countries. However, developed countries should grant concessions to all developing countries and extend to developing countries all concessions they grant to one another and should not, in granting these or other concessions, require any concessions in return from developing countries. New preferential concessions, both tariff and non tariff, should be made to developing countries as a whole and such preferences should not be extended to developed countries. Developing countries need not extend to developed countries preferential treatment in operation amongst them."<sup>318</sup>

122. In recalling the question of the operation of the most-favoured-nation clause in trade relations between States at different levels of economic development, the Commission was aware that it could not enter into fields outside its functions and was not in a position to deal with economic matters and suggest rules for the organization of international trade. Nevertheless, it recognized that the operation of the clause in the sphere of international trade with particular reference to the developing countries posed serious problems, some of which related to the Commission's work on the topic. As indicated by the Special Rapporteur, . . . the Commission intends to examine, in future draft articles, the question of exceptions to the operation of the clause; it recognizes the importance of the question and intends to revert to it in the course of its future work."

<sup>317</sup> See *Yearbook . . . 1970*, vol. II, p. 231, document A/CN.4/228 and Add. 1, para. 188.

One member of the commission has recalled the Aristotelian definition of equality:

"There will be the same equality between the shares as between the persons, since the ratio between the shares will be equal to the ratio between the persons; for if the persons are not equal, they will not have equal shares; it is when equals possess or are allotted unequal shares, or persons not equal equal shares, that quarrels and complaints arise."<sup>319</sup>

<sup>318</sup> See Aristotle, *Nicomachean Ethics*, V; iii, 6."

(*Yearbook . . . 1968*, vol. I, p. 186, 967th meeting, para. 6.)

<sup>319</sup> See *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No. 64.11.B.11), p. 20.<sup>320</sup>

### 3. Most-favoured-nation clauses in relation to treatment under a generalized system of preferences: article 21

#### A. ARTICLE 21 RELATES TO TRADE AND TO TRADE ONLY

85. It is true that the text of article 21 as provisionally adopted does not contain the word "trade", this word,

<sup>320</sup> See *Yearbook . . . 1973*, vol. II, pp. 212-213, document A/9010/Rev.1.

which appeared in the original version, having been later deleted. But it is crystal clear that it refers to "treatment extended within a generalized system of preferences" (GSP) and thus its effect is limited to trade (mainly tariff) preferences. The whole provision is the legal expression of the "Agreed Conclusions" which were reached within the Special Committee on Preferences of UNCTAD and raised to a decision by the Trade and Development Board.<sup>84</sup> The core of these conclusions is chapter IX on "Legal Status" which clearly speaks of "tariff preferences".

86. Other areas of inter-State relations were mentioned in the Sixth Committee to which the principle of article 21 could be extended.<sup>85</sup> Reference was also made to the resolutions of the sixth and seventh special sessions of the General Assembly. The most relevant part of resolution 3201 (S-VI) of 1 May 1974 entitled "Declaration on the Establishment of a New International Economic Order" is the following:

...

4. The new international economic order should be founded on full respect for the following principles:

...

(n) Preferential and non-reciprocal treatment for developing countries, wherever feasible, in all fields of international economic co-operation whenever possible.

87. Basing himself on this text, one representative in the Sixth Committee urged that preferential treatment should apply not only to trade relations but also to the transfer of technology, the exploitation of resources constituting the common heritage of mankind and all areas of economic life and international relations.<sup>86</sup>

88. In this connexion, the Commission must be aware that the main concern of the developing countries is help, assistance, credits, gifts, transfer of technology, preferential treatment in any form. In this respect, however, the Commission has no power but only a very indirect influence through the progressive development of the rules pertaining to the most-favoured-nation clause. What the Commission can do is to propose rules which except from the operation of the clause certain favours granted to developing countries, thus relieving the donor countries from their obligations under most-favoured-nation clauses vis-à-vis other countries and thereby extending the favours in question to the developing countries. Of course, the Commission may wish to propose only such rules as have a chance of adoption by States. Article 21 was tentatively proposed on the basis of the agreement reached in the competent bodies of UNCTAD. This circumstance has achieved a relative success for this article in the General Assembly.

89. The extension of the article to fields other than trade would, in the view of the Special Rapporteur, not only endanger its future but would not be warranted, for the

<sup>84</sup> See *Yearbook . . . 1975*, vol. II, p. 165, document A/10010/Rev.1, chap. IV, sect. B, para. 5 of the commentary to article 21.

<sup>85</sup> See the statement made by the representative of Brazil (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1538th meeting, para. 29).

<sup>86</sup> See the statement made by the representative of Romania (*ibid.*, 1543rd meeting, para. 14).

following reasons. In some of the fields which were mentioned by representatives of States in the Sixth Committee (for instance, in the field of transfer of technology, exploitation of resources, etc.), the possible grants to developing countries do not lend themselves to generalization through most-favoured-nation clauses. In other words, these are not fields where most-favoured-nation clauses exist. In other fields the possibility of the application of most-favoured-nation clauses exists, but hitherto there has been no practice of States to support the idea that such fields should be covered by a provision similar to that of article 21. For example, the field of shipping and port facilities, which was mentioned,<sup>87</sup> is one where general non-reciprocal preferential treatment could theoretically be given to vessels of developing countries. This, however, to the knowledge of the Special Rapporteur, has not been the case and therefore the very basis upon which the establishment of an exception to most-favoured-nation clauses could be built is missing. Among the difficulties which prevent the introduction of such a complete innovation, might be mentioned the question of the nationality of the shipowner companies and the nationality of ships sailing under flags of convenience.

#### B. THE NATURE AND MEANING OF ARTICLE 21

90. Article 21 is neither a panacea for all the ills of the developing countries nor is it perfect in itself. It is the result of the study which the Commission undertook on the basis of the promise it made in the report on its twenty-fifth session,<sup>88</sup> and it seems to be within the ambit of a possible adoption by a large majority of States both developed and developing. Article 21 uses the means of a "*renvoi*" by referring to the notion of "generalized system of preferences". The usefulness of article 21 obviously depends upon the usefulness and further development of this system, the GSP.

##### (a) *Origin and objectives of the GSP*

91. For the sake of brevity, the reader is respectfully referred to the Special Rapporteur's sixth report.<sup>89</sup>

##### (b) *The shortcomings of article 21 are those of the GSP*

###### (i) *The temporary nature of the GSP*

92. It is true that "the initial duration of the generalized system of preferences" (see part VI of the Agreed conclusions reached by The Special Committee on Preferences)<sup>90</sup> is 10 years. The expression "initial duration" itself reveals that at the very origin of the idea a prolongation of the duration was envisaged. And indeed resolution 3362 (S-VII) of 16 September 1975 of the

<sup>87</sup> See the statement made by the representative of Brazil (*ibid.*, 1538th meeting, para. 29).

<sup>88</sup> See para. 84 above.

<sup>89</sup> *Yearbook ... 1975*, vol. II, pp. 20-24, document A/CN.4/286, paras. 64-74.

<sup>90</sup> *Ibid.*, p. 21, para. 66.

General Assembly contains the following passage:

#### I. INTERNATIONAL TRADE

8. ... The generalized scheme of preferences should not terminate at the end of the period of ten years originally envisaged and should be continuously improved through wider coverage, deeper cuts and other measures bearing in mind the interests of those developing countries which enjoy special advantages and the need for finding ways and means for protecting their interest ...

93. The developing countries continue to make efforts to maintain the GSP on a permanent basis. This was manifested quite recently at the Third Ministerial Meeting of the Group of 77, held at Manila from 26 January to 7 February 1976. The following are passages from the "Programme of Action" adopted at Manila:

##### *Section Two*

#### MANUFACTURES AND SEMI-MANUFACTURES

...  
(f) The GSP should be given a firm statutory basis and made a permanent feature of the trade policies of the developed market economy countries and of the socialist countries of Eastern Europe.

##### *Section Three*

#### MULTILATERAL TRADE NEGOTIATIONS

...  
6. Developing countries urge that the following specific issues of major concern to them be given immediate consideration:

...  
(d) The maintenance and improvement of the GSP ...<sup>91</sup>

(ii) *The generalized system is in fact a complex of national systems*

94. The preferences established by some 18 developed market-economy countries and by five socialist countries of Eastern Europe are far from uniform. Great differences exist in product coverage, in the depth of the tariff cut, in safeguard mechanisms by which the preference-giving countries seek to retain some degree of control over the trade which might be generated by the tariff advantages accorded by them (ceilings, tariff quotas in the case of "sensitive products", etc.), in the rules of origin (conditions for eligibility to preferential treatment, documentary evidence and procedure for claiming preferences, verification, sanctions, etc.), and in the range of the beneficiaries.

95. As to the last mentioned question, the preference-giving countries agree in general to base their choice of beneficiaries on the principle of self-election.<sup>92</sup> A statement by the preference-giving countries on this subject includes the following proviso:

Individual developed countries might ... decline to accord special tariff treatment to a particular country claiming developing status on

<sup>91</sup> See *Proceedings of the United Nations Conference on Trade and Development, Fourth Session*, vol. I, *Final Act and Report* (United Nations publication, Sales No. E.76. II.D.10), annex V.

<sup>92</sup> "Operational guide to the Generalized System of Preferences (GSP) report by the UNCTAD secretariat" (TD/B/AC.5/41), para. 118.

grounds which they hold to be compelling. Such *ab initio* exclusion of a particular country would not be based on competitive considerations ...<sup>93</sup>

(c) *General features of the tariff preferences*

96. The preferences are: (a) temporary in nature; (b) their grant does not constitute a binding commitment and, in particular, it does not in any way prevent: (i) their subsequent withdrawal in whole or in part; or (ii) the subsequent reduction of tariffs on a most-favoured-nation basis, whether unilaterally or following international tariff accommodation; (c) in the case of parties to GATT, their grant is conditional upon the necessary waiver.<sup>94</sup> The preferences are supposed to be *non-reciprocal* in the sense that the preference-giving countries are not to require the beneficiaries of the system to reciprocate with tariff concessions on their imports and *non-discriminatory* in the sense that the preferences shall be extended to products of all developing countries alike. This latter requirement is obviously qualified by the condition of self-election.

(d) *A threat to the GSP: multilateral trade negotiations*

97. The relationship between the multilateral trade negotiations (the "Tokyo Round", etc.) and the GSP is evident. To the extent that generally employed, so-called "most-favoured-nation" tariffs may be cut in the course of such negotiations in respect of products which are exported by developing countries and covered by the GSP, the margin of preference (the difference between the ordinary tariff and the preferential one) can be reduced or even eliminated, depending on the depth of the cut. Recognizing the danger of this possibility, the General Assembly, at its sixth and seventh special sessions, adopted resolutions pertaining to multilateral trade negotiations.

98. Resolution 3202 (S-VI) of 1 May 1974, entitled "Programme of Action on the Establishment of a New International Economic Order" provides *inter alia* in section I:

3. *General trade*

All efforts should be made:

...

(b) To be guided by the principles on non-reciprocity and preferential treatment of developing countries in multilateral trade negotiations between developed and developing countries, and to seek sustained and additional benefits for the international trade of developing countries, so as to achieve a substantial increase in their foreign exchange earnings, diversification of their exports and acceleration of the rate of their economic growth.

Resolution 3362 (S-VII) of 16 September 1975, entitled "Development and international economic co-operation" provides *inter alia*:

...

<sup>93</sup> Report by the Special Group on Trade with Developing Countries [of OECD], part one, sect. A (see *Proceedings of the United Nations Conference on Trade and Development, Second Session*, vol. III, *Problems and policies of trade in manufactures and semi-manufactures* (United Nations publication, Sales No. E.68.II.D.16), p. 79, document TD/56, annex).

<sup>94</sup> See *Yearbook ... 1975*, vol. II, p. 22, document A/CN.4/286, para. 66 *in fine*.

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...

8. Developed countries should take effective steps within the framework of multilateral trade negotiations for the reduction or removal, where feasible and appropriate, of non-tariff barriers affecting the products of export interest to developing countries on a differential and more favourable basis for developing countries. ...

99. The problem was dealt with by the Third Ministerial Meeting of the Group of 77 held at Manila from 26 January to 7 February 1976 where a Declaration and a Programme of Action were adopted.<sup>95</sup> In section three of the latter entitled: "Multilateral Trade Negotiations" the following has been stated *inter alia*:

...

6. Developing countries urge that the following specific issues of major concern to them be given immediate consideration:

...

(d) The maintenance and improvement of the GSP and effective compensation in case of the erosion of preferential margins resulting from the MFN tariff cuts;

100. The UNCTAD secretariat has prepared a study entitled: "The generalized system of preferences and the multilateral trade negotiations" which gives a detailed analysis of the problems involved and concludes:

... the developing countries *in toto* have a common interest in extending and preserving the benefits of the GSP. If the GSP is to continue to assist the developing countries in achieving their longer term development aspirations, the concerted attention of these countries should be given to the potential erosion of GSP benefits that could result from the multilateral trade negotiations.<sup>96</sup>

(e) *The material significance of the GSP at present*

101. This is a very cursory information on a huge and complex subject. The bulk (almost two thirds) of the exports of the developing countries to the donor countries consists of primary commodities and industrial raw materials and most of these are not dutiable in the importing donor countries. From among the remaining dutiable exports to those countries, consisting of manufactured or semi-manufactured products, a considerable part (e.g. processed agricultural and fishery products, textiles, leather and petroleum products) is not eligible for GSP treatment according to the different schemes. Thus it seems that the scope of the GSP amounts to less than 10 per cent of the imports of the donor countries from the beneficiaries of the schemes.<sup>97</sup>

102. Another feature of the GSP is that because of the facts mentioned above, it has at present limited significance for the least-developed countries or, expressed in other

<sup>95</sup> See *Proceedings of the United Nations Conference on Trade and Development, Fourth Session*, vol. I, *Final Act ... (op. cit.)*, annex V.

<sup>96</sup> Document TD/B/C.5/26, "Summary and conclusions", sect. H (see *Operation and effects of the generalized system of preferences: selected studies submitted to the sixth session of the Special Committee on Preferences for its second annual review, Geneva 20-31 May 1974* (United Nations publication, Sales No. E.75.II.D.9), p. 142).

<sup>97</sup> This is a very rough estimate, based on the UNCTAD secretariat study mentioned in para. 100 above, and on Tracy Murray, "UNCTAD's Generalized Preferences: An Appraisal", *Journal of World Trade Law* (Twickenham), vol. 7, No. 4 (July-August 1973), pp. 461-472.

words, the more a developing country is industrialized, the more it benefits from the system. The result of all this is that as long as the product coverage of the GSP is not extended, and the various safeguard measures, ceilings, rules of origin, etc. not improved, the beneficial effect of the GSP on the economies of the developing countries as a whole will be limited. For individual countries, however, it can and does yield substantial advantages.

103. This is to place in proper perspective the significance of article 21. The agreement reached in the Special Committee on Preferences according to which no country will invoke its most-favoured-nation rights with a view to obtaining the preferential treatment accorded within the GSP has certainly a beneficial effect on the functioning of the GSP. Taken as a whole this effect is presently limited. In individual cases, however, the loss of their most-favoured-nation rights may mean for the affected developed or developing beneficiary States a material sacrifice. With the improvement of the system, with the broadening of the product coverage, with an approximation and possible uniformization of the rules of origin and other features of the national schemes the significance of the GSP may grow and so the importance of the provision embodied in article 21.

### C. OBJECTIONS TO ARTICLE 21

104. Some remarks made in the Sixth Committee by representatives of developing countries who believe that the scope of article 21 should be widened have been dealt with above. What the Special Rapporteur has tried to make clear is that article 21 does not and cannot apply to matters other than trade. As to the remarks of representatives of developed countries, it must first be said that several of them have made no objections to article 21, and others (the USSR<sup>98</sup> and other socialist countries,<sup>99</sup> Italy,<sup>100</sup> France,<sup>101</sup> in principle, etc.) supported it outright.

105. Some of the objections of representatives of developed countries may be summarized as follows:

(a) The current system of generalized preferences was envisaged on a temporary basis for a period of 10 years.<sup>102</sup> In this respect, attention is drawn to what has been said above on the duration of the GSP.<sup>103</sup> Further, it is true that if the GSP ceases to exist in the foreseeable future, which does not seem very probable to the Special Rapporteur (*c'est le provisoire qui dure!*) then article 21 will become objectless. Should this hypothetical case happen and article 21 become a dead letter, it still cannot do any harm and will remain on the text as an imprint of the period in which it was conceived.

(b) It is difficult to draw a clearly defined line between

<sup>98</sup> See *Official Records of the General Assembly, Thirtieth Session, Sixth Committee, 1544th meeting, para. 14.*

<sup>99</sup> See for instance the statements made by the representatives of Czechoslovakia (*ibid.*, 1546th meeting, para. 4); and Hungary (*ibid.*, 1547th meeting, para. 48).

<sup>100</sup> *Ibid.*, 1543rd meeting, para. 25.

<sup>101</sup> *Ibid.*, 1549th meeting, para. 36.

<sup>102</sup> See the statement made by the representative of Japan (*ibid.*, 1546th meeting, para. 26).

<sup>103</sup> See paras. 92–93 above.

the concepts of developed and developing States.<sup>104</sup> This objection obviously does not apply to the text of article 21. Within the GSP only developed States are preference-giving and their own schemes determine the scope of the preference-receiving developing countries. Further, the article applies to any State beneficiary of a most-favoured-nation clause irrespective of whether it belongs to the developed or the developing category. The provision must apply also to developing beneficiary States, because if it did not, the basic principle of the GSP, the principle of self-election, could be circumvented.

(c) Further difficulty could arise from the question of whether the developed granting State was the sole judge of what might be encompassed within a generalized system of preferences, that is, within its own scheme.<sup>105</sup> As shown above, the principle of self-election is part of the system, from which it cannot be severed. It is part of the price the developing States are paying for the concessions of the developed countries. The right of self-election, however, should be exercised with reasonable restraint, that is, it should not destroy completely the original idea of non-discrimination between developing countries.

(d) Doubts were expressed by one representative as to the desirability of the Commission drafting articles on the most-favoured-nation clause in an area in which the rules governing international economic relations were still subject to continuous change.<sup>106</sup> Curiously enough the same representative in the same intervention remarked that the needs of developing countries had necessitated new rules to facilitate the access of their products to the markets of developed countries and this aspect of the matter had been *inter alia* neglected by the Commission, which had attempted to reaffirm the traditional rules of international law.<sup>107</sup> Similarly, it was stated that “the draft articles on the most-favoured-nation clauses did not offer an appropriate context in which to deal with matters of economic policy rather than legal principles”.<sup>108</sup> And again, it was stated that the Commission “should concentrate on the juridical aspects of the clause, however, leaving the question of its application in commercial treaties between States at different levels of economic development to other international organs, notably . . . UNCTAD”.<sup>109</sup> On different grounds, it was said that “. . . it would be totally illogical to interpret a most-favoured-nation clause so as to give a developed country the right to enjoy the benefits granted to developing countries within a system of preferences . . . there was some question as to whether it was necessary to include a specific article on the subject.”<sup>110</sup>

<sup>104</sup> See the statement made by the representative of the United States of America (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee, 1545th meeting, para. 39.*)

<sup>105</sup> *Ibid.*

<sup>106</sup> See the statement made by the representative of the Netherlands (*ibid.*, 1543rd meeting, para. 38).

<sup>107</sup> *Ibid.*, para. 36.

<sup>108</sup> See the statement made by the representative of the United States of America (*ibid.*, 1545th meeting, para. 39).

<sup>109</sup> See the statement made by the representative of Denmark (*ibid.*, 1546th meeting, para. 18).

<sup>110</sup> See the statement made by the representative of Sweden (*ibid.*, 1545th meeting, para. 25).



106. It is the feeling of the Special Rapporteur that the Commission is bound to consider very seriously the objections of representatives of those developed countries who have spoken on the subject and made objections, since, after all, they belong to the preference-giving group. At the same time, the Commission cannot lose sight of the great number of developing States whose representatives welcomed article 21.<sup>111</sup> It is the feeling of the Special Rapporteur, and probably the feeling of some of the objectors, as was inadvertently disclosed by the representative of the Netherlands in the statement already quoted, that it would be utterly impossible for the Commission today to present a set of articles on the most-favoured-nation clause losing sight of the fact that there is emerging before our eyes a "new international law of development" and that that emerging law has an impact upon the operation of the most-favoured-nation clauses included in commercial treaties.

107. On the basis of the foregoing the Special Rapporteur believes that, taking into consideration the discussion in the Sixth Committee, the Commission could maintain the stand it provisionally took at the twenty-seventh session and adopt article 21 definitively in first reading.

#### 4. Most-favoured-nation clauses in relation to trade among developing countries

108. According to the summary records of the debate in the Sixth Committee at the thirtieth session of the General Assembly, the representative of a developing country stated that

Article 21 might not be sufficient to exclude completely the application of the most-favoured-nation clause to the developing countries [i.e. in matters of trade] and ILC might consider the possibility of adopting at least one more article for the purpose of protecting those countries, possibly along the lines of article 21 of the Charter of Economic Rights and Duties of States. Such an article would provide protection for the developing countries against the application of article 15, the provisions of which should apply only to agreements concluded between developed countries.<sup>112</sup>

Other representatives spoke, in a similar vein, if not so explicitly.

109. Article 21 of the Charter of Economic Rights and Duties of States (adopted by the General Assembly by resolution 3281 (XXIX) of 12 December 1974) reads as follows:

Developing countries should endeavour to promote the expansion of their mutual trade and to this end may, in accordance with the existing and evolving provisions and procedures of international agreements where applicable, grant trade preferences to other developing countries without being obliged to extend such preferences to developed countries, provided these arrangements do not constitute an impediment to general trade liberalization and expansion.

<sup>111</sup> See, for instance, the statements made by the representatives of Brazil (*ibid.*, 1538th meeting, para. 29); Jamaica (*ibid.*, 1541st meeting, para. 22); Sierra Leone (*ibid.*, 1543rd meeting, para. 43); Ethiopia (*ibid.*, 1545th meeting, para. 13); Yugoslavia (*ibid.*, 1546th meeting, para. 34); Oman (*ibid.*, para. 45); Botswana (*ibid.*, 1547th meeting, para. 35); Indonesia (*ibid.*, 1548th meeting, para. 25); Ghana (*ibid.*, 1549th meeting, para. 44); Zambia (*ibid.*, 1550th meeting, para. 5).

<sup>112</sup> See the statement made by the representative of Yugoslavia (*ibid.*, 1546th meeting, para. 34).

110. Article 23 of the same Charter seems to be also relevant. It reads as follows:

To enhance the effective mobilization of their own resources, the developing countries should strengthen their economic co-operation and expand their mutual trade so as to accelerate their economic and social development. All countries, especially developed countries, individually as well as through the competent international organizations of which they are members, should provide appropriate and effective support and co-operation.

#### A. THE ANTECEDENTS OF ARTICLES 21 AND 23 OF THE CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES

111. Trade expansion, economic co-operation and economic integration among developed countries have been accepted as important elements of an "international development strategy" and as essential factors towards their economic development in a number of important international instruments. In these instruments, the establishment of preferences among developing countries has been acknowledged to be one of the arrangements best suited to contribute to trade among themselves. Some of these instruments testify to the willingness of the developed countries to promote this tendency by *inter alia* granting exceptions from their most-favoured-nation rights.

112. Promotion of trade expansion and economic integration among developing countries was proclaimed in the "Programme of Action" set forth in Part Two of the Charter of Algiers adopted by the first Ministerial Meeting of the Group of 77 in 1967.<sup>113</sup> The Declaration and Principles of the Action Programme adopted by the Second Ministerial Meeting of the Group of 77 at Lima in 1971<sup>114</sup> contains under the heading "General policy issues" a chapter on "Trade expansion, economic co-operation and regional integration among developing countries" specifying the actions envisaged to that end by the developing countries and the corresponding actions demanded from the "developed market-economy countries", the socialist countries of Eastern Europe and the multilateral organizations. The intensification of efforts to promote "Intra-African trade" has been urged by an "African Declaration on Co-operation, Development and Economic Independence" adopted at the Tenth Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity on 28 May 1973.<sup>115</sup> The Conference of Ministers for Foreign Affairs of the Non-Aligned Countries in the "Lima Programme for Mutual Assistance and Solidarity" adopted in August 1975<sup>116</sup> also advocated co-operation and particularly trade among developing countries.

113. In United Nations bodies, it is in General Principle

<sup>113</sup> See *Proceedings of the United Nations Conference on Trade and Development, Second Session*, vol. I, *Report and annexes* (United Nations publication, Sales No. E.68.II.D.14), p. 431.

<sup>114</sup> See *Proceedings of the United Nations Conference on Trade and Development, Third Session*, vol. I, *Report and annexes* (United Nations publication, Sales No. E.73.II.D.4), p. 373.

<sup>115</sup> Organization of African Unity, document CM/ST.12 (XXI).

<sup>116</sup> Document NAC/FM/CONF.5/15, circulated to the General Assembly at its seventh special session under a covering note A/10217.

Eight, adopted at the first session of UNCTAD, in 1964, that the basic idea was for the first time briefly set forth:

Developing countries need not extend to developed countries preferential treatment in operation amongst them.<sup>117</sup>

In General Principle Ten, it is stated that:

Regional economic groupings, integration or other forms of economic co-operation should be promoted among developing countries as a means of expanding their intra-regional and extra-regional trade . . .<sup>118</sup>

The recommendation contained in annex A.III.8 to the Final Act adopted by UNCTAD at its first session states *inter alia* that:

. . . rules governing world trade should . . . permit developing countries to grant each other concessions, not extended to developed countries . . .<sup>119</sup>

114. At its second session, held at New Delhi in 1968, UNCTAD adopted without dissent, on 26 March 1968 a "Concerted declaration on trade expansion, economic co-operation and regional integration among developing countries" (declaration 23 (II))<sup>120</sup> which contains "declarations of support" by the developed market-economy countries and by the socialist countries of Eastern Europe. According to the former:

19. The developed market-economy countries are ready, after examination and consultation within the appropriate international framework, to support particular trading arrangements among developing countries which are consistent with the objectives set out above. This support could include their acceptance of derogations from existing international trading obligations, including appropriate waivers of their rights to most-favoured-nation treatment.

According to the latter:

21. The socialist countries view with understanding and sympathy the efforts of the developing countries with regard to the expansion of trade and economic co-operation among themselves and, following the appropriate principles by which the socialist countries are guided in that respect, they are ready to extend their support to the developing countries.

115. At its third session, held at Santiago de Chile, in 1972, UNCTAD adopted, again without dissent, a resolution entitled "Trade expansion, economic co-operation and regional integration among developing countries" (resolution 48 (III)).<sup>121</sup> This was probably inspired by paragraphs 39 and 40 of the International Development Strategy for the Second United Nations Development Decade, adopted by the General Assembly in resolution 2626 (XXV) of 24 October 1970.

116. The General Assembly resolutions adopted more

recently, at the sixth special session, contain passages reading as follows:

4. The new international economic order should be founded on full respect for the following principles:

. . .  
(s) The strengthening, through individual and collective actions, of mutual economic, trade, financial and technical co-operation among the developing countries, mainly on a preferential basis; (resolution 3201 (S-VI), of 1 May 1974, entitled "Declaration on the Establishment of a New International Economic Order").

and

#### VII. PROMOTION OF CO-OPERATION AMONG DEVELOPING COUNTRIES

1. Collective self-reliance and growing co-operation among developing countries will further strengthen their role in the new international economic order. Developing countries, with a view to expanding co-operation at the regional, subregional and interregional levels, should take further steps, *inter alia*:

. . .  
(c) To promote, establish or strengthen economic integration at the regional and subregional levels;

(d) To increase considerably their imports from other developing countries;

(e) To ensure that no developing country accords to imports from developed countries more favourable treatment than that accorded to imports from developing countries. Taking into account the existing international agreements, current limitations and possibilities and also their future evolution, preferential treatment should be given to the procurement of import requirements from other developing countries. Wherever possible, preferential treatment should be given to imports from developing countries and the exports of those countries; (resolution 3202 (S-VI), of 1 May 1974, entitled "Programme of Action on the Establishment of a New International Economic Order").

#### B. DEVELOPMENTS IN GATT

117. A Protocol relating to Trade Negotiations among Developing Countries, drawn up under the auspices of GATT, was adopted at Geneva on 8 December 1971.<sup>122</sup> The objective of trade negotiations among developing countries being to expand their access on more favourable terms in one another's markets through exchanges of tariff and trade concessions, the Protocol includes rules to govern the necessary arrangements to achieve that objective as well as a first list of concessions. The concessions exchanged pursuant to the Protocol are applicable to all developing States which become parties to it. The Protocol is open for acceptance by the countries which made offers of concessions in the negotiations and for accession to all developing countries. The Protocol came into effect on 11 February 1973 for eight participating countries and, subsequently, for four additional participating countries.

118. The Contracting Parties to GATT, desirous of encouraging trade negotiations among developing countries through their participation in the Protocol, adopted on 26 November 1971, a Decision authorizing a waiver of the provisions of paragraph 1 of article 1 of the General Agreement to the extent necessary to permit participating contracting parties to accord preferential treatment as provided in the Protocol to products originating in other parties to the Protocol, without being required to extend the

<sup>117</sup> See para. 84 above.

<sup>118</sup> *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (*op. cit.*), p. 20.

<sup>119</sup> *Ibid.*, p. 42. For a fuller treatment of the problems involved, and the views of the UNCTAD secretariat on trade among developing countries, see *Yearbook . . . 1970*, vol. II, p. 238, document A/CN.4/228 and Add.1, annex I).

<sup>120</sup> *Proceedings of the United Nations Conference on Trade and Development, Second Session*, vol. I and Corr.1 and Add.1, *Report and Annexes* (*op. cit.*), pp. 51-53.

<sup>121</sup> *Proceedings of the United Nations Conference on Trade and Development, Third Session*, vol. I, *Report and annexes* (*op. cit.*), p. 103.

<sup>122</sup> See GATT, *Basic Instruments and Selected Documents, Eighteenth Supplement* (Sales No. GATT/1972-1), p. 11.

same treatment to like goods when imported from other contracting parties. This decision was taken without prejudice to the reduction of tariffs on a most-favoured-nation basis.

119. The full text of the GATT decision is as follows:

#### TRADE NEGOTIATIONS AMONG DEVELOPING COUNTRIES

*Decision of 26 November 1971  
(L/3636)*

The CONTRACTING PARTIES to the General Agreement on Tariffs and Trade,

*Recognizing* that individual and joint action is essential to further the development of the economies of developing countries and to bring about a rapid advance in the standards of living in these countries;

*Noting* that the CONTRACTING PARTIES may enable developing contracting parties to use special measures to promote their trade and development;

*Considering* that trade negotiations among developing countries have as their objective expanding access on more favourable terms for developing countries in one another's markets through an exchange of tariff and trade concessions directed towards the expansion of their mutual trade;

*Recalling* that, at the twenty-third session, the CONTRACTING PARTIES recognized that the establishment of preferences among developing countries, appropriately administered and subject to the necessary safeguards, could make an important contribution to the expansion of trade among developing countries and to the attainment of the objectives of the General Agreement;

*Noting* that the countries which have participated in these negotiations have drawn up the "Protocol relating to Trade Negotiations among Developing Countries" (hereinafter referred to as the Protocol) with rules to govern the arrangements as well as a first list of concessions, and that these countries intend to keep under review the possibility of promoting negotiations for additions or enlargements to the schedules of concessions;

*Noting also* that while concessions exchanged in the Negotiations will apply among parties to the arrangements set out in the Protocol, the countries participating in these negotiations have undertaken to facilitate the accession of all developing countries on terms consistent with the latter's individual development, financial and trade needs;

*Noting further* that the CONTRACTING PARTIES express the hope that all developing countries which have not participated in the arrangements will consider acceding to the Protocol; and

*Recognizing* that these arrangements should not impede the reduction of tariffs on a most-favoured-nation basis;

*Decide:*

(a) That without prejudice to any other Article of the General Agreement and subject to the provisions of paragraphs (b) to (e) of this Decision, the provisions of paragraph 1 of Article I of the General Agreement shall be waived to the extent necessary to permit each contracting party participating in the arrangements set out in the Protocol (hereinafter referred to as a participating contracting party) to accord preferential treatment as provided in the Protocol with respect to products originating in other parties to the Protocol, without being required to extend the same treatment to like goods when imported from other contracting parties;

*Provided that* any such preferential treatment shall be designed to facilitate trade between participants and not to raise barriers to the trade of other contracting parties;

(b) That any participating contracting party which, pursuant to the arrangements set out in the Protocol, introduces or modifies any preferential concessions shall so notify the CONTRACTING PARTIES and shall furnish them with all useful information relating to the actions taken;

(c) That each participating contracting party shall afford adequate opportunity for consultations at the request of any other contracting party which considers that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the arrangements set out in the Protocol;

(d) That any contracting party which considers that the arrangements under the Protocol are being applied inconsistently with this Decision or that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the arrangements and that consultations have proved unsatisfactory, may bring the matter before the CONTRACTING PARTIES, which will examine it promptly and will formulate any recommendations that they judge appropriate; and

(e) That the CONTRACTING PARTIES will review annually, on the basis of a report to be furnished by the participating countries, the operation of this Decision in the light of the aforementioned objectives and considerations and after five years of its operation carry out a major review in order to evaluate its effects. Before the end of the tenth year, the CONTRACTING PARTIES will undertake another major review of its operations with a view to deciding whether this Decision should be continued or modified. In connexion with such annual reviews and major reviews, the participating contracting parties shall make available to the CONTRACTING PARTIES relevant information regarding action taken under this Decision.<sup>123</sup>

#### C. AN EMERGING CONSENSUS

120. From the resolutions of the General Assembly and the action of GATT it seems that a consensus of States is emerging. This consensus recognizes the importance of the expansion of trade among developing countries irrespective of the framework in which the arrangements aiming at such expansion take place. It seems also that a consensus is emerging among the developed States, both those of the market-economy group and those of the socialist group, favourable to the promotion of trade expansion among the developing countries even if this promotion entails a certain sacrifice of their most-favoured-nation rights. The signs of this tendency are most recognizable in declaration 23 (II), adopted without dissent at the second session of UNCTAD,<sup>124</sup> and the developments in GATT.

121. The logical conclusion of such a tendency would be a legal rule which could be tentatively expressed as follows:

A developed beneficiary State is not entitled under a most-favoured-nation clause to any treatment extended by a granting developing State to a third developing State for the purpose of promoting the expansion of their mutual trade.

122. However, there are at least two kinds of serious obstacle to the proposal of such a rule. The first apparently relates only to terminology. As one representative in the Sixth Committee said, it is difficult to draw a clearly defined line between the concepts of developed and developing States. While it has been shown above that this comment carries no weight in respect of article 21,<sup>125</sup> it has to be admitted that it would have importance in the case of a rule fashioned in the way just suggested, because here, in contradiction to article 21, the method of self-election does not apply or at least is not embodied in the rule.

123. The view has been expressed that this difficulty was not insurmountable. According to one representative in the Sixth Committee

The term "developing country" had acquired a broad connotation within the United Nations and the United Nations Conference on Trade and Development which could be further clarified by those organizations and could be used as a basis for ILC's work. A convention on most-

<sup>123</sup> *Ibid.*, pp. 26-28.

<sup>124</sup> See para. 114 above.

<sup>125</sup> See para. 105(b) above.

favoured-nation treatment should not, however, contain a definition of that term.<sup>126</sup>

Reference could, indeed, be made to international instruments which have overcome the drafting difficulty in the sense proposed by that representative. One example is the International Covenant on Economic, Social and Cultural Rights (General Assembly resolution 2200A(XXI), annex), article 2, paragraph 3 of which runs as follows:

Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Another example is article V *bis* of the Universal Copyright Convention as revised at Paris on 24 July 1971:<sup>127</sup>

1. Any Contracting State regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations may, by a notification . . . avail itself of any or all exceptions provided for in Articles V *ter* and V *quater*.

124. In the matter under consideration, it has to be admitted, however, that the situation is not as simple. This is also a territory where the general wisdom applies that equal treatment of unequals leads to injustice. On the one hand there are great differences among developed countries, not only as regards size, population, wealth, etc. but also as regards the fact that while some of them are self-sufficient, others are compelled to rely heavily on foreign trade. On the other hand there is a world of difference between giving up a State's most-favoured-nation rights on a market like, for instance, that of Brazil and that of the Maldives Islands.

125. The second difficulty consists in the fact that here the Commission cannot build on a clear unambiguous agreement of the community of States as was the case with article 21. Indeed, if the relevant texts quoted above are analysed, it cannot fail to be seen that all of them with the exception of General Principle Eight,<sup>128</sup> which will be reverted to below, tie the exception to various conditions. The task of the Commission would be in this field, as has been graphically expressed by representatives in the Sixth Committee to "translate" the provisions of the Charter of Economic Rights and Duties of States and other related instruments "into an enforceable legal convention".<sup>129</sup> The pertinent provision of the Charter of Economic Rights and Duties is article 21, quoted above,<sup>130</sup> and that article is couched in rather uncertain terms. The same applies to article 23.<sup>131</sup> The 1968 "Concerted declaration" of UNCTAD (declaration 23 (II)) is very cautiously worded and the GATT decision of 1971 is also combined with safeguards including notification to the Contracting Parties, consul-

<sup>126</sup> See the statement made by the representative of the German Democratic Republic (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee, 1539th meeting, para. 5*).

<sup>127</sup> For the text of the revised Convention, see United Nations, *Juridical Yearbook, 1971* (United Nations publication, Sales No. E.73.V.1), pp. 123 *et seq.*

<sup>128</sup> See para. 84 above.

<sup>129</sup> See the statements made by the representatives of the Philippines (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee, 1547th meeting, para. 39*); and Cyprus (*ibid.*, 1550th meeting, para. 14).

<sup>130</sup> See para. 109 above.

<sup>131</sup> See para. 110 above.

tations, and annual review. To "translate" these texts into an "enforceable legal convention" seems not to be an easy task. It is difficult, because in this instance there is no ready device of built-in safeguards which could be referred to, as in the case of article 21 of the Commission's 1975 draft.

126. While in the view of the Special Rapporteur General Principle Eight adopted at the first session of UNCTAD is now generally accepted as a valid principle (even though in 1964 the roll-call vote was 78 to 11 with 23 abstentions) and within that principle also that part according to which: "... Developing countries need not extend to developed countries preferential treatment in operation amongst them . . .", it is for the time being not more than a principle or more precisely a "wish-principle" which cannot be translated into a legal rule in stark simplicity as it stands or as it has been tentatively suggested at the beginning of this section.<sup>132</sup> All the texts adopted in the General Assembly, within GATT or elsewhere indicate that the essence of the consensus is not that the most-favoured-nation rights which may attract the trade preferences to be established between developing countries *inter se*, outside or within customs unions, free-trade areas or other similar associations, shall be simply abolished, but rather that the developing countries concerned, grantors of such rights, and the beneficiaries of those rights, whether developed or developing countries, should (the conditional form is used in both articles 21 and 23 of the Charter of Economic Rights and Duties of States) endeavour to find appropriate and equitable solutions. Where the parties concerned are all bound by an international agreement in the framework of which there exists an established procedure to this end, as in GATT, such a solution will be relatively simple to find. Article 21 of the Charter of Economic Rights and Duties of States refers not only to existing but also to "evolving" provisions and procedures of international agreements.

127. Of course no problem arises where the developing States co-operating outside or within customs unions or other similar associations have inserted in the most-favoured-nation clauses concluded with outsiders an appropriate exception, as very often occurs on the basis of old tradition, in Latin American practice.<sup>133</sup> In some of the Latin-American integration treaties the parties undertake to embody such exceptions in their treaties. Thus, in article XXIV of the Multilateral Treaty of Free Trade and Central American Economic Integration, signed at Tegucigalpa, Honduras on 10 June 1958 by Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica, the following provision is included:

The Contracting States agree to maintain the "Central American exception clause" in any trade agreements they may conclude on the basis of most-favoured-nation treatment with any countries other than the Contracting States.

The following paragraphs in the same article are very instructive:

The Contracting States declare that, in concluding this Treaty, they are prompted by the desire to establish closer mutual links as States of

<sup>132</sup> See para. 121 above.

<sup>133</sup> Among the very rich literature, see the studies included in F. Orrego Vicuña, ed., *Derecho internacional económico: I. América Latina y la Cláusula de la Nación más favorecida*, 1st ed. (Lecturas 10\*, Mexico, Fondo de cultura económica, 1974).

Central America governed by the special principles of a Central American public law. To that end, they agree that if any of the trade agreements they may conclude with other countries or their participation in other international arrangements, should constitute an obstacle to this Treaty, particularly as a result of provisions embodied in the other treaties permitting other countries to claim no less favourable treatment, they shall renegotiate or, as the case may be, denounce them at the earliest opportunity with a view to avoiding the difficulties or prejudice which might ensue for any of the Contracting States as a result of claims of that nature.

The contracting Parties also undertake not to conclude any new agreements with other countries which are contrary to the spirit and purposes of this Treaty and, in particular, to the provisions of this article.<sup>134</sup>

The text quoted reveals the seriousness with which the developing countries concerned regard their most-favoured-nation obligations.

128. The General Treaty on Central American Economic Integration, signed at Managua, Nicaragua, on 13 December 1960 by the same countries, contains a brief provision (article XXV) as follows:

The Signatory States agree not to sign unilaterally with non-Central American countries any new treaties that may affect the principles of Central American economic integration. They further agree to maintain the "Central American exception clause" in any trade agreement they may conclude on the basis of most-favoured-nation treatment with any countries other than the Contracting States.<sup>135</sup>

129. An important exception clause can be found in the Treaty establishing a Free Trade area and instituting the Latin American Free Trade Association, signed at Montevideo, on 18 February 1960.<sup>136</sup> While the parties agreed in article 18 of the treaty to accord to each other most-favoured-nation treatment in their mutual trade, chapter VIII of the treaty provides for "Measures in favour of countries at a relatively less advanced stage of economic development". Under this heading in article 32(a) the Contracting Parties reserve their right to

Authorize a Contracting Party to grant to another Contracting Party which is at a relatively less advanced stage of economic development within the Area, as long as necessary and as a temporary measure, for the purposes set out in the present article, advantages not extended to the other Contracting Parties, in order to encourage the introduction or expansion of specific productive activities.

130. The most various exception provisions have been coupled to most-favoured-nation clauses in bilateral treaties concluded by Latin American States. The following one is

<sup>134</sup> See United Nations, *Treaty Series*, vol. 454, pp. 88 and 90.

<sup>135</sup> *Ibid.*, vol. 455, p. 90.

<sup>136</sup> *Multilateral Economic Co-operation and Latin America*, vol. I, *Text and Documents* (United Nations publication, Sales No. 62.II.G.3), p. 57.

taken from article 1 of the Colombia-USSR trade agreement signed at Bogotá on 3 June 1968:<sup>137</sup>

... The provisions of the present article [the most-favoured-nation pledge] shall not extend to the advantages and privileges which ...

...  
(b) Colombia has granted or may grant any Latin American country as a result of its participation in free trade zones or other regional economic unions of the Latin American developing countries.

131. The problem to be solved is whether a customary rule can be discerned or a new rule established which would, in the absence of specific agreement to that effect, exempt in one way or another the trade relations between developing States, outside or within customs unions or other associations, from the operation of most-favoured-nation clauses, and whether a distinction has to be drawn according to whether the beneficiary of such a clause is a developed or a developing country. It seems to the Special Rapporteur that upon the evidence available the proposal of a rule simply deriving the beneficiaries of their most-favoured-nation rights is not at present warranted. Though it is obvious that the generally recognized aim of expanding the mutual trade of developing countries may be a good reason for requesting release from a most-favoured-nation pledge and such a request should be considered with benevolence by the beneficiary, it seems problematic whether this is enough for being formulated as a rule and whether and what distinctions should be made according to the beneficiary State's status as a developing or developed country and according to the granting State's relation to its trading partner within or outside a customs union or a similar association. The Special Rapporteur does not intend to submit a proposal until he has heard the views of his colleagues in the Commission. At that time the results of the fourth session of UNCTAD, to be held at Nairobi in May 1976 should also be available, and these may include some new development on which the Commission may rely.

### III. SETTLEMENT OF DISPUTES

132. The matter last dealt with illustrates the obvious fact that the questions connected with the application of most-favoured-nation clauses may also lead to international disputes. As the articles on the most-favoured-nation clause are conceived as a supplement to the Vienna Convention, the relevant provisions of that Convention will also apply when a dispute arises in connexion with a most-favoured-nation clause.

<sup>137</sup> Text in American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. VIII, No. 6 (November 1969), p. 1302.

**DOCUMENT A/CN.4/L.242****Alternative drafts for a Customs union and free-trade area exception  
suggested by Mr. Hambro**

[Original: English]  
[4 June 1976]

- I. A beneficiary State is not entitled, under a most-favoured-nation clause, to any treatment extended under a Customs union, a free-trade area or an interim arrangement leading to a Customs union or a free-trade area, or extended under treaties concluded between adjacent States for the purpose of facilitating frontier traffic of persons or goods originating in areas close to the frontier between those States.
- II. (a) States to which the clause is applied should not be able to invoke it in order to claim a treatment identical with that which States participating in an integrated regional system concede to one another.  
(b) States to which the clause is applied should not be able to invoke it in order to claim a treatment identical with that which States participating in a Customs union or a free-trade area concede to one another.
- III. A beneficiary State is not entitled, under a most-favoured-nation clause, to claim a treatment identical with that which members of a Customs union or a free-trade area concede to one another.
- IV. The provisions of the present articles shall not prejudice any question that may arise in connexion with a Customs union or a free-trade area.





**QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND  
INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE  
INTERNATIONAL ORGANIZATIONS**

[Agenda item 5]

**DOCUMENT A/CN.4/290 AND ADD.1**

**Fifth 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 (continued)\**

[Original: French]  
[10 February 1976]

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\* For draft articles 1-4 and 6-18, see the third and fourth reports (*Yearbook . . . 1974*, vol. II (Part One), p. 135, document A/CN.4/279, and *Yearbook . . . 1975*, vol. II, p. 25, document A/CN.4/285).

## Preface

1. In its report on the work of its twenty-seventh session, the International Law Commission noted that the Planning Group established in the Enlarged Bureau to study the functioning of the Commission and formulate suggestions regarding its work had reached the following conclusion regarding the topic currently under consideration, which had been:

... progressing at a good rate. The Group, therefore, considered that establishment of the goal of completion of the second reading of a set of articles on this subject by or prior to 1981 was a justifiable goal.<sup>1</sup>

2. When the report of the International Law Commission was considered by the Sixth Committee of the General Assembly, that conclusion was confirmed and valuable encouragement given for the continuation of the work.<sup>2</sup> The rate of preparation of a complete draft will, however, depend on the difficulty of the obstacles which the International Law Commission may encounter in studying certain particularly delicate articles, as well as on the time that can be devoted to this topic.

3. In his fourth report,<sup>3</sup> the Special Rapporteur submitted 30 new draft articles. At its twenty-seventh session the Commission was able to adopt 15 of them—articles 7 to 18, together with certain definitions to be included in the preliminary articles, consideration of which had been deferred until the articles concerned were discussed. The International Law Commission also had a fairly substantial exchange of views on articles 19 and 20, and heard some observations on articles 21, 22 and 23, but it did not have time to prepare for those five articles a text which was likely to be adopted.

4. This review shows that, when the subject-matter does not involve too many difficulties the Commission can, by making an exceptional effort, adopt a series of draft articles in a very short space of time. However, the Special Rapporteur feels obliged to stress that such an effort, especially when it must be made during the last weeks of the session, imposes on the Commission working conditions which are far from ideal and places a very heavy burden on the secretariat and conference services. Thus the Commission could do no more than begin its consideration of articles 19 to 23, which make up section 2, concerning reservations. But the views expressed, however rapidly, by the members of the Commission gave the Special Rapporteur very valuable indications as to how he should resume his study of the question of reservations.

5. Resolution 3495 (XXX) adopted by the General Assembly on the recommendation of the Sixth Committee gives the International Law Commission some indications regarding the priorities to be observed in the work at its twenty-eighth session. It seems to follow from those indications that the International Law Commission will be unable in 1976 to adopt any more articles than it did in

1975 on the question of treaties concluded between States and international organizations or between international organizations.

6. The Special Rapporteur has therefore concluded that he should submit a particularly brief report this year. He feels that new light has been shed on the question of reservations to the treaties under consideration by the discussion in the Commission at its twenty-seventh session and by the observations made on the matter in the Sixth Committee of the General Assembly. He will therefore devote the present report to a reconsideration of the question of reservations and to new proposals concerning the relevant articles. However, in the case of draft articles 24 to 33, which have not yet been given any consideration by the International Law Commission, he will merely refer the reader to his fourth report.

7. The present report will therefore be devoted to part II, section 2, of the draft articles, concerning reservations, and, in addition to a general introduction, will contain new texts for articles 19 to 23, each accompanied by a commentary.

### Draft articles, with commentaries (*continued*)

#### PART II. CONCLUSION AND ENTRY INTO FORCE OF TREATIES

##### SECTION 2: RESERVATIONS

##### *General introduction*

8. In his fourth report, the Special Rapporteur adopted a relatively simple position on the subject, which can be summarized as follows:

(a) At the current stage, and in view of the extreme rarity of cases of participation by international organizations in multilateral treaties between States, the Special Rapporteur considered that the question of reservations to treaties concluded by international organizations was of no immediate practical interest.

(b) He considered that, generally speaking, international organizations could be placed on the same footing as States in that respect, since their treaty commitments were subject to a régime which was broadly comparable.

(c) However, the Special Rapporteur drew attention to the serious problems which could arise in the specific case where the parties to a treaty between States and international organizations included States which were themselves members of one of the organizations in question, for account must be taken of the fact that, in practice, the respective areas of competence of the organization and its member States are not always clearly defined and their distribution is, moreover, liable to change.<sup>4</sup> That being so, if

<sup>1</sup> *Yearbook* ... 1975, vol. II, p. 184, document A/10010/Rev.1, para. 145.

<sup>2</sup> *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, paras. 165–166.

<sup>3</sup> *Yearbook* ... 1975, vol. II, p. 25, document A/CN.4/285.

<sup>4</sup> This difficulty was mentioned by some representatives in the Sixth Committee during the consideration of the report of the Commission on the work of its twenty-seventh session; it was stressed that "the legal personality of international organizations was created, modified or terminated through a joint expression of the will of the States constituting the organization concerned" (*Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, para. 167).

the very liberal régime established for treaties between States by the Vienna Convention on the Law of Treaties (1969)<sup>5</sup> is adopted for reservations to treaties of the type at present under consideration, it is conceivable that the position of the organization with regard to the treaty could, as a result of the operation of the reservations mechanism, differ from that of some of its member States and that objections to reservations would complicate still further the confusion related to the uncertainty about the areas of competence of the States and of the organization with regard to the subjects dealt with in the treaty. However, the Special Rapporteur proposed no remedies for such a situation, considering that should there be a risk of such a situation arising, the States and organizations concerned would be careful to arrange for a *conventional* reservations régime proper to each treaty which would avoid all such confusion.

9. The Special Rapporteur therefore proposed in his fourth report five articles which followed very closely the corresponding texts of the Vienna Convention, differing from them only where drafting changes were deemed essential.<sup>6</sup> However, the adoption by the Commission of draft article 9, paragraph 2, which reads:

The adoption of the text of a treaty between States and one or more international organizations at an international conference in which one or more international organizations participate, takes place by the vote of two thirds of the participants present and voting, unless by the same majority the latter shall decide to apply a different rule.

showed, even before the Commission took up article 19, that it was necessary to take into account the possibility—theoretical, perhaps, but one which could not be excluded from the future scope of the development of international relations—that some international organizations might be admitted in a greater or lesser degree to participation in treaties between States. It was precisely with regard to that possibility that the Special Rapporteur had expressed certain misgivings, without proposing any remedy.

10. As soon as the Commission began its consideration of the basic articles 19 and 20, it became clear that its members were embarking on a substantive debate, which revealed differences of opinion and uncertainties in that regard.<sup>7</sup> After a very substantial but relatively short exchange of views, the whole of section 2 was referred to the Drafting Committee, which did not have time to prepare texts for submission to the Commission.

11. Apart from drafting points and secondary questions, two main problems were mentioned during the debate. The first may be summed up as follows: is it necessary to provide, in certain cases and on certain points, for a régime fundamentally different from that of the Vienna Convention? The second, which goes beyond the scope of the problem of reservations but arises very clearly in that connexion, is the following: what provisions are needed to define clearly the respective spheres of application of the

<sup>5</sup> 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. The Convention will be referred to hereafter as the Vienna Convention.

<sup>6</sup> See *Yearbook . . . 1975*, vol. I, pp. 237 *et seq.*, 1348th meeting, paras. 38–45.

<sup>7</sup> *Ibid.*, pp. 240 *et seq.*, 1349th and 1350th meetings.

draft articles and the 1969 Vienna Convention, especially when a treaty originally designed to establish treaty relations between States and international organizations loses that character wholly or partially? These two questions call for certain general observations.

12. With regard to the first question, which relates to the basic character of the reservations régime that should be established for treaties between States and international organizations or between two or more international organizations, the options centre on the idea which dominates the Vienna Convention, namely, that of freedom to formulate reservations. By and large, three solutions are possible:

(a) Freedom to formulate reservations with a number of exceptions: this is the régime of the Vienna Convention, which the Special Rapporteur proposed in his fourth report should be extended to the treaties covered by the present draft articles:

(b) The application to reservations of an express authorization régime with some exceptions—this régime is the opposite of the preceding one: freedom to formulate reservations has become the exception and the authorization régime the general rule. It was on the basis of this solution that the Special Rapporteur made a new proposal concerning articles 19 and 20 during the twenty-seventh session;<sup>8</sup>

(c) Freedom to formulate reservations combined with a number of exceptions for treaties between two or more international organizations, and the application to reservations of an express authorization régime with certain exceptions for treaties between States and international organizations. This formula represents a compromise between the two preceding solutions in that it allots each of them a specific sphere of application on the basis of a distinction between the two basic categories of treaty covered by the draft articles.

13. The first solution does not call for many comments. The course followed thus far by the Special Rapporteur and approved on many occasions by the Commission has consistently been to follow the solutions and the text of the Vienna Convention whenever possible, and the Sixth Committee of the General Assembly once again on the whole approved that position.<sup>9</sup> If the Commission is to depart from that course, it must have specific and convincing reasons for doing so; otherwise, it will have to revert to the solution originally proposed in the fourth report and make numerous improvements in the text of articles 19 and 20, which will be mentioned below in the commentary on those articles.

14. What reasons are there to justify a departure from the Vienna Convention? Are they sufficiently compelling to commend the second solution outlined above, which runs contrary to the Vienna Convention? In fact, it can in general be stated that international organizations are not only quite different from States but also different from each other. Any participation by an international organization in any treaty whatsoever would thus pose a specific political

<sup>8</sup> *Ibid.*, p. 246, 1350th meeting, para. 1.

<sup>9</sup> See *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, para. 167.

problem and a specific legal problem, often unforeseeable. The parties to a treaty in which an international organization participates should therefore be urged to provide a detailed and case-by-case solution to the problem of reservations; the simplest way of obliging the parties to establish in each convention of this kind a precise reservations régime is to lay down as a suppletive general rule a restrictive rule which virtually prohibits reservations. This provides the basis for a very simple alternative: exclusion of reservations or establishment of a precise and individualized régime, adapted to each case by the parties themselves. From this viewpoint, the statement of general rules in a very liberal spirit appears to be the worst course. This second solution is therefore characterized by a spirit of great caution and even of mistrust with regard to the uncertainties covered by the protean concept of "international organization".

15. The third solution is derived from the two preceding solutions: it still reflects great mistrust of the effects which may follow from the reservations mechanism as extended to organizations parties to a treaty, but it goes further in the analysis in order to determine more accurately the risks which may be involved in organizations' reservations and for this purpose it distinguishes between treaties concluded between States and international organizations, on the one hand, and treaties concluded between two or more international organizations, on the other hand. It is a fact that the origin of the difficulties caused by the participation of one or more organizations in a treaty lies in the *simultaneous* participation of an organization and of a State in a treaty. As has been pointed out by Mr. Ushakov and Mr. Kearney,<sup>10</sup> it often happens that the positions of States parties to a treaty and of an international organization which is a party to the same treaty are not symmetrical. Under a very liberal reservations régime, it would even be conceivable that an organization might try to formulate reservations to provisions which do not create either rights or obligations for it directly but which affect the rights and obligations of the States parties to that treaty. Moreover, in the case most frequently encountered, in which at least some of the States parties to the treaty are members of an organization which is also a party to that treaty, there would be a risk of encountering the difficulties to which the Special Rapporteur drew attention in his fourth report and which he recalled earlier.<sup>11</sup> The simplest solution would therefore be to abandon the theoretical freedom to formulate reservations. That would in no way prevent the parties from defining in the treaty in each particular case the reservations régime which they consider to be suitable in the circumstances and, where appropriate, establishing complete freedom to formulate reservations; but they will have done so *advisedly*, after having foreseen and weighed the consequences. In other words, abandonment of the *principle* of freedom to formulate reservations is designed not to abolish freedom to formulate reservations, but to oblige parties to consider the consequences of that principle before adopting it in each particular case.

<sup>10</sup> *Yearbook . . . 1975*, vol. I, p. 239, 1348th meeting, para. 47, and p. 248, 1350th meeting, paras. 20-21.

<sup>11</sup> See above, para. 8 (c).

16. On the other hand, treaties concluded between two or more international organizations do not require the same cautious approach. The organizations which are parties to them are independent of each other. While it is true that they are still very different from States, in this regard they are all in the same situation. In the case of this type of treaty they may therefore be given the same freedom with regard to reservations as is granted to States by the Vienna Convention.

17. The third solution therefore produces a régime which differentiates between treaties between States and international organizations, on the one hand, and treaties between two or more international organizations, on the other hand. The Special Rapporteur suggests that the Commission should consider this third solution. It is slightly more complicated than the two others, although it should be noted that the other two would also require, not for substantive reasons but for drafting reasons, separate treatment for the two groups of treaties covered by this report. It has at least the advantage of being more balanced than the other solutions and perhaps more easily acceptable to the Commission as a whole. Separate articles are therefore devoted to treaties concluded between two or more international organizations, on the one hand (articles 19 and 20), and to treaties concluded between States and international organizations, on the other hand (articles 19 *bis* and 20 *bis*). The Special Rapporteur ventures to hope that it will thus be easy for the members of the Commission to have before them all the possible solutions and to choose the one which they find most suitable.

18. In addition to this first general question, another question has arisen<sup>12</sup> which calls for certain explanations. It may not be superfluous to recall how it emerged in the Commission's discussions. It was Mr. Ushakov who, in connexion with article 20, made a comment relating solely to treaties between States and international organizations. If, in a treaty of this type, a reservation formulated by a State were accepted by another State, or even gave rise to an objection on the part of another State, the conventional relations between those two States would be governed not by the draft articles (assuming that they were transformed into a treaty in force between those States) but by the Vienna Convention (assuming that it was in force between those two States).<sup>13</sup> This is because article 3 of the Vienna Convention states:

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

...

(c) 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.

19. Without expressing an opinion in favour of a special provision to cover such possibilities, the Special Rapporteur gave other examples of situations in which the same

<sup>12</sup> See above, para. 11.

<sup>13</sup> See *Yearbook . . . 1975*, vol. I, p. 239, 1348th meeting, para. 51.

problem might arise.<sup>14</sup> For instance, a treaty in which, before the formulation of reservations, States and two international organizations participated might create only conventional relations between States, in the event that the two international organizations formulated different reservations, that all the States objected to those reservations and each organization objected to the reservations of the other, and that each objecting State or organization declared that it did not consider itself to be bound by the treaty with the parties which formulated the reservations to which it objected. If one were to introduce a variation into the above hypothesis and to assume that the organizations accepted their reservations in their mutual relations, while the situation of the States remained unchanged, the same conventional act would be governed by the Vienna Convention for the relations between States and by the draft articles for the relations between the two organizations.<sup>15</sup> If, in addition, one considers the possibility of the withdrawal of objections to reservations, a treaty (or rather the conventional relations deriving from it) could, after ceasing to be covered by the régime of the draft articles, once again come within its scope.

20. Sir Francis Vallat considered this problem in a more general manner, expressing concern that the provisions of article 3 (c) of the draft articles were not identical with those of article 3 (c) of the Vienna Convention. He wondered whether it was "theoretically and practically possible to limit the applicability of the Commission's provisions on reservations to the relations between international organizations and States and between international organizations themselves, leaving the relations between States to be governed by the Vienna Convention".<sup>16</sup> According to Professor Ushakov, it is also necessary to consider the case in which a reservation formulated by a State was accepted by the other States but objected to by an international organization: the legal effects of the reservation in the relations between States would be governed by the Vienna Convention and it would be useful to include "a general saving clause applicable to the draft as a whole, to the effect that relations between States only would be governed by the Vienna Convention . . . or by the relevant rules of general international law".<sup>17</sup> Mr. Ago, for his part, emphasized the very general nature of the problem, which went beyond the question of reservations: a treaty which, at the outset of the negotiations, was destined to become a treaty between States and international organizations might in fact become a treaty between States, if the organizations concerned did not approve it or withdrew from it,<sup>18</sup> and Sir Francis Vallat once again stressed the need to clarify the

relationship between the draft articles and the Vienna Convention.<sup>19</sup>

21. That is a brief summary of the exchange of views which raised very interesting but extremely complicated questions for the Commission. There appears to be unanimity on two points:

(a) Firstly, these problems do not arise for treaties between two or more international organizations; this is an additional reason for preparing draft articles devoted exclusively to this category of treaty.

(b) Secondly, the difficulties mentioned go beyond the problem of reservations and have a quite general character. Assuming that the problem can be considered at this stage from the viewpoint of reservations, it will be possible to reach only a provisional conclusion and the Commission will have to indicate that it intends to reconsider the entire question when it has concluded its work. It is with this important proviso that the Special Rapporteur will revert to the questions discussed and will repeat—with any modifications made necessary in the light of the views expressed in the Commission—some of the comments which he made during the discussion.

22. In the first place, it seems to him that the International Law Commission adopted a definite position at the outset of its work on a basic question of method, and that its position in that regard can be altered only on the occasion of the second reading, at the end of its work. The Commission decided to draft articles which would be *independent of the Vienna Convention*, in the sense that the articles would contain no reference to that Convention and would be sufficient in themselves for the settling of any questions which might arise with regard to treaties falling within their sphere of application, regardless of the fate of the Vienna Convention. It is for that reason, for example, that all the rules concerning the consent of States have been set forth once again in the preceding articles, although they involve no change by comparison with the provisions of the Vienna Convention.

23. That being said, another question of substance arises, independently of article 3 (c) of the Vienna Convention, independently of any relationship between that Convention and the present draft articles; that question is whether the Commission wishes to lay down, with regard to the reservations régime in the case of treaties between States and international organizations, rules which would vary depending on whether States, or a State and an international organization, or two international organizations are involved. It would then be necessary, in theory at least, to distinguish eight cases (acceptance by a State of the reservations of a State, acceptance by a State of the reservations of an organization, acceptance by an organization of the reservations of an organization, acceptance by an organization of the reservations of a State, plus four additional symmetrical possibilities for objections). But it is possible—fortunately—that agreement may be reached on a simpler régime in which States and international organizations would be in the same situation. This will be the case if the Commission adopts the proposals of the

<sup>14</sup> *Ibid.*, pp. 240–241, 1349th meeting, paras. 5 and 6.

<sup>15</sup> Is it necessary to point out that it would then be the provisions of the draft articles concerning treaties between two or more international organizations which would apply, and that those provisions might be different from those concerning treaties between States and international organizations? If these considerations are relevant, they do not argue in favour of a differentiation of régime for these two groups of treaties.

<sup>16</sup> *Yearbook . . . 1975*, vol. I, p. 243, 1349th meeting, para. 24 and, even more categorically, *ibid.*, p. 248, 1350th meeting, para. 23.

<sup>17</sup> *Ibid.*, p. 248, 1350th meeting, paras. 25 and 26.

<sup>18</sup> *Ibid.*, p. 249, para. 31.

<sup>19</sup> *Ibid.*, para. 32.

Special Rapporteur. He is proposing a fairly strict general reservations régime, with exceptions; but in his approach, liberalism and severity apply in the same manner to States and to international organizations. If the Commission does not accept this assimilation, the principal effect of which is to impose on States, because they have agreed to enter into conventional relations with international organizations, a restriction on the freedom of action conferred upon them by the Vienna Convention, it will have to choose on the basis of the actual merits of the solution adopted, and not by reference to the rules established by the Vienna Convention.

24. It is not until this choice has been made that it will be possible to consider the problems which may arise from article 3 (c) of the Vienna Convention. These problems arise only in connexion with relations between two States which are both parties to the Vienna Convention and to the convention which may result from these draft articles. They can easily be solved in advance: it would suffice for the present draft articles to contain the necessary clauses to this effect. If the Commission espouses the viewpoint which the Special Rapporteur has just outlined, the problem is quite simple to solve. The draft articles will have to constitute a complete whole—in other words, as has been shown, they will have to define a reservations régime applicable in relations between two States parties to a treaty between States and international organizations. It is that régime, and not the provisions of the Vienna Convention, which will be applicable. In order to prevent any hesitation as to which of the two conventions—the 1969 Convention or the convention resulting from these draft articles—should prevail, it will suffice to insert in the final provisions of the latter a provision precluding for States parties to the two conventions the application of article 3 (c) of the Vienna Convention. Such a solution certainly reflects the intention of the representatives who, at the United Nations Conference on the Law of Treaties, agreed to the inclusion of article 3 (c): *it was to be only a transitional measure* designed partially to fill the gap created by the fact that the scope of the Convention is limited to written treaties between States. This solution is also in conformity with the general principles applicable with regard to successive treaties relating to the same subject-matter, in particular as they emerge from article 30, paragraph 4 (a), of the Vienna Convention itself.

25. After these problems have been solved, one last question would then remain to be considered. It is always possible that a treaty between States may, at certain moments of its genesis and its history, be drafted with the idea of the possible participation of one or more international organizations, that subsequently all those international organizations cease to be parties to it or refrain from becoming parties, and that at a still later stage one or other of those organizations becomes a party to the treaty for the first or the second time. This would raise the problem of what might be called “an intermittent régime”. Would the convention based on the draft articles and the Vienna Convention be applied successively? In this matter, it appears necessary to exercise a certain moderation. And the Special Rapporteur, for his part, is tempted to follow the position suggested by Mr. Ago.<sup>20</sup> A treaty in which an

<sup>20</sup> *Ibid.*, para. 31.

international organization of any kind is precluded from participating, not only for the present but also in the future, should normally fall within the scope of the Vienna Convention. On the other hand, a treaty to which even one organization retained the right to become a party or to become a party for a second time should, even for the period during which it binds only States, continue to be covered by the draft articles. The point is that States do not lightly agree to open an international convention to one or more international organizations and it is presumably agreed that this situation poses special problems. It is therefore quite natural for relations between States to remain subject to the rules of the draft articles simply because of the possibility of participation by an international organization. This reasoning is of course also based on the fundamental idea that the draft articles constitute a complete and homogeneous whole—an idea which has so far always been the basis for the Commission's work.

26. The Special Rapporteur has not, however, prepared a draft article on this last point, because the problem goes beyond the question of reservations and would have to be covered in the final clauses of the draft. In addition, it is preferable for the Commission to decide first on the questions of principle which have just been raised, before turning to that of the texts themselves, which should not in any case be particularly difficult to draft.

**Article 19. Formulation of reservations in the case of treaties concluded between several international organizations<sup>21</sup>**

**In the case of a treaty between several international organizations, an international organization may, when signing, formally confirming, accepting, approving or acceding to the treaty, formulate a reservation unless:**

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.<sup>20</sup>

*Commentary*

The proposed wording follows faithfully the text of article 19 of the Vienna Convention; the only change, which has been made in the light of the text of paragraph 2 of draft article 11 adopted by the Commission, has been to replace the word “ratifying” by the words “formally confirming”.

<sup>21</sup> Corresponding provision of the Vienna Convention:

*“Article 19: Formulation of reservations*

“A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- “(a) the reservation is prohibited by the treaty;
- “(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- “(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.”

**Article 20. Acceptance of and objection to reservations in the case of treaties concluded between several international organizations<sup>22</sup>**

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting international organizations unless the treaty so provides.

2. When it appears from the limited number of the negotiating international organizations and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting international organization of a reservation constitutes the reserving organization a party to the treaty in relation to that other organization if or when the treaty is in force for those organizations;

(b) an objection by another contracting international organization to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving organizations unless a contrary intention is definitely expressed by the objecting organization;

(c) an act expressing the consent of an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting international organization has accepted the reservation.

4. For the purposes of paragraphs 2 and 3 and unless the treaty otherwise provides, a reservation is considered to have been accepted by an international organization if it shall have raised no objection to the reservation by the end

of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

*Commentary*

The only difference between this text and that of the Vienna Convention which calls for an explanation is the absence of any provision corresponding to article 20, paragraph 3, of that Convention. It is conceivable in theory that the membership of an international organization might consist only of international organizations, and in that case it would be reasonable to allow that a reservation to the constituent instrument of that organization requires the acceptance of the competent organ of that organization. That would, however, be a very rare situation, of which there is at present no example. The text of such a provision would give rise to very difficult problems of vocabulary. The fact is that such an organization, being composed of international organizations, would no longer correspond to the definition of the term "international organization" since it would not be "intergovernmental". A new term would therefore have to be devised and defined. It appears that no purpose would be served by going into this extra complication, in view of the rare occurrence of the case. In this connexion, it might be pointed out once again that article 20, paragraph 3, of the Vienna Convention might be useful in helping to develop and reinforce a general practice, but that it is absolutely incapable of giving a conventional basis to the rule set out therein since international organizations are third parties in relation to the 1969 Vienna Convention, and that Convention cannot confer any new competence on their organs.

**Article 19 bis. Formulation of reservations in the case of treaties concluded between States and international organizations<sup>23</sup>**

1. In the case of a treaty between States and international organizations, a reservation may be formulated by:

a State, when signing, ratifying, accepting, approving or acceding to the treaty, or

an international organization, when signing, formally confirming, accepting, approving or acceding to the treaty,

only if the reservation is expressly authorized either by the treaty or in some other manner by all the contracting States and international organizations.

2. Notwithstanding the rule laid down in the preceding paragraph, in the case of a treaty concluded between States and international organizations on the conclusion of an international conference in the conditions provided for in article 9, paragraph 2, of these draft articles, in respect of which it does not appear either from the limited number of the negotiating States or from the object and purpose of the treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation may be formulated by:

a State, when signing, ratifying, accepting, approving or acceding to the treaty, or

<sup>22</sup> Corresponding provision of the Vienna Convention:

*"Article 20: Acceptance of and objection to reservations*

"1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

"2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

"3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

"4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

"(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

"(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

"(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

"5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."

<sup>23</sup> For the corresponding provision of the Vienna Convention, see foot-note 21 above.



an international organization, when signing, formally confirming, accepting, approving or acceding to the treaty, unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

#### *Commentary*

(1) The purpose of article 19 *bis* is to state a general rule restricting the freedom to formulate reservations in the case of treaties between States and international organizations, for the reasons indicated above in the general commentary on section 2 as a whole. The rule stated, however, comprises two exceptions.

(2) The first exception is self-evident and does not call for a long commentary. It relates to the reservations expressly authorized by the treaty itself. As has been said, the aim of the stricter régime provided for here is to oblige those drafting treaties to draw up conventional rules, on a case-by-case basis, to govern the reservations régime. By comparison with the text of the Vienna Convention, the only change has been to expand somewhat the scope of the exception by including in it not only the case in which the reservation is expressly provided for by the text of the treaty itself, but also that in which it is authorized by all the States in some other manner, in other words by consent given outside the text of the treaty.

(3) The second exception concerns the case in which one or more international organizations become parties to a relatively open treaty in which they have a place comparable with that occupied by States. Such would be the case of a convention relating to customs nomenclature to which two customs unions, in addition to States, were parties. In that case there would be little need to adopt a reservations régime other than that of the Vienna Convention, for to impose on States a rule restricting their freedom because they had allowed the participation of one or two international organizations would obviously discourage States from expanding the circle of entities which may become parties to a treaty. In adopting article 9, paragraph 2, at its twenty-seventh session,<sup>24</sup> the International Law Commission intended to provide for exactly this eventuality, which had up to the present time remained purely theoretical.

(4) A mere reference to article 9, paragraph 2, does not, however, appear to be sufficient since, as we know, that text does not define the concept of international conference, and the hypothesis must be clarified. In the second version of article 19 which he proposed at the Commission's twenty-seventh session,<sup>25</sup> the Special Rapporteur used the

terms "treaty concluded between States on the conclusion of a general conference, in which one or more international organizations participate on the same footing as those States . . .". But several members of the Commission observed that the use of the adjective "general" or even "universal" would give rise to uncertainty.<sup>26</sup> On reflection, it seems pointless to add a clarification of this nature; the reference to the rule of the two-thirds majority in article 9, paragraph 2, necessarily implies that it applies to "conferences" for which such a reference has some meaning, in other words conferences of a certain scope, and that there is no need to seek any greater clarification than that which was sufficient for the Vienna Convention, especially since the second condition appearing in the second version of article 19 referred to above has been retained, and this makes it possible to exclude from enjoyment of the freedom to formulate reservations those treaties the application of which in their entirety is an essential condition of the consent of each party to be bound thereby—hereafter referred to as "entire" treaties—which article 19 *bis*, paragraph 1, *in fine*, places under the same strict régime as that provided in article 20 of the Vienna Convention.

(5) It appears from the preceding comment that, while the general structure of the Vienna Convention, which in article 19 deals with questions relating to *formulation* and in article 20 to questions relating to *acceptance* and *objection*, has been respected, the questions have been divided in a slightly different manner between articles 19 *bis* and 20 *bis*. In the system under the Vienna Convention, a reservation to an "entire" treaty may be *formulated* but it must be *accepted* by all the parties (article 20, para. 2); in the system proposed for treaties between States and international organizations, reservations may not be formulated to "entire" treaties unless all the contracting States and organizations give their *authorization* (article 19 *bis*, para. 1, *in fine*). But that difference is a logical consequence of the difference between the two systems: in the Vienna system, since the freedom to formulate reservations is the general rule, the question of "entire" treaties is seen from the standpoint of *acceptance*; in the system provided for under articles 19 *bis* and 20 *bis*, since the freedom to formulate reservations does not exist as a general rule, the only reservations which can be accepted are those whose *formulation* is authorized.

(6) The other drafting problems posed by article 19 *bis* relate to the distinction between "ratification", which is reserved to States, and "formal confirmation", which is reserved to international organizations; this question has already been dealt with above in connexion with article 19.

#### *Article 20 bis. Acceptance of and objection to reservations in the case of treaties concluded between States and international organizations*<sup>27</sup>

**1. A reservation expressly authorized either by a treaty or in some other manner by all the contracting States and international organizations does not require any subsequent**

<sup>24</sup> This provision reads as follows:

"The adoption of the text of a treaty between States and one or more international organizations at an international conference in which one or more international organizations participate takes place by the vote of two thirds of the participants present and voting, unless by the same majority the latter shall decide to apply a different rule."

<sup>25</sup> See *Yearbook . . . 1975*, vol. I, p. 246, 1350th meeting, para. 1.

<sup>26</sup> *Ibid.*, p. 247, 1350th meeting, para. 8.

<sup>27</sup> For the corresponding provision of the Vienna Convention, see footnote 22 above.

acceptance by the other contracting States or international organizations unless the treaty so provides or it is otherwise agreed.

2. In the case falling under article 19 *bis*, paragraph 2, and unless the treaty otherwise provides:

(a) acceptance by another contracting State or international organization of a reservation constitutes the reserving party a party to the treaty in relation to that other contracting party if or when the treaty is in force for those parties,

(b) an objection by another contracting State or international organization to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving contracting parties unless a contrary intention is definitely expressed by the objecting contracting party;

(c) an act expressing the consent of a State or international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State or international organization has accepted the reservation.

3. For the purposes of paragraph 2 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after notification of the reservation was received or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

#### Commentary

(1) The wording of paragraph 1 of draft article 20 *bis* differs slightly from that of the corresponding provision of the Vienna Convention in order to take into account the end of article 19 *bis*, paragraph 1, which provides for the case where a reservation "is expressly authorized either by the treaty or in some other manner by all the contracting States and international organizations". The proposed text takes account of this provision, which makes the article more flexible.

(2) The text of draft article 20 *bis* contains no provision based on paragraphs 2 and 3 of article 20 of the Vienna Convention. The reasons for this omission with regard to paragraph 2 were given above.<sup>28</sup> With regard to paragraph 3, the case of an international organization becoming a member of an inter-State international organization is less theoretical than that envisaged earlier,<sup>29</sup> of an organization with a membership consisting exclusively of international organizations, and examples could be quoted of an international organization holding a certain place in another international organization.<sup>30</sup> However, it would be premature to say that an organization has become a member of

another organization on the same footing as States, for it is subject to a special régime. In any event, the terminological problems already mentioned would arise: an international organization whose members included another organization would no longer be strictly "intergovernmental". For all these reasons, it seemed preferable not to deal with this question in the draft articles. However, an objection could be raised to this solution: if it is desired that the draft articles should constitute an autonomous whole, it is necessary to take into account, in the case under consideration, the reservations which might be formulated by a State. A distinction must therefore be drawn between the reservations formulated by an organization and those formulated by a State; for the latter, it would be necessary to include a rule similar to that contained in article 20, paragraph 3, of the Vienna Convention. However, such a solution would not be very satisfactory, for it would introduce pointless discrimination between States and international organizations. In fact, it would be quite possible to refrain from providing for special treatment in the case of an organization originating in a treaty between States and in which one or more international organizations also participate: the rules providing protection against the abuse of the reservations contained in draft article 19 *bis* are adequate.

#### Article 21. Legal effects of reservations and of objections to reservations<sup>31</sup>

1. A reservation established with regard to another party in accordance with articles 19, 19 *bis*, 20, 20 *bis* and 23:

(a) modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving party.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When, as provided in article 20, paragraph 3 (b), and in article 20 *bis*, paragraph 2 (b), a contracting State or international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving contracting party, the provisions to which the reservation relates do not apply as between the two contracting parties to the extent of the reservation.

<sup>31</sup> Corresponding provision of the Vienna Convention:

"Article 21: Legal effects of reservations and of objections to reservations

"1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

"(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

"(b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

"2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

"3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation."

<sup>28</sup> See above, article 19 *bis*, para. (5) of the commentary.

<sup>29</sup> See above, commentary to article 20.

<sup>30</sup> The question arises with regard to the European Economic Community in organizations originating in commodity agreements (see the studies published in the *Annuaire français de droit international*, 1970 (Paris), vol. XVI (1971), pp. 695 *et seq.* and in *Annuaire français de droit international*, 1975 (Paris), vol. XXI (1976). For the position of the United Nations in the International Telecommunication Union, see *Yearbook . . . 1972*, vol. II, p. 194, document A/CN.4/258, foot-note 178.

*Commentary*

Compared with the corresponding text of the Vienna Convention, this article contains only the drafting changes necessitated by its specific subject. Since the scope of the objections machinery is less general than in the Vienna Convention, it seemed advisable to insert in paragraph 3 a reference to the relevant provisions concerning objections.

**Article 22. *Withdrawal of reservations and of objections to reservations***<sup>32</sup>

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or international organization which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State or international organization only when notice of it has been received by that State or international organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the reserving party.

*Commentary*

This draft article contains no changes as compared with the version proposed in the fourth report.<sup>33</sup> If the International Law Commission, rejecting the suggestions of the Special Rapporteur, were to agree that a treaty could be subject alternatively to the régime of the Vienna Convention on the Law of Treaties and to the régime of the convention based on the draft articles, depending on the circumstances in which international organizations became parties to a treaty to which States were also parties, it would be necessary to complete article 22 and in particular to provide for wider notification when the withdrawal of an objection to a reservation results in a modification of the conventional régime to which a treaty is subject.

<sup>32</sup> Corresponding provision of the Vienna Convention:

*“Article 22: Withdrawal of reservations and of objections to reservations*

“1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

“2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

“3. Unless the treaty otherwise provides, or it is otherwise agreed:

“(a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;

“(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.”

<sup>33</sup> *Yearbook* . . . 1975, vol. II, p. 38, document A/CN.4/285, article 22.

**Article 23. *Procedure regarding reservations***<sup>34</sup>

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and international organizations and other States and international organizations entitled to become parties to the treaty.

2. If formulated when signing the treaty

by a State subject to ratification, acceptance or approval of the treaty,

by an international organization subject to formal confirmation, acceptance or approval of the treaty,

a reservation must be formally confirmed, as the case may be, by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

*Commentary*

Paragraph 2 alone differs from the version of this draft article contained in the fourth report. It was necessary to take into account the notion of “formal confirmation” introduced in draft article 11, adopted by the International Law Commission at its twenty-seventh session. To that end, it was necessary not only to mention that act in connexion with the consent of international organizations but also to make the wording slightly more precise in order to avoid confusion between the formal confirmation *of the treaty* and the formal confirmation *of the reservation* mentioned in the same provision. If the International Law Commission considers that there is still a risk of confusion, it will be necessary to depart even further from the text of the Vienna Convention, to avoid referring to the formal confirmation of a reservation and to render the idea by using another expression such as “formulate” or “express for a second time”.

<sup>34</sup> Corresponding provision of the Vienna Convention:

*“Article 23: Procedure regarding reservations*

“1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

“2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

“3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

“4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.”

# THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

(Agenda item 6)

DOCUMENT A/CN.4/294 AND ADD.1

Replies of Governments to the Commission's questionnaire

[Original: English/French/Spanish]  
[1 April 1976]

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## ABBREVIATIONS

ECE	Economic Commission for Europe
EEC	European Economic Community
OECD	Organisation for Economic Co-operation and Development
UNEP	United Nations Environment Programme

## NOTE

For the texts of the treaties, reports, etc., listed below, which are referred to in this document, see the following sources:

- |  |   |
|--|---|
| Final Act of the Congress of Vienna (9 June 1815)  | A. Oakes and R. B. Mowat, eds. <i>The Great European Treaties of the Nineteenth Century</i> (Oxford, Clarendon Press, 1918), p. 37. |
| Regulation concerning the free navigation of rivers (Vienna, 24 March 1815)  | G. F. de Martens, ed., <i>Nouveau Recueil de traités</i> , vol. II, 1814–1815 (Göttingen, Dieterich, 1887), p. 434.                 |
| Treaty of Versailles (28 June 1919)  | <i>British and Foreign State Papers</i> (London, H.M. Stationery Office, 1922), vol. 112, p. 1.                                     |
| Act regarding navigation and economic co-operation between the States of the Niger basin (Niamey, 26 October 1963) | United Nations, <i>Treaty Series</i> , vol. 587, p. 9.  |
| Convention relating to the general development of the Senegal River Basin (Bamako, 26 July 1963)                   | <i>Journal Officiel de la République du Sénégal</i> , 20 February 1965, p. 171.   |
| Treaty on the River Plate Basin (Brasilia, 23 April 1969)  | United Nations, <i>Treaty Series</i> , vol. 875 (to be published), No. 12550.   |
| Convention for the prevention of marine pollution from land-based sources (Paris, 4 June 1974)                     | Conference on the prevention of marine pollution from land-based sources, Paris, June 1974, document No. 220.                       |
| Convention and Statute on the Regime of Navigable Waterways of International Concern (Barcelona, 20 April 1921)    | League of Nations, <i>Treaty Series</i> , vol. VII, p. 35.  |
| Helsinki Rules on the Uses of the Waters of International Rivers (1966)  | <i>Yearbook ... 1974</i> , vol. II (Part Two), p. 357, document A/CN.4, part four, sect. C, 1.                                      |
| Report of the Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses (July 1974)      | <i>Yearbook ... 1974</i> , vol. II (Part One), p. 301, document A/9610/Rev.1, chapter V, annex.                                     |

## INTRODUCTION

1. In paragraph 4 of resolution 3071 (XXVIII) of 30 November 1973 the General Assembly recommended that the International Law Commission should, at its twenty-sixth session, commence its work on the law of the non-navigational uses of international watercourses by, *inter alia*, adopting preliminary measures provided for under the Commission's statute. Pursuant to that recommendation the Commission, at that session, set up a Sub-Committee to consider the question and report to the Commission, and it appointed Mr. Richard D. Kearney as Special Rapporteur for the topic. The Commission adopted the Sub-Committee's report and included it in its report on the work of its twenty-sixth session. The Sub-Committee's report contained a series of questions intended to elicit the views of States on certain preliminary aspects of the subject-matter with a view to facilitating the future study of the topic by the Commission.

2. At its twenty-ninth session the General Assembly, in connexion with its consideration of the Commission's report, adopted resolution 3315 (XXIX) of 14 December 1974. In paragraph 4 (e) of section I of the resolution, the Assembly recommends 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 International Law Commission on the topic, and comments received from Member States on the questions referred to in the annex to chapter V of the Commission's report.

3. By a circular note dated 21 January 1975 the Secretary-General invited Member States to communicate to him, if possible by 1 July 1975, the comments on the Commission's questionnaire referred to in General Assembly resolution 3315 (XXIX).

4. As of 26 March 1976, replies to the Secretary-General's note referred to above had been received from the Governments of the following States: Argentina, Austria, Barbados, Brazil, Canada, Colombia, Ecuador, Federal Republic of Germany, Finland, France, Hungary, Indonesia, Nicaragua, Pakistan, Philippines, Poland, Spain, Sweden, United States of America and Venezuela. A reply was subsequently received from the Government of the Netherlands.

5. The present document contains the above-mentioned replies, giving first the general comments and observations and then the replies to each of the specific questions reproduced below. The internal structure of each governmental reply and the categorization of the materials with respect to each question as presented by the Governments have been fully respected. When a Government has indicated that the text of a reply covers more than one question, the reply has been reproduced only once, under

the first relevant question, cross references being used under the others.

6. 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?

## I. GENERAL COMMENTS AND OBSERVATIONS

### Argentina

[Original: Spanish]  
[26 August 1975]

1. The Argentine Government accords high priority to the study undertaken by the International Law Commission and hopes that it can be completed with the promptness which this area of international relations requires. It reflects an aspiration which goes back to General Assembly resolution 1401 (XIV) and was affirmed and supplemented through resolutions 2669 (XXV), 2780 (XXVI), 2926 (XXVII), 3071 (XXVIII) and 3315 (XXIX).
2. This background in itself demonstrates the acute need, which becomes even more evident if one considers the

development which has been taking place, in this and related matters, through the work of international bodies, the practice of States, legal theory, custom, international treaty law, and so on. The non-navigational use of international watercourses is a topic closely related to the subject of the relations of co-operation and friendship which should exist between States. The identification and formulation of legal rules by the Commission will contribute to the success of this undertaking. Furthermore, it is to be expected that the early completion of this work will be useful not only for the maintenance of these relations but also for the avoidance of possible disputes which is imperative in today's world characterized by a growing interdependence.

3. The Argentine Government believes that the study of this subject offers the opportunity for an effort to achieve this objective and trusts that its completion in the shortest possible time will be a new and valuable contribution by the International Law Commission.

### Austria

[Original: English]  
[18 July 1975]

Austria's comments have been made from the viewpoint of the experiences and interests of Austria as a land-locked country occupying the area above and below two international river catchment basins in Europe. Austria's attitude toward these problems largely corresponds to the views expressed in paragraphs 161, 162 (second sentence), 166 (last sentence), 167 (last sentence), 168 (from third sentence onward), 169 (last sentence), 170, 172 and 175 of the report of the Sixth Committee to the General Assembly at its twenty-ninth session.<sup>1</sup>

<sup>1</sup> See *Official Records of the General Assembly, Twenty-ninth Session, Annexes*, agenda item 87, document A/9897, chap. III, sect. E.

### Hungary

[Original: English]  
[14 July 1975]

1. We stress that we consider the codification of international law on waters and the support and fastening of the activity of the Committee to be of vital national interest.
2. Our country is on a lower location and therefore in an extremely unfavourable position from the point of view of water exploitation. Our existing agreements with the neighbouring States on frontier waters offer only a few protections at a time of limited water reserves.

### Netherlands

[Original: English]  
[21 April 1976]

1. The differences between drainage basins as regards climate and the characteristics of the watercourses (natural composition, quantity of water, current velocity) on the one hand, and the use made of the water on the other hand, require a different régime for every drainage basin.



Nonetheless a number of fundamental rules need to be developed and codified that could apply throughout the world.

2. Among these universal rules are those indicating the substance and extent of the obligation resting on the individual States sharing the same drainage basin to cooperate in managing the water in the best possible manner for all the States in that basin.

3. In the opinion of the Netherlands Government, these universal rules also include rules on the control of water pollution in so far as its consequences can make themselves felt outside the territories of the States sharing the same basin. One example that comes to mind is the pollution of the sea by the dirty rivers that flow into it.

#### Philippines

[Original: English]  
[25 August 1975]

1. The Philippines is far removed from the realities that give shape to the problems relating to non-navigational uses of international watercourses, simply because of the absence of any international river or watercourse within its national jurisprudence. Problems pertinent to the subject do not impinge on our national experience to any significant degree, not as much at least as our obvious interest in the strictly navigational uses of such waterways. This consideration affects the nature of whatever contribution the Philippine Government may have on the subject.

2. The problems presented by the questionnaire are necessarily drawn from the experience of riparian States, and, for obvious reason, not from actual problems created by our own national experience. Necessarily, our comments cannot be based on State practice on the part of the Philippines.

#### Spain

[Original: Spanish]  
[22 September 1975]

1. The Spanish Government is pleased that the International Law Commission took the initiative of consulting States when embarking upon its work on the law of the non-navigational uses of international watercourses. Owing to the continuing dialogue between the Commission and Governments, the arduous work of codification and progressive development of international law will not only be properly prepared technically, but also be assured of broad political acceptance.

2. In this case the method followed is the surest guarantee that the Commission will act prudently and avoid the danger of a codification that goes beyond what States are currently prepared to accept. The Commission is undoubtedly also aware of the difficulty of establishing general principles of universal application in a field fundamentally governed by specific treaties covering the many different situations that arise in practice.

3. In this task the Commission has an excellent starting point, thanks to the studies prepared by the Secretariat

(A/5409<sup>1</sup> and A/CN.4/274<sup>2</sup>) and the progress report of the Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses which met during the Commission's twenty-sixth session. The Spanish Government also has confidence in the ability of Ambassador Richard D. Kearney successfully to complete his important assignment as Special Rapporteur.

4. To supplement the data provided in document A/CN.4/274, a few references to recent Spanish international practice and legal doctrine are set forth below, in the hope that they may prove useful to the Commission.

#### Practice:

Franco-Hispanic agreement of 29 July 1963 on the development of the hydroelectric resources of the upper basin of the Garonne (*Boletín Oficial del Estado*, Madrid, 304th year, No. 184, 1 August 1964, p. 9948).

Spanish-Portuguese agreement of 16 July 1964 regulating the hydroelectric development of the international reaches of the river Duero and its tributaries (*ibid.*, 306th year, No. 198, 19 August 1966, p. 10876).

Spanish-Portuguese exchange of notes of 22 June 1968 constituting an agreement on fishing rights in the international reaches of the Miño (*ibid.*, 308th year, No. 185, 2 August 1968, p. 11406).

Spanish-Portuguese agreement of 29 May 1968 regulating the utilization and development of water-power in the international reaches of the Miño, Limia, Tagus, Guadiana, Chanza, and their tributaries (*ibid.*, 309th year, No. 96, 22 April 1969, p. 5929).

#### Doctrine:

J. de Yanguas Messia, "El aprovechamiento hidroeléctrico de los ríos internacionales en las zonas fronterizas españolas", *Revista de la Facultad de Derecho de la Universidad de Madrid*, 1957, vol. I, No. 1, pp. 9 *et seq.*

L. Martínez-Agulló y Sánchez, "Los tratados y la costumbre en el derecho fluvial internacional", *Revista Española de Derecho Internacional*, Madrid, 1962, vol. XV, No. 1-2, pp. 35 *et seq.*

J. h. de Azcárraga, "El aprovechamiento de los ríos internacionales", *Actas del V Congreso del Instituto Hispano-Luso-Americano de Derecho Internacional*, 1966.

<sup>1</sup> "Legal problems relating to the utilization and use of international rivers: report by the Secretary-General" (see *Yearbook . . . 1974*, vol. II (Part Two), pp. 33 *et seq.*).

<sup>2</sup> "Legal problems relating to the non-navigational uses of international watercourses: supplementary report by the Secretary-General" (*ibid.*, pp. 265 *et seq.*).

#### United States of America

[Original: English]  
[12 June 1975]

The Government of the United States welcomes the opportunity to comment on the questions submitted by the International Law Commission regarding the scope and procedures of its study of the law of the non-navigational

uses of international watercourses. The ever growing world population places ever greater demands upon the static supply of fresh water. The development of equitable and operable principles to provide for the availability of this vital resource is a pressing requirement.

## 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?*

#### Argentina

[Original: Spanish]  
[26 August 1975]

1. In view of the current acceleration in the development and progress of knowledge and of scientific and technological advances, the specification and limitation of definitions is unnecessary and even inappropriate. It is felt that this could give rise to prolonged academic discussions whose conclusions might be overtaken by events. Accordingly, the Committee on Natural Resources of the Economic and Social Council, for example, at its first session, agreed for practical reasons not to attempt to define a "natural resource". Similarly, the United Nations Conference on the Human Environment did not consider it necessary to define the environment. In spite of that, natural resources and the environment are universally identified and progress has been made in the consideration of these subjects without the restriction which definitions impose.

2. Notwithstanding the foregoing, and in a very general manner, it can be said that the term "international watercourse" should be understood to mean any collector of the drainage of a basin which extends beyond the limits of a single State.

3. International rivers are of special significance among international watercourses. In this connexion, it is appropriate to recall article 3 of the Inter-American Juridical Committee's Draft convention on the industrial and agricultural use of international rivers and lakes (1965), which states: "An international river is one that flows through or separates two or more States. The former shall be called successive, and the latter contiguous".<sup>1</sup>

4. This geographical difference is quite often more apparent than real, since many rivers may be both successive and contiguous.

5. The principal and secondary tributaries of an international river must also be considered "international", even when they lie entirely within a national territory, since they form part of the river system of an international drainage basin.

<sup>1</sup> See *Yearbook ... 1974*, vol. II (Part Two), p. 350, document A/CN.4/274, para. 379.

6. The waters of international rivers are shared natural resources. Consequently, in a study of the legal aspects of their uses, one major element which must be taken into account is the system of information and prior consultation between the States sharing an ecosystem, as is stated in article 3 of the Charter of Economic Rights and Duties of States.<sup>2</sup>

7. This reply is valid both for a study of the legal aspects of the uses of international watercourses and for any study of pollution of such watercourses.

<sup>2</sup> For the text of the Charter, see General Assembly resolution 3281 (XXIX).

#### Austria

[Original: English]  
[18 July 1975]

#### Reply to questions A, B and C

1. The Austrian concept of *Wasserwirtschaft* (management of water resources) comprises the utilization of water resources, the protection of waters against pollution by man as well as the protection of man against the elemental force of water. Accordingly, comprehensive provisions relating to these concerns have been embodied in Austrian Water-Supply and Waterways Law for more than 100 years. Also, the bilateral agreements with Yugoslavia concerning the rivers Drava (1954)<sup>1</sup> and Mur (1956),<sup>2</sup> and with Hungary (1959) and Czechoslovakia (1970) deal with water utilization, water pollution and flood control.

2. The treaties on water management concluded by Austria with the neighbouring States are drafted in terms of border watercourses rather than geographical or hydrological drainage areas. Similarly, the Draft European convention for the protection of international watercourses against pollution<sup>3</sup> of the Council of Europe, the blueprint of which related to "international drainage areas", had to be restricted to "international watercourses" because of legal, practical and political difficulties.

3. According to article 1 of the Convention, "international watercourse" means any watercourse, canal or lake separating or traversing the territories of several States.

<sup>1</sup> United Nations, *Treaty Series*, vol. 227, p. 111.

<sup>2</sup> *Ibid.*, vol. 396, p. 75.

<sup>3</sup> For the text of the draft convention, see *Yearbook ... 1974*, vol. II (Part Two), p. 346, document A/CN.4/274, para. 377.

#### Barbados

[Original: English]  
[10 November 1975]

An international watercourse may be defined as one which, together with its tributaries and distributaries, lies in part within the jurisdiction of two or more States or which forms the boundaries between two or more States.

#### Brazil

[Original: English]  
[3 July 1975]

1. The Brazilian Government considers that the study of the non-navigational uses of international watercourses

should be based on the traditional definition of an international river, deriving from articles 1 and 2 of the Regulation of 24 March 1815, concerning the free navigation of rivers, and articles 108 and 109 of the Final Act of the Congress of Vienna of 9 June 1815. That definition, which seems the most appropriate one for the orientation of the work of the Committee, has been accepted by a majority of experts in international law. According to this classical concept, international watercourses are those which separate or cut across the territory of two or more States. The study of the legal aspects of water uses and of pollution will, in our opinion, be perfectly oriented if it is conducted within the framework of the classical definition of international watercourses, which makes a natural distinction between contiguous and successive international watercourses, and derives all the consequences from this distinction. The example of the Treaty on the River Plate Basin, which was the subject of an opportune reference on the part of the Sub-Committee created by the International Law Commission with a view to the implementation of General Assembly resolution 3071 (XXVIII), is an eloquent demonstration of the pertinency of these comments. The Treaty in question, as has been pointed out, has as its purpose the harmonious development and physical integration of the River Plate Basin and of the area under its direct and measurable influence. It was thus designed to have a bearing on the development of the region. When the Treaty signatories were engaged in establishing rules for the exploitation of watercourses, covering problems such as pollution, they did not concentrate their attention on the concept of "drainage basin" (which is essentially territorial but not specifically fluvial), but rather on the classical distinction between contiguous and successive international watercourses, and they adopted the Declaration of Asunción,<sup>1</sup> the legal document that rules on the subject for the River Plate Basin and that was very justifiably noted in the report of the Sub-Committee already mentioned. In addition, as far as the Brazilian Government is concerned, the classical concept of international watercourses is, specifically, a constitutional matter, since chapter I, article 4, paragraph II of the Brazilian Constitution establishes that the patrimony of the Union includes "... watercourses ... that serve as boundaries with other countries, or that extend into foreign territory ...".<sup>2</sup>

2. The position of the Brazilian Government on this first question is based not only on the texts of international and national law cited above, but, in addition, on the fundamental juridical principles that must, in its view, be applied internationally to the regulation of the utilization of international watercourses. In fact, for any legal study of the matter, it is of the utmost importance to establish norms that will meet the special circumstances attendant upon the uses of a contiguous international watercourse (in which case it is essential for the riparian States to establish prior

<sup>1</sup> Declaration of Asunción on the use of international rivers: for the text, see *Yearbook ... 1974*, vol. II (Part Two), p. 324, document A/CN.4/274, para. 326, Act of Asunción, resolution No. 25.

<sup>2</sup> *Constitution of Brazil, 1967* (as amended by Constitutional Amendment No. 1 of 17 October 1969) (Washington, D.C., General Secretariat, OAS) pp. 2-3.

agreement) and those of a successive international watercourse, subject to the successive jurisdiction of two or more States and, therefore, subject to the principle of juridical responsibility, which presupposes the prohibition against causing significant harm to third parties.

3. On this subject, the Declaration of Asunción mentioned above seems to the Brazilian Government to be particularly adequate, not only because it makes a perfect clarification of the norms to be applied in the utilization of each type of watercourse but also because it establishes the legal basis for this difference in treatment in making it patent that in the case of contiguous international watercourses sovereignty is shared, while in the case of successive watercourses sovereignty is not shared. Moreover, that instrument was very significantly sanctioned by two separate treaties of the greatest importance, both of which regulate instances of hydroelectric exploitation in the area of the River Plate Basin: the Treaty of Itaipú,<sup>3</sup> concluded between Brazil and Paraguay on 26 April 1973, which, in its preamble, takes into consideration "That which has been established in the Declaration of Asunción on the use of international rivers, of 3 June 1971" and the Treaty of Jaciretá<sup>4</sup> of 3 December 1973, between Argentina and Paraguay, which, in an even more emphatic manner, acknowledges again as one of the *consideranda* of the preambular part, that "Article VI of the Treaty on the River Plate Basin and the Declaration of Asunción of 3 June 1971, determine the criteria, accepted by the two countries, for the exploitation of international rivers".

4. It would be well to keep in mind, furthermore, that for the purposes of the study entrusted to the International Law Commission, that which is important is to seek to achieve the elaboration of norms of a truly international character, i.e., norms that will rule on the uses of a contiguous portion of a watercourse and on the differing conditions under which a successive watercourse passes from the territorial jurisdiction of one State to another or to other States.

<sup>3</sup> Text of treaty in *Derecho de la Integración, Revista Jurídica Latinoamericana*, Buenos Aires, vol. VI, No. 14 (November, 1973), p. 233.

<sup>4</sup> *Ibid.*, vol. VII, No. 15 (March, 1974), p. 211.

#### Canada

[Original: English]  
[25 September 1975]

1. The definition should refer to the strictly international reaches of a shared body of fresh water—in other words, a body of fresh water which crosses or forms an international boundary.

2. Two of the factors which lead to this conclusion are:

(a) A legal definition should be a workable starting point and not a limiting factor that would preclude consideration of any appropriate geographical unit when specific, concrete problems are considered. Because such a wide variety of problems will fall within the scope of the Commission's study, the use of a large geographical unit for all legal purposes could prove awkward in certain circumstances.

(b) It is desirable to distinguish between legal and managerial concepts. From the resource manager's perspec-

tive, the proper unit of concern should normally be based upon functional rather than legal or geographical criteria, because the problem to be resolved is that of conflicting uses. Accordingly, from a managerial perspective, the optimum unit might simply be that area where the water uses of two or more States are interrelated. This is an approach which the Commission might consider when more specific topics are discussed at a later stage.

#### Colombia

[Original: Spanish]  
[9 July 1975]

1. The Government of Colombia considers that the scope of the definition of an "international watercourse", in the study both of the legal aspects of fresh water uses and of fresh water pollution, should be simply that of an "international river", as given in the Final Act of the Congress of Vienna of 1815, namely, a river which traverses or separates the territories of two or more States.
2. An international river may, of course, be successive—when it flows through the territories of two or more States—or contiguous—when it separates or serves as a boundary between States.
3. In the case of a successive river, although there may be agreements on navigation, fishing or other matters between two or more States there is no dual sovereignty. For that reason, a State traversed by the river must utilize the waters in such a way that it causes no appreciable damage to the other nations traversed by the same stream.
4. Conversely, in the case of a contiguous river, there is dual sovereignty at least in the reach which separates the territories of two countries. Consequently, for certain uses of the waters of such rivers, in addition to the considerations mentioned in the preceding case, account might be taken of the possibility of concluding bilateral or multilateral agreements between the nations concerned.

#### Ecuador

[Original: Spanish]  
[5 August 1975]

1. According to the most widely accepted definition, international watercourses are those which separate or pass through the territory of two or more States. In the opinion of the Government of Ecuador, a study of the legal aspects of the uses and pollution of international watercourses should be carried out on the basis of this definition which, in accordance with the geographical and political realities of the world, makes a distinction between contiguous and successive watercourses. This distinction, which relates essentially to rivers, was recognized in the Inter-American Juridical Committee in resolution (LXXII) of the Seventh International Conference of American States, which, leaving aside the territorial aspect, deals exclusively with the utilization of the water power of international waters for industrial or agricultural purposes. In a legal study of the subject, rules should be established to cover the special circumstances which may arise in connexion with the uses

of a contiguous international watercourse and a successive international watercourse. On the side under their jurisdiction, States have the exclusive right to utilize the waters of contiguous rivers for industrial or agricultural purposes. In the case of successive watercourses, the international aspect of the uses of such watercourses obviously arises only at the point where such watercourses cease to be subject to the sovereignty of one State and come under the sovereignty of another State. Consequently, the obligation of the sovereign State in the upper reaches of a watercourse cannot go beyond ensuring that no extensive or irreparable damage is caused for the sovereign States in the successive parts of the watercourse. It is for this reason that Ecuador has opposed the view that "prior consultation" is necessary for the use of an international watercourse. Nevertheless, Ecuador has maintained that it is advisable to exchange information with States concerned in a watercourse, regarding the uses which those States intend to make of the watercourse. In this way, it will be possible to avoid undue limitations on the exercise of the sovereignty of a State to which the upper reaches of a river belong.

2. The foregoing view is suitably complemented by the principle of the responsibility of the State exercising sovereignty over the upper reaches of a watercourse, as referred to above.

3. The Government of Ecuador accordingly considers that the International Law Commission, for the purposes of the study entrusted to it, should establish rules governing the uses of a contiguous portion of an international watercourse, as well as various others ensuring the use of a successive watercourse under the various territorial jurisdiction of the States through which it passes.

#### Finland

[Original: English]  
[21 August 1975]

Question A concerns the appropriate scope of the definition of an international watercourse with regard to the legal aspects of fresh water uses on the one hand and of pollution on the other. The concept of international watercourse was used by the Government of Finland in its motion of 1970 to the General Assembly and later on included in General Assembly resolution 2669 (XXV) concerning the development of the rules of international law relating to international watercourses. The term "international watercourse" has generally been regarded to be broad enough to cover all the problems which have relevance in this connexion, and it did not look too technical. When compared with other terms which have been used instead of "international watercourse", the scope of the latter is wider than that of "international river", because watercourse also means lakes. On the other hand "international watercourse" might be practically regarded as equivalent to "international drainage basin", provided that underground waters which are contained in the latter concept are not taken into account. Particularly for the purposes of the codification of international law of waters the term "international watercourse" seems to be as usable as the concept of "international drainage basin", which

concept has been adopted by the International Law Association after a careful study of various alternatives (Helsinki Rules of 1966). A similar terminological problem was studied also in 1952 by ECE and the results of this study which led to the acceptance of the concept "rivers and lakes of common interest" have been published in an ECE document.<sup>1</sup> Those studies have indicated that synonymous terms can be used for describing the same notion, provided that the terms chosen cover the main factors which with regard to watercourses have an international legal relevance. Firstly, the term should indicate that a watercourse or a system of rivers and lakes (a hydrographic basin) is divided between the territories of two or more States. The second factor of importance in this connexion is based upon the hydrographic coherence of the basin. Due to this coherence there exists, irrespective of the political borders, a legally relevant interdependence between the various parts of the watercourse belonging to different States. This interdependence which in each individual case should decide to what extent the drainage area will be subjected to an international legal regulation, does not concern the different uses of the watercourse and its water only; it has also bearing upon problems of pollution. For that reason there is no need to make distinctions concerning the scope of the definition of an "international watercourse" or an "international drainage basin" with regard to the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand.

<sup>1</sup> "Legal aspects of the hydro-electric development of rivers and lakes of common interest" (E/ECE/136-E/ECE/EP/98/Rev.1).

France

[Original: French]  
[11 July 1975]

*Reply to questions A, B and C*

*Nature of international watercourses*

1. Questions A, B and C can actually be reduced to one, namely, whether the concept of an international drainage basin or that of an international watercourse is the appropriate basis, depending on whether the subject of the study is the use or the pollution of the waterway.
2. As far as the use of the watercourse is concerned, it would be almost unthinkable to adopt any concept of a waterway other than that of an international watercourse.
3. As regards pollution of the waterway, on the other hand, the drainage basin concept might be adopted for the purpose of considering measures to be taken, with the exception of such controls as would have to be organized at the individual State level. However, for reasons which are explained more fully with reference to question H, the French Government does not consider it advisable at this juncture for the International Law Commission to undertake a study of the pollution of watercourses.

Federal Republic of Germany

[Original: English]  
[6 October 1975]

1. The Government of the Federal Republic of Germany holds the view that a study of the legal aspects of the non-

navigational uses of international watercourses should be based on the common definition of the term "international watercourse". In the opinion of the majority of international law experts and according to international practice as reflected in treaties and conventions, the term "international watercourse" comprises any watercourse, canal or lake forming the frontier or traversing the territories of two or more States.

2. This definition is derived from articles 1 and 2 of the Regulation concerning the Free Navigation of Rivers of 24 March 1815 and from articles 108 and 109 of the Final Act of the Congress of Vienna of 9 June 1815. It has since been internationally accepted.

3. In the Western European sphere of law the same definition was accepted by the member States of the Council of Europe as the basis for their consultations on a draft European convention for the protection of international watercourses against pollution and was eventually included in the text of the draft convention. It was also embodied in the German-Dutch Frontier Treaty of 8 April 1960<sup>1</sup> which contains provisions in chapter 4, article 56 and following concerning the use of waters which cross or, in some of their sections, form the frontier between the Federal Republic of Germany and the Netherlands.

4. A study of the legal aspects of fresh water uses and of fresh water pollution should take into account the full scope of this definition, thus allowing for practical results to be deduced on a broad scale. It should not be confined, as was done at the International Transport Conference in Barcelona in 1921, to the navigable section of a watercourse, especially as this particular study is to be limited to the use of watercourses for purposes other than navigation.

5. For completeness, however, it may be necessary and useful to include in the Commission's considerations also the navigational uses of watercourses at least as far as their contaminating effect is concerned. The removal of bilge oil as well as of ship refuse and waste water is of considerable significance for the pollution load of watercourses and the problems involved in this are therefore the subject of international efforts to secure pollution control of navigable waterways. The endeavour to formulate principles designed to reconcile conflicting interests resulting from so-called positive and negative uses of watercourses should be based on the consideration of as many aspects of pollution as possible.

<sup>1</sup> Treaty between the Kingdom of the Netherlands and the Federal Republic of Germany concerning the course of the common frontier, the boundary waters, real property situated near the frontier, traffic crossing the frontier on land and via inland waters, and other frontier questions (Frontier Treaty): for text see United Nations, *Treaty Series*, vol. 508, p. 148.

Hungary

[Original: English]  
[14 July 1975]

*Reply to questions A, B and C*

No unambiguous answer can be given to the questions put in points A, B and C of the questionnaire because the geographical designations mentioned there, "international

watercourses" and "international drainage basin" are appropriate only for a part of the so far non-regulated legal relations. The non-regulated legal relations and the main conceptions of their regulations can be outlined as follows:

The international legal regulation of the questions concerning the utilization of waters or drainage basins extending over the territory of several countries is necessary partly because of the hydrological unity of waters and drainage basins and partly because of their hydrography due to political demarcation of frontiers.

From the conception of "hydrological unity" the following essential facts can be concluded:

1. Hydrological unity first of all means that an intervention into the relations of waters on any part of a watercourse or drainage basin (i.e., the utilization of waters) has an effect on another part of the watercourse or the drainage basin.

The hydrography of frontiers of the watercourses or drainage basins through political demarcation means that any intervention on the territory of a State (generally on a higher location) has possibly an effect on the territory of another State (generally on a lower location) and causes changes in the water relations there (generally at the expense of the State on lower location).

There are two main cases of harmful changes in water relations: either a change in the quantity of the water reserve (i.e., because of the utilization of water for industrial, agricultural or communal purposes, or turning the water to other drainage basins, etc., causing a decrease in the water-reserve, or causing an increase in it because of depleting the water reservoirs in time of floods), or else a deterioration in the quality of water because of the introduction of unacceptably cleaned industrial, agricultural or communal outlet water.

The aim of the international legal regulation is to eliminate harmful interventions in water relations by prohibiting or preventing them.

(a) The rule prohibiting harmful intervention—deduced from the "*sic utere tuo . . .*" that is generally accepted by international law—was formulated by the United Nations Conference on the Human Environment in Stockholm as follows: ". . . States have, . . . the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States . . .".<sup>1</sup> The United Nations recognized this rule to be authoritative "in such cases".

Concerning waters, no specific geographical term of waters is necessary beyond this formulation, except the notion of "State territory".

(b) In most cases the interventions causing damages to another State are not made by a State but by some economic organizations or legal entities functioning inside the boundaries of the State. The means of controlling such kinds of activities is the legal system of concessions for the

utilization of waters enforced by the State. This system exists in all countries in a more or less developed form. Theoretically the above rule also decrees that the State is obliged to prevent or not to permit the activity that causes damages in another State.

However, it is necessary to elaborate further regulations in order to avoid harmful interventions because generally the authority on water rights has not the possibility to examine and judge the effect of the planned intervention that can be experienced in another State.

There were attempts to solve this problem in the agreements on the exploitation of frontier waters mainly in the relations of European socialist countries and in the relations of socialist and the neighbouring non-socialist countries. The following rules can be concluded from these agreements:

- (i) The waters creating borders between two countries or the waters crossed by a border between two States are "frontier waters";
- (ii) All the interventions affecting the water relations on frontier waters can be done only with the concord of both States; certain agreements contain provisions even about the division of water reserves;
- (iii) When waters are crossed by a frontier it is stipulated in some agreements that any interventions affecting the water relations can be made only with the consent of both States in the frontier area at a prescribed distance from it in both directions;
- (iv) No consent of the other State is necessary to the interventions made on the above-mentioned area of frontier waters or outside of them when the agreements provide only for informing the other State about the effect of the intervention if it is observable on frontier waters.

According to these agreements the following can be concluded:

- (i) Frontier waters have a special international legal status distinguishing them from any other waters;
- (ii) However, this status does not concern either other waters flowing into frontier waters or the full length of the currents crossed by a frontier and still less the drainage basin.

The last criterion also indicates the insufficiency and limits of the outlined regulation. We have made several unsuccessful attempts to extend this distinctive status in the negotiations with our neighbours. There were two reasons for this failure:

- (i) States regard the extension of the distinctive status of frontier waters to the whole drainage basin or to the full length of a current as an unjustified encroachment on their sovereignty;
- (ii) The extension of special status, i.e., the obligation to co-ordinate interventions into all the waters is impossible in practice. Theoretically the limitation of interventions is possible, but this also cannot give protection against the total effect of minor interventions.

<sup>1</sup> See 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, sect. II, principle 21.

Further possibilities to eliminate the difficulties are the following:

- (i) The bilaterally assured fixing of the quantity and quality of the water flowing across frontier waters either by the present co-ordination system or without it. For the description of this kind of regulation the necessary geographical terms are: "frontier waters", "boundary section", "frontier cut".
- (ii) In the latest bilateral treaties relating to the utilization of frontier waters the parties also assume the obligation of co-ordinating their long-range plans on water consumption. This obviously does not mean the co-ordination of detailed interventions but the co-ordination of the main directions of development. However, there is a possibility in this way to reach an agreement on the quantity and quality of waters flowing through a border.

2. There are some other questions originating from the hydrological unity of waters that are answered in the above-mentioned treaties on frontier waters. From these treaties several rules can be generalized concerning the co-operation of neighbouring countries, e.g.:

(a) Rules concerning the maintenance, control, embankment of the bed of frontier waters and concerning the exploitation, planning, execution and financing of these works;

(b) Rules giving a simplified way to cross the border for the workers who take part in the works stated above or in the co-operation on frontier waters;

(c) Rules prescribing the duty-free moving of machines and materials across the border;

(d) Rules concerning concessions in water rights etc.

In our opinion these rules are ripe for codification; there are no contradictions in the principle of their formulations between States on a higher or lower location.

For the formulation of these rules the following geographical terms are necessary: "frontier waters", "border section", "frontier cut".

3. The co-operation of neighbouring countries in the defence against the damages caused by waters originates in the hydrological unity of waters. In the protection against floods and inland waters it is necessary for both countries to co-ordinate the building and maintenance of dikes on their territories or to make and operate the works of common interest, to inform each other about the hydrometeorological data, possibly to develop automatic measuring systems, to make radio or phone connexion between the protecting organizations, to offer effective help to the other party, etc.

The possible forms of necessary co-operation against the damages of pollution are:

(a) The establishment of a network to control the quality of the polluted water, and the maintenance of this network;

(b) The introduction of effective protection on the State's own territory against the extremely polluted waters and informing in advance the country on a lower location about the pollution waves, etc.

For the description of the rules concerning the damages of waters, the necessary geographical terms are "frontier waters" and maybe "drainage basin".

4. Finally, the co-operation of States located on the same drainage basin—and not necessarily neighbours of each other—in the intended development and utilization of the waters of the drainage basin also originates in the hydrological unity of waters. The treaties mentioned as examples in the seventh, eighth and eleventh paragraphs of the Sub-Committee's report relate to this most comprehensive co-operation and for the regulation of this co-operation "drainage basin" is really the adequate geographical term.

We mention furthermore that in our opinion the uncertainty in the explanation of "international rivers" and "international drainage basin" that was well characterized in the sixteenth paragraph of the report, is due to the fact that the general legal relation concerning basically only the co-operation is not clearly discriminated from the other legal relations outlined above connected with the utilization of water.

The use of the attribute "international" is not correct, because without the detailed determination of the whole drainage basin it can also mean a special international legal status of whole currents such as the frontier waters have. This is unacceptable to the States on higher locations.

5. Summarizing our view, we underline the following:

(a) There is no geographical term so general that it could be applied to the description of all the legal relations relating to the waters or drainage basin which are on the territory of more than one State;

(b) "International river", "international drainage basin" and "frontier waters" are geographically exactly determined and well explainable terms. Therefore, it is not necessary to study the meaning of these terms, but the question what term is suitable to the regulation of certain legal relations.

6. The following points can be proposed for the classification of these legal relations:

(a) The water exploitations having effect on the quantity and quality of waters;

(b) Other water exploitations;

(c) The co-operation of States which are either neighbours or on the same drainage basin in the utilization of waters.

**Indonesia**

[Original: English]  
[17 July 1975]

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, should be the aim for the welfare of the people.

**Netherlands**

[Original: English]  
[21 April 1976]

(a) *Brackish water*

1. The subject of the study begun by the International Law Commission is the law of the non-navigational uses of



international watercourses. Yet in question A, and again in question D, mention is made of fresh water uses and fresh water pollution. The introduction of the term "fresh water" limits the scope of the study, in that it excludes those parts of international watercourses in which the water is brackish owing to the influence of the sea. Especially in such low-lying deltas as exist in the Netherlands it has been found that the salinizing effect of the sea can still be observed several dozen kilometres upstream from the point where the watercourse flows into the sea.

2. A distinction between fresh and brackish water may indeed be of some value for certain uses of the watercourse, such as irrigation of farm land, water use in some industrial process, the production of drinking water and the discharge of waste salts. With respect to other uses, however, for instance as cooling water, for recreation and for the discharge of waste chemical products this distinction is hardly—if at all—relevant.

3. The Netherlands Government considers that, in the interest of careful and balanced management of the watercourses in one and the same drainage basin, the definition of an international watercourse should be wide enough to include the part of it that contains brackish water.

4. The Government's opinion is based partly on the experience it has acquired in negotiations with the Governments of States situated upstream from the Netherlands, for it has been found that, from the viewpoint of the State situated farther upstream, the fact that the brackish part of a watercourse is not taken into consideration allows the Netherlands so much more freedom in the uses it can make of the watercourse as to make it difficult to achieve equilibrium between the rights and obligations of the upstream and downstream States.

5. An additional argument that might be mentioned is that in 1971–1974, when a draft European convention between the member States of the Council of Europe for the protection of international watercourses against pollution<sup>1</sup> was in the course of preparation, the basic principle originally adopted was the idea of fresh water protection. Yet in the course of the negotiations the experts of the member States came to the conclusion that the qualitative management of a watercourse should extend to the brackish lower reaches as well. This draft convention regards a watercourse as extending down to the base-line of the territorial sea.

#### (b) *Freshwater limit*

6. For those aspects of qualitative water management where it may be important to distinguish between the fresh-water and the brackish-water parts of a watercourse, the draft European convention referred to in paragraph 5 above contains the following definition in its article 1(c):

"freshwater limit" means the place in the watercourse where, at low tide and in a period of low freshwater flow, there is an appreciable increase in salinity due to the presence of sea water.

<sup>1</sup> For the text of the draft convention, see *Yearbook . . . 1974*, vol. II (Part Two), p. 346, document A/CN.4/274, para. 377.

7. The same definition was later included in the Convention concluded in Paris on 4 June 1974 for the prevention of marine pollution from landbased sources.

#### (c) *Watercourse*

8. For the purpose of the present study, "watercourses" should be taken to mean not only rivers but also canals and lakes through which the water may move, so that the use made of the water in one State may affect the possibilities of water use in another State.

#### Nicaragua

[Original: Spanish]  
[10 September 1975]

1. The scope which should be given to the definition of an international watercourse must be considered from two different angles: the legal aspects of uses and the legal aspects of pollution.

2. From the viewpoint of the utilization of waters, it is necessary to limit it to the following cases: (a) navigable rivers which traverse the territory of two or more States (successive rivers), in which the waters are under two or more different jurisdictions but are subject to the principle of legal responsibility, which presupposes a prohibition on causing substantial injury to third countries; (b) navigable rivers in which the dividing line between two States follows the direction of the thalweg (contiguous rivers), in which sovereignty over their waters is shared; (c) non-navigable rivers which traverse two or more States; (d) non-navigable rivers which constitute the border between two or more States. The legal aspects of water pollution should be considered with due consideration for other factors which will be set out later on. When a frontier lies on one of the banks of a river, that river should not be deemed to be an international river.

#### Pakistan

[Original: English]  
[10 October 1975]

All perennial rivers, streams, canals and even non-perennial streams which flow through more than one country should be included in the definition of international watercourses.

#### Philippines

[Original: English]  
[25 August 1975]

The definition of an international watercourse should be based on the unity of all surface waters as a physical concept. This reflects the centuries-old practice of States in cases of politically divided watercourses or basins.

#### Poland

[Original: English]  
[27 August 1975]

1. The study of the legal aspects of the non-navigational uses of international watercourses should encompass those

international watercourses which separate or cut across the territories of more than one State. For several years now international law has been engaged in problems connected with rivers separating or cutting across the territories of two or more States and which may be called international and not national rivers, meaning that they are not flowing through the territory of one State exclusively.

2. Classical international law did not, however, define as an international river every river flowing through or constituting the frontier of two or more States. The internationalization of a river was connected with its navigational function and a river which in its naturally navigational course separated or cut across the territories of two or more States was considered an international river. (See the Final Act of the Congress of Vienna of 1815 and the regulations of the Treaty of Versailles of 1919; the notion of "river network" as well as the broader notion of "navigable waterways of international concern" were adopted in the Barcelona Convention and Statute of 1921 on the régime of navigable waterways and international concern.)

3. From the viewpoint of non-navigational use of rivers the notion of international river is connected with its geo-political position, that is, with the fact that its watercourse flows successively through or separates the territories of two or more States.

4. The problem of navigation of a river may not be essential for its commercial, agricultural or domestic uses. In non-navigational use of rivers international law is interested in international rivers also defined as "common" or "multinational" rivers as opposed to "truly" national rivers, i.e., those in which the course from the spring to its sea estuary flows through the territory of only one State. At present, in international law, the notion "international river", besides its known classic interpretation, is used for the definition of every river, navigational or not, separating or cutting across the territories of two or more States.

5. For the purpose of non-navigational use of waters, the States are interested both in international rivers as well as in other internal watercourses, namely, in lakes cutting across international frontiers, which may be called international lakes, and in all other frontier waters.

6. The notion "frontier waters" is used in bilateral agreements on water economy concluded by Poland with her neighbouring countries (the Agreement between the Government of the Polish People's Republic and the Government of the Republic of Czechoslovakia on water economy in frontier waters of 21 March 1958;<sup>1</sup> the Agreement between the Government of the Polish People's Republic and the Government of the USSR on water economy in frontier waters of 17 July 1964;<sup>2</sup> the Agreement on co-operation in water economy in frontier waters concluded between the Polish People's Republic and the German Democratic Republic on 11 March 1965).

7. In those agreements the notion "frontier waters" embraces surface flowing and stagnant waters (rivers, streams, canals, lakes, ponds) which are run or cut across by the State frontier, at the points cut by the frontier line, as

well as subsoil waters cut across by the State frontier line at the points cut by this line.

8. Answering the question posed, the Government of the Polish People's Republic wishes to state that in defining the notion of international watercourses different criteria should not be used for the definition of this notion in the case of studies on legal aspects of the use of international watercourses and in the case of undertaking studies on the legal aspects of pollution of those waters.

9. It seems that for the need of studies on legal aspects of the use of waters and their protection against pollution one should understand under the notion of international watercourses all flowing (rivers, canals, streams) or stagnant waters (lakes, ponds), navigational or not, which successively flow through the territories of at least two States or constitute the frontier between States.

10. At the same time, the Government of the Polish People's Republic wishes to call attention to the fact that recently in international practice the subject of legal considerations and regulations relative to the use of international watercourses and aimed at their concordant and mutually profitable use are not only surface waters separating or cutting across the territories of two or more States but also subsoil waters. This is undoubtedly due to the ever-greater possibilities of their location, settlement of their flow directions, as well as due to ever more universal and possible use of methods connected with the development of technology.

11. Thus, one should also give some thought to the possible inclusion in legal considerations on the use of international watercourses of subsoil frontier waters and those subsoil waters which successively cut across the territories of two or more States.

Spain

[Original: Spanish]  
[22 September 1973]

#### *Reply to questions A, B and C*

1. Obviously, the first task must be to delimit the material scope of the study to be undertaken. In that connexion, the Spanish delegate pointed out at the 1228th meeting of the Sixth Committee on 12 November 1970,<sup>1</sup> the various problems that would certainly arise. The terminology used can affect not only the different physical realities to be included, but also the different legal consequences to be covered. This point can better be appreciated if we consider separately the elements in the definition of the question raised in General Assembly resolution 2669 (XXV).

#### (a) "Watercourses"

2. Traditionally, international practice and theory have dealt principally with "rivers" although lately greater emphasis has been placed upon "waterways" or "watercourses", which include lakes, canals, dams or reservoirs and other surface waters.

3. In its questionnaire, the Commission includes the term "drainage basin". That term, which was based on the

<sup>1</sup> United Nations, *Treaty Series*, vol. 538, p. 108.

<sup>2</sup> *Ibid.*, vol. 552, p. 188.

<sup>1</sup> *Official Records of the General Assembly, Twenty-fifth Session, Sixth Committee, 1228th meeting, paras. 38-43.*

concept of "river system", does not appear to have only one meaning at the present time and at any rate it is doubtful whether its meaning has become fixed. Thus, the Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development is of the opinion (quoted in para. 350 of document A/CN.4/274<sup>2</sup>) that "basin" should encompass not only surface waters, but also underground and atmospheric water as well as frozen resources, thus arriving at the concept of "international water resources system". On the other hand, the Secretary-General's report to the Committee on National Resources on river discharge and marine pollution (quoted in para. 335 of the same document<sup>3</sup>) maintains that, as far as pollution is concerned, the river basin should be considered as part of a much larger interdependent system that would include the oceans.

4. In view of the vagueness of the term "drainage basin" and of the scientific developments which are constantly changing the technical approach to the subject, it might be preferable to keep the traditional term "watercourses" for the purpose of codifying international law. Obviously, this would not prevent the development and clarification of the concepts "basin", "interdependent system" or "integrated water resources" by international technical or economic bodies or the adoption of such concepts by States either on a bilateral or regional basis.

(b) "International" watercourses

5. Traditionally, a distinction was made between rivers that are by their nature international and rivers that have been internationalized under a treaty or by custom. An attempt to establish a broad concept was made at the 1921 Barcelona Conference which drafted a Convention on the Régime of Navigable Waterways of International Concern. It is a well-known fact that many States did not ratify the Convention precisely because they could not accept that broad concept which would have included waterways that until then had been considered national.

6. This should serve as a lesson. The concept of "drainage basin" or "river system" implies the internationalization of watercourses that are wholly within the territory of a State. Undoubtedly, two or more States can agree to accept this with regard to a specific basin but the rules of general international law are quite another matter. There is no reason to believe that States are prepared to accept today what they rejected 50 years ago.

7. Consequently, it would be prudent to adhere to the traditional concept of watercourses of international character either because they constitute the boundary between two States (contiguous watercourses), or because they cross the territory of more than one State (successive watercourses).

<sup>2</sup> Yearbook . . . 1974, vol. II (Part Two), p. 334.

<sup>3</sup> *Ibid.*, p. 329.

Sweden

[Original: English]  
[24 June 1975]

The definition of an international watercourse should include all sweet water extending over the territory of two or

more States. It should refer to surface water as well as ground water. As regards the last mentioned, it is important that a regulation be also made, as such water covering the territory of two States can be used and polluted to the detriment of a neighbouring State. The concept of international watercourse should—for practical reasons—have the same meaning whether it is the question of use or pollution.

United States of America

[Original: English]  
[12 June 1975]

Reply to questions A, B and C

1. Questions A, B and C all deal with the definition of the term "international watercourse". Consequently the United States will deal with these questions *en bloc*. In considering these questions, the United States found the comments of Dr. Bengt Broms, the Finnish representative in the Sixth Committee discussion of this aspect of the Commission's report during the Twenty-Ninth General Assembly, to be a concise and penetrating analysis of the key issue:

The term chosen should be understood as indicating the fact that a watercourse or system of rivers and lakes (the hydrographic basin) is divided between two or more States. This division of the basin into various parts is combined with a second factor, the hydrographic coherence of the basin irrespective of the political borders. Due to this coherence, there exists an interdependence of legal relevance between the various parts of the watercourse or basin belonging to different States.<sup>1</sup>

2. In other words, action taken, or not taken, affecting water in any part of a hydrographic basin may produce consequences in water at other places within the hydrographic basin without regard to the conceptual division of the basin into different political entities. This causal relationship demands that the water system in a basin be considered in its entirety for the purpose of attempting to establish international legal rules because it is only in that manner that a workable set of rights and obligations can be established.

3. Consequently the United States considers that the concept of an international drainage basin from the standpoint of physical geography would be the appropriate basis for study of the legal aspects both of the non-navigational uses of international watercourses and of the pollution of such watercourses. The United States would add, however, that relationships between international drainage basins, and in particular, diversions of water into and out of such basins, may have significant effects on the interests of States within the basin. Accordingly, the United States considers that relationships between international drainage basins, including the effects of diversions into and out of such basins, should be included within the study.

<sup>1</sup> See *Official Records of the General Assembly, Twenty-ninth Session, Sixth Committee, 1487th meeting, para. 30.*

Venezuela

[Original: Spanish]  
[15 March 1976]

1. The definition of an international watercourse should be clearly differentiated from that of a national watercourse which traverses the territory of a single State.

2. In keeping with current trends in public international law, it should be possible to broaden the traditional definition of an international watercourse which, until now, has been tied to the criterion of navigability and access to the sea.

3. For these reasons, watercourses meeting the following criteria could be considered international watercourses:

(a) *Geopolitical criteria*: From the point of view of the preliminary study of the legal aspects of non-navigational fresh water uses on the one hand, and of fresh water pollution on the other, international watercourses would be not only those watercourses which traverse or separate two or more States (traditionally termed contiguous and successive), but also, possibly, watercourses pertaining to the same international drainage basin which covers the territory of more than one State. The traditional criterion of access to the sea for the definition of an international watercourse would thus be discarded. Lastly, suitable terminology would have to be developed for watercourses that could be considered international (rivers, streams, brooks, wadis, etc.).

(b) *Socio-economic criteria*: Watercourses used for economic purposes (navigation, irrigation, energy production, etc.), or social purposes (human consumption, etc.) could be considered international watercourses where such use serves the interests and needs of two or more countries, or where such use by one State may be directly detrimental to another or other States.

(c) *Legal criteria*: There are two cases to be considered:

(i) In the case of a mere preliminary study which does not call for the establishment of rights or obligations, watercourses which meet the above-mentioned criteria could be considered as coming within the same international scope. Recognition, by the States concerned, of the international nature of the watercourses covered by such a study would have declaratory value.

(ii) However, it should be stressed that in any attempt to arrive at a definition of such watercourses for the purpose of drawing up international legal rules, the use of these objective criteria must be tempered by the use of legal criteria. These criteria would be based on the common will of the States concerned expressly to recognize a special situation and to establish specific regulations to safeguard, co-ordinate and equitably serve a whole series of common interests. The instrument chosen to achieve this objective would be the internationalization of these watercourses, by means of bilateral or multilateral agreements and conventions having constitutive value. In that case, the scope of the definition of an international watercourse could be far more restrictive in that, for example, it would not cover the entire drainage basin.

4. A fundamental distinction must necessarily be made between the declaratory and the constitutive value of such internationalization. While Venezuela can recognize a watercourse as international for the purposes of a preliminary study, provided that such a watercourse meets certain prerequisites, that recognition merely has declaratory value, without involving the establishment of legal rules and obligations. On the other hand, when it subsequently comes to the point of proposing to codify the legal

system covering international watercourses, acceptance by States will have to be formalized by the drafting and adoption of specific treaties.

### Question 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?*

Argentina

[Original: Spanish]  
[26 August 1975]

*Reply to questions B and C*

1. In this connexion it should be said that the English text of the questionnaire has been used because the Spanish version incorrectly translates "international drainage basin" as "*cuenca hidrográfica internacional*", when it should have been translated as "*cuenca de drenaje internacional*".

2. We consider the geographical concept of an international drainage basin to be the appropriate basis for a study of the legal aspects of international watercourses and the pollution of international watercourses.

3. The concept of an international drainage basin, in its legal aspect, must conform to the acknowledged principle of good-neighbourliness which is fundamental in this branch of international law.

4. There is an extensive bibliography on the legal aspect and on the value of the concept of an international drainage basin, which has for long found favour in the literature. Among many authors, mention should be made of Herbert Arthur Smith, who, in his classic work *The Economic Uses of International Rivers* arrives at the following conclusion: "The first principle is that every river system is naturally an indivisible physical unit and that as such it should be so developed as to render the greatest possible service to the whole human community which it serves, whether or not that community is divided into two or more political jurisdictions".<sup>1</sup>

5. The 1966 Helsinki Rules, prepared by the International Law Association after a series of meetings, are based on the use of the waters of an international drainage basin, the latter being defined in article II of the Rules.

6. A detailed and soundly based study on the value, from the legal standpoint, of the concept of international drainage basins was made in *The Law of International Drainage Basins*, published by the Institute of International Law of the New York University School of Law.<sup>2</sup>

7. In *The River Basin in History and Law*,<sup>3</sup> after a documented study, Ludik A. Teclaff demonstrates the value and appropriateness of the concept of an international

<sup>1</sup> H. A. Smith, *The Economic Uses of International Rivers* (London, King, 1931), pp. 150–151.

<sup>2</sup> Dobbs Ferry, N.Y., Oceana Publications, 1967.

<sup>3</sup> The Hague, Nijhoff, 1967.

drainage basin for the study of the legal aspects of the various uses of international watercourses.

8. Claude-Albert Colliard devotes chapter III of "*Evolution et aspects actuels du régime juridique des fleuves internationaux*"<sup>4</sup> to the question of the optimum use of basins and endorses the modern concept of an integrated basin, an international drainage basin.

9. The study entitled *Management of International Water Resources: Institutional and Legal Aspects*<sup>5</sup> concludes in favour of the concept of an international drainage basin.

10. In "International Water Quality Law",<sup>6</sup> Albert E. Utton discusses at length the development of international environmental law pertaining to drainage basins.

11. In the light of the above-mentioned works and the wealth of information on State practice and on international legal theory and judicial decisions which they contain, it seems unnecessary to advance any further arguments at this stage in support of adopting the concept of an international drainage basin as the appropriate basis for the study in question.

<sup>4</sup> *Recueil des Cours de l'Académie de Droit International de La Haye, 1968-III* (Leiden, Sijthoff, 1970), vol. 125, pp. 398 et seq.

<sup>5</sup> United Nations publication, Sales No. E.75.II.A.2.

<sup>6</sup> In *Natural Resources Journal*, University of New Mexico School of Law, April 1973.

#### Austria

[See above, p. 152, sect. II, question A, Austria.]

#### Barbados

[Original: English]  
[10 November 1975]

1. The geographical concept of an international drainage basin is that a unit area is drained by a single river system passing through two or more States.

2. It is considered that this concept of an international drainage basin may be regarded as an appropriate basis for a study of the legal aspects of non-navigational uses of international watercourses for the reason that this principle suggests that the river system is an indivisible whole and on this basis States should be able to enforce their rights of irrigation or use such river courses for hydroelectric purposes.

3. If it is accepted that a river system is an indivisible whole then States should not be inhibited from utilizing rivers that flow through their territories.

#### Brazil

[Original: English]  
[3 July 1975]

The position of the Brazilian Government on this question has already been presented in the reply to question A above.<sup>1</sup> As it then emphasized, drainage basin is a territorial concept which may, under particular local characteristics and pertinent international acts, constitute not more

<sup>1</sup> See above, p. 152, sect. II, question A, Brazil.

than an appropriate unit for certain projects of development and physical integration, as is the case in the Treaty on the River Plate Basin, and in the process Brazil and Uruguay are carrying out for the Lagoa Mirim Basin. Such a concept, however, does not in fact have any bearing on the legal aspects of the uses of watercourses which do not, accordingly, depend on the concept of drainage basin.

#### Canada

[Original: English]  
[25 September 1975]

#### Reply to questions B and C

No. The definitional point of departure should be "the international watercourse" as described above. The use of a geographically narrow definition as a starting point would not preclude consideration of a natural drainage basin, or of a functional unit as described above,<sup>1</sup> where the circumstances of the case so require.

<sup>1</sup> See above, p. 153, sect. II, question A, Canada.

#### Colombia

[Original: Spanish]  
[9 July 1975]

#### Reply to questions B and C

1. The Government of Colombia considers that the definition of an international drainage basin as contained in chapter I, article II of the Helsinki Rules is appropriate in itself. It also believes that the said geographical concept may in many cases be exceeded for purposes of regional integration and development projects between two or more States.

2. Nevertheless, the definition of a drainage basin is not, in its view, the most appropriate basis for a study of the legal aspects of fresh water uses or of the pollution of international watercourses.

3. Providing legal mechanisms for the settlement of any disputes that may arise between States over waste use or the pollution of international watercourses would undoubtedly guarantee harmonious relations among the nations.

#### Ecuador

[Original: Spanish]  
[5 August 1975]

1. In the light of the above,<sup>1</sup> there is no need to expand the concept of an international watercourse to include the geographical concept of an international drainage basin for a study of the legal aspects of non-navigational uses of international watercourses.

2. In so far as the international aspects of the uses of a watercourse come into play only at the point where the watercourse leaves the sovereignty of one State and comes under the sovereignty of another State and the State owning

<sup>1</sup> See above, p. 154, sect. II, question A, Ecuador.

the upper course must avoid damage to the State owning the lower course, the legal concept of the watercourse suffices, *de facto*, to provide the basis for international regulations governing the matter. On the other hand, if reference were made to the geographical concept of a basin, it would leave open the possibility of undue and unacceptable restrictions which would affect not only the watercourse in question but also all those which constitute it, as well as those in the geographical areas through which they pass. Moreover, it is hard to see what the State owning the lower course would stand to gain from the inclusion in the relevant legal rules of the over-all geographical concept of a basin since the only real concern of that State is to receive the waters of the international watercourse under conditions which do not involve serious or irreparable damage.

#### Finland

[Original: English]  
[21 August 1975]

In order to answer the question whether the concept of an international drainage basin is an appropriate basis for the study of the legal aspects of non-navigational uses of international watercourses, the nature of those aspects and the aim and scope of such a study must be clarified. The international law of waters differs in one essential respect from the other fields of the law of the environment. As for the international law of the sea, for example, some of the major problems concern parts of the environment beyond national jurisdiction, while legal aspects which have relevance with regard to international watercourses are in most cases connected with relations between States. That means that injurious effects on the environment of a broader nature are in principle not more common as a result of uses of international rivers or lakes, than those resulting from activities taking place within watercourses under national jurisdiction. The concept, geographical or hydrographical, to be applied as a basis for the study in question, should therefore contain the two basic elements already mentioned. It should mean an area which geographically or politically divided between territories of two or more States and, on the other hand, hydrographically indicate the legally relevant coherence and interdependence of the different parts. The concept of international drainage basin is thus most appropriate for a study of the legal aspects of non-navigational uses of international watercourses.

#### France

[See above, p. 155, sect. II, question A, France.]

#### Federal Republic of Germany

[Original: English]  
[6 October 1975]

#### Reply to questions B and C

1. In the opinion of the Government of the Federal Republic of Germany, a study of the legal aspects of the various uses of international watercourses should, as a rule,

not be based on the geographical concept of an international drainage basin.

2. This applies in particular with regard to pollution. A study based on the geographical concept of the drainage basin as a whole would disregard the self-cleansing capacity of rivers and lakes as the most important natural element of pollution control and of restoring an ecological equilibrium as prerequisite for a balanced pattern of uses. Such unrealistic assumptions do not allow of reality-oriented conclusions to be drawn.

3. The logical basis for any study of the legal aspects of inland water pollution thus seems to be the "international watercourses" in the sense of water traversing or forming the frontier of the territories of two or more States. Only trans-boundary pollution, as distinct from pollution confined to some point in the river basin, is of relevance to a legal study of the uses of the downstream sections of a watercourse.

4. This view is reflected in the provisions of the draft European convention for the protection of international watercourses against pollution<sup>1</sup> concerning minimum quality standards at border-crossing points.

5. The concept of "international watercourses" as defined above was also accepted by the States bordering on the Rhine as the basis for their co-operation in the International Commission for the Protection of the Rhine against Pollution under the Berne Agreement of 29 April 1963.<sup>2</sup> In order to safeguard pollution control pursuant to article 2 of the Convention, monitoring stations have been set up along the banks of the river at all points where it crosses the frontiers of the two States.

6. Apart from being the appropriate basis for considerations of uses affecting the quality of water or presupposing specific quality standards, the concept "international watercourse" also lends itself to a study of uses producing changes in quantity.

7. It should not be overlooked, however, that the supply of water to countries below stream may depend just as much on water withdrawals from a national tributary as on those from the international watercourse concerned. It may therefore be useful to extend a legal study of questions of quantity to aspects of the river basin as a whole, taking duly into account the sovereign rights of the riparian States.

8. Several treaties concerning river basins have been concluded in conformity with this principle, especially in the African sphere of law.

<sup>1</sup> For the text of the draft convention, see *Yearbook . . . 1974*, vol. II (Part Two), p. 346, document A/CN.4/274, para. 377.

<sup>2</sup> *Ibid.*, p. 301, paras. 138-141.

#### Hungary

[See above, p. 155, sect. II, question A, Hungary.]

#### Indonesia

[Original: English]  
[17 July 1975]

Yes, it would be more of advantage if the geographical

concept of an international drainage basin is considered as the appropriate basis for the study.

**Netherlands**

[Original: English]  
[21 April 1976]

(a) *Drainage basin (uses)*

1. The reply to this question is in the affirmative. However, the Netherlands Government wishes to make two distinctions in its reply (see sub-sections (b) and (c) below).

(b) *Transfrontier effects*

2. It has been found impossible in practice to restrict the international control of the quantitative and qualitative management of a watercourse to laying down rules that are only applicable in places where the watercourse forms or intersects the frontier between two States. Study of the rules governing international co-operation in water management will therefore have to include the entire international watercourses from source to mouth, and all waters connected therewith, such as a canal which, though not in itself an international canal, is fed by or discharges into an international watercourse. Yet it is conceivable that in the rules arrived at by the International Law Commission in the course of its study a distinction may be made according to whether or not certain uses of the water at certain places within the drainage basin can affect the possibilities of using the water in another State.

(c) *Groundwater*

3. The term "drainage basin" also includes the groundwater. The use made of groundwater may indeed under certain circumstances (depending notably on the nature of the soil and on the slope of the impermeable layers) have an effect on the quality or quantity of the water in a watercourse. On the other hand there are geological situations in which the groundwater shows characteristics distinctly different from those of the surface water, and is not even connected with it. So the Netherlands Government can imagine that the study in question may be limited for the present to the legal aspect of the uses of surface water. In that event the term "hydrographic basin" would seem to be the more appropriate one. If the International Law Commission introduces this restriction it should however be borne in mind that, where the use of the groundwater affects the surface water belonging to the hydrographic basin, some of the legal rules applicable to surface water should be extended to groundwater.

4. Apart from the foregoing, special rules may be needed on the use of groundwater that affects the level or the quality of the groundwater in a neighbouring State.

**Nicaragua**

[Original: Spanish]  
[10 September 1975]

1. It is felt that it would be inadvisable to adopt the geographical concept of an international drainage basin as an appropriate basis for the study of the legal aspects of the non-navigational uses of international watercourses.

2. It should be borne in mind that the traditional concept of international watercourses applies solely to contiguous and successive rivers and specifically and exclusively to the river bed.

3. The drainage basin is a territorial concept which can constitute a single unit for certain development and integration projects only when particular local characteristics are present and through the conclusion of special treaties.

**Pakistan**

[Original: English]  
[10 October 1975]

Yes. The use of the international drainage basin concept would be very appropriate for a study of the legal aspects of non-navigational uses of international watercourses.

**Philippines**

[Original: English]  
[25 August 1975]

*Reply to questions B and C*

The geographical concept of an international drainage basin is an appropriate basis for the study of the legal aspects of non-navigational uses of international watercourses. This would mean that politically divided basins should be treated as a functional legal unity. This holds true even in the problem of pollution of international watercourses.

**Poland**

[Original: English]  
[27 August 1975]

1. The geographical concept of "international drainage basin" may constitute and constitutes the basis for the projects of a complex development of water basins.

2. But the Government of the Polish People's Republic considers that for the need of legal studies on the use and protection against pollution of international watercourses the concept may have only an ancillary significance. The physical unity of water basins may not be treated as a basis of legal obligations of States pertaining to the use of the waters of those basins. Of course, from the geographical point of view the physical unity of international drainage basin waters is beyond any doubt, but at the same time one cannot agree with deriving from this fact the existence of a legal unity between the States of this basin. The derivation from the physical unity of the water basin of the legal unity between States of this basin were represented in the doctrine of international law as the quality theory of river basin unity by E. Hartig and K. Kaufman and recently it has been adopted in the work of the International Law Association (Helsinki Rules on the Uses of the Waters of International Rivers, 1966, Article II). The theory of basin unity cannot explain why and which legal norms or principles of international law lead to the transformation of physical unity into legal unity (e.g. sea waters constitute to a larger extent



one geographical entity which, however, did not create one legal régime).

3. The decision of the Arbitration Tribunal issued in the French-Spanish dispute concerning the use of Lake Lanoux waters stated distinctly that the physical unity of the river basin is not a basis for recognizing the existence of a legal unity between those States (see "Affaire du Lac Lanoux", sentence du Tribunal arbitral du 16 November 1957, in *Revue générale de droit international public* (Paris, 1958), vol. LXII, p. 103, para. 8).<sup>1</sup>

4. Thus, it seems that from the legal point of view one cannot speak of the unity of the international drainage basin extending over the territory of more than one State if the States of this basin will not recognize the restriction of their territorial sovereignty on internal waters under their control. Of course, such a restriction could exclusively result from international agreements concluded by those States.

5. Taking into account the above reservations pertaining to the notion of international drainage basin itself and the non-existence of legal norms or principles substantiating the derivation from this physical and geographical unity of restrictions on State competence in use of waters constituting a part of the international drainage basin, it should be stated that in a number of international agreements on joint development of water basins the geographical concept of the water basin extending over the territories of several States is the basis of economic and technological projects for their development (e.g. the Convention of 1963 concluded between Guinea, Mali, Mauritania and Senegal on the development of the Senegal River Basin; the Act of 1963 concluded between Cameroon, Ivory Coast, Dahomey, Guinea, Upper Volta, Mali, Niger, Nigeria and Chad on navigation and co-operation between the Niger Basin countries; the Treaty of 1969 concluded between Argentina, Brazil, Bolivia, Paraguay and Uruguay on the River Plate Basin and the territories under its direct influence).

6. The concept of the international drainage basin should thus be understood as a geographical concept unquestionably necessary for the needs of the economic development of water basins.

7. But in the case of lack of special agreements on the use of those water basins the concept of the international drainage basin should not be used for deriving any legal consequences restricting the competence of States of those basins with regard to the use of waters on their territories.

8. Thus, the Government of the Polish People's Republic is of the opinion that the concept of international drainage basin, due to the above reservations, should not constitute the fundamental basis for legal studies on non-navigational use of international watercourses.

<sup>1</sup> See also *Yearbook . . . 1974*, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, part III, chap. II.

#### Spain

[See above, p. 159, sect. II, question A, Spain.]

#### Sweden

[Original: English]  
[24 June 1975]

#### Reply to questions B and C

1. The concept of "international drainage basin" is probably the most appropriate for any study of the legal aspects of the problems related to international watercourses, including pollution, erosion and flood control, as well as any other uses of water. It is an advantage that it includes groundwater.

2. Attention is drawn in this context to the regulation of many related questions in the Frontier Rivers Agreement of 16 September 1971, between Sweden and Finland.<sup>1</sup>

<sup>1</sup> An English version of the text of the agreement was attached to the reply of the Swedish Government.

#### United States of America

[See above, p. 160, sect. II, question A, United States of America.]

#### Venezuela

[Original: Spanish]  
[15 March 1976]

There is no doubt that, from the technical point of view, the drainage basin—as a purely geomorphological concept—is the appropriate basis for the study of problems concerning water resources and, consequently, for the study of the legal aspects of non-navigational uses of international watercourses. However, the following reservation must be reiterated once again: on the one hand, the drainage basin in the geographical sense need not necessarily serve as a basis for the application of a future international régime; on the other hand, international rules can be applied only or specifically to cases of direct or obvious detriment or unfair advantage to any of the users.

#### 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?*

#### Argentina

[See above, p. 161, sect. II, question B, Argentina.]

#### Austria

[See above, p. 162, sect. II, question A, Austria.]

#### Barbados

[Original: English]  
[10 November 1975]

1. The geographical concept of an international drainage

basin is given above<sup>1</sup> as a unit area divided by a single river system, passing through two or more States.

2. It is considered that this concept may be used as a basis for the study of the legal aspects of pollution of water-courses in that in a polluted river system the States with riparian rights are entitled to maintain an action without proof of damage against any offending State. Pollution is an infringement of a right of property of the owner.

<sup>1</sup> See above, p. 162, sect. II, question B, Barbados.

#### Brazil

[Original: English]  
[3 July 1975]

The concept of an international drainage basin does not seem to the Brazilian Government the most appropriate basis for a study of the legal aspects of pollution. When dealing with pollution of contiguous portions of water-courses, the problem is, actually, one that the two riparian States have in common. In the case of successive international watercourses, what is important juridically is whether or not the flow of water that passes from the territory of one State to another or other States is polluted. There are no repercussions if, for example, a tributary or sub-tributary of an international watercourse has been polluted, as long as that pollution does not exist downstream, by reason of natural dilution or adequate treatment of the waters. This reasoning, in our view, shows that the concept of drainage basin would be inappropriate as a framework for a study of the legal aspects of the question. In truth, that concept essentially applies to a territorial, static unit, while the conducting vehicle of pollution is the watercourse itself, a moving unit of the larger physical component.

#### Canada

[See above, p. 162, sect. II, question B, Canada.]

#### Colombia

[See above, p. 162, sect. II, question B, Colombia.]

#### Ecuador

[Original: Spanish]  
[5 August 1975]

As to whether the geographical concept of an international drainage basin is the appropriate basis for a study of the legal aspects of the pollution of international water-courses, the answer must be in the negative. In the case of a contiguous international watercourse, the important legal consideration is that the portion of water belonging to one riparian State is not polluted by the uses of the other riparian State, affecting its own portion of water. In the case of a successive international watercourse, the important consideration, from the legal standpoint, is that the flow of water from the territory of one State to the territory of another should not be polluted. In this latter case, although

there might be pollution at a point higher up the course, by the time the water reaches the territory of another State, this pollution may have disappeared as a result of spontaneous dilution or treatment received. The geographical concept of a drainage basin involves a static approach, intimately bound up with the land territory; the concept of a water-course, on the other hand, is essentially dynamic; although, as a result of such factors as winds or streams, the pollution of a drainage basin can spread to other geographical areas, there is not doubt that the watercourse is a dynamic factor in the spread of pollution. The concept of a drainage basin therefore seems inappropriate as a basis for a study of the legal aspects of the pollution of international watercourses. Furthermore, the question appears to depart from the subject-matter of the study entrusted to the International Law Commission, which was not the law of the uses of drainage basins, but the law of the uses of international watercourses.

#### Finland

[Original: English]  
[21 August 1975]

All that has been said above<sup>1</sup> of the appropriateness of the concept of an international drainage basin with regard to uses of international watercourses concerns also the application of the same concept as a basis for a study of the legal aspects of pollution of international waters. The main reason why problems of pollution have international legal relevance within watercourses belonging to two or more states, is the hydrological coherence mentioned before, which results in that polluting effects originating from the territory of one basin State may easily spread themselves over the borders of other basin States. For this reason the concept of an international drainage basin is particularly well suited to be used as a basis for a study of the legal aspects of pollution of international waters, especially because it is broad enough to cover problems relating to pollution of underground waters of international concern also.

<sup>1</sup> See above, p. 163, sect. II, question B, Finland.

#### France

[See above, p. 155, sect. II, question A, France.]

#### Federal Republic of Germany

[See above, p. 163, sect. II, question B, Federal Republic of Germany.]

#### Hungary

[See above, p. 155, sect. II, question A, Hungary.]

**Indonesia**

[Original: English]  
[17 July 1975]

The comments offered with respect to question B<sup>1</sup> are also applicable to the pollution aspect.

<sup>1</sup> See above, p. 163, sect. II, question B, Indonesia.

**Netherlands**

[Original: English]  
[21 April 1976]

**Drainage basin (pollution)**

In the opinion of the Netherlands Government, the remarks made in sub-sections (a), (b) and (c) of its reply to question B<sup>1</sup> apply equally to question C.

<sup>1</sup> See above, p. 164, sect. II, question B, Netherlands.

**Nicaragua**

[Original: Spanish]  
[10 September 1975]

1. In the specific instance of pollution, it would be advisable to take into account the geographical concept of a drainage basin, without considering it, however, to be international in the sense normally accepted by international law.

2. The damage which the pollution of the waters forming the drainage basin can cause in the principal river makes it imperative to extend the scope of the study on the legal aspects of pollution.

**Pakistan**

[Original: English]  
[10 October 1975]

Yes.

**Philippines**

[See above, p. 164, sect. II, question B, Philippines.]

**Poland**

[Original: English]  
[27 August 1975]

1. In answering the above question one should, first of all, give some general thought to the question of relying in conducting studies on legal aspects of non-navigational use of watercourses and in studies on legal aspects of protection of those waters against pollution on various fundamental conceptions, such as, how would the situation appear if it was recognized that the concept of international drainage basin constituted the basis for studies on the legal aspects of water protection against pollution and not the basis for studies on legal aspects on the non-navigational use of those waters.

2. In the opinion of the Government of the Polish People's Republic the question of the protection against pollution of international watercourses should be considered simultaneously with the problem of non-navigational use of those waters on the basis of the same fundamental concepts.

3. That is why the remarks made with respect to question B<sup>1</sup> pertaining to the concept of the international drainage basin relate at the same time to conducting legal studies on the protection of those waters against pollution.

4. Thus, similarly as in the case of non-navigational use of international watercourses also in the protection of those waters against pollution no legal consequences will result from the physical unity of the water basin exceeding the political frontiers for States of this basin.

5. Of course, in many cases the pollution of the tributary or sub-tributary of an international river flowing within the boundaries of one State may be damaging for the State to the territory of which the international river flows next. This State, however, can insist, not exactly on the protection of the tributary of the international river against pollution, but on ensuring to it appropriate quality of waters of the international river at the point where the river flows into its territory.

6. Naturally such problem does not arise in a case when the tributary or sub-tributary of the international river polluted by one State does not cause the pollution of the international river in its course flowing into the territory of another State due to self-purification of the river or treatment work conducted by the State of the upper course.

7. Thus, it seems that the geographical concept of international drainage basin can only be taken accessorially into account in studies on legal aspects of protection against pollution of international watercourses.

8. Efforts should be made to promote co-operation between States of the same water basins both as regards the use of basin waters and as regards protection against pollution, while the basis of such co-operation and possible competence restrictions, connected with the use of waters, on States with respect to waters of basins on their territories should be international agreements concluded by the States of the basin.

<sup>1</sup> See above, p. 164, sect. II, question B, Poland.

**Spain**

[See above, p. 159, sect. II, question A, Spain.]

**Sweden**

[See above, p. 165, sect. II, question B, Sweden.]

**United States of America**

[See above, p. 160, sect. II, question A, United States of America.]

## Venezuela

[Original: Spanish]  
[15 March 1976]

Since pollution of international watercourses may be due to causes other than the use of the surface water of the drainage basin and even to other factors, or to the use or pollution of the ground water of drainage basins which may not necessarily coincide with the surface water, the basis for the technical study of pollution of international watercourses, and consequently of the legal aspects of such pollution, should be broader than that provided by the drainage basin alone.

## 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.).*

## Argentina

[Original: Spanish]  
[26 August 1975]

1. The proposed outline is acceptable.
2. However, we would make the following comment: the aspects dealt with in items (a), (b) and (c) are all economic aspects of water uses. The word "economic" should therefore be deleted in item (b) and be replaced by the word "industrial". Item (b) would then read: "Industrial and commercial uses".

## Austria

[Original: English]  
[18 July 1975]

No objection.

## Brazil

[Original: English]  
[3 July 1975]

The Brazilian Government considers the outline for water uses acceptable as a basis for the Sub-Committee's study, as long as it is understood that the outline is only a method of work, and has no hierarchical connotations that might imply the priority of one aspect over any other. The relative degree of importance of the different types of use can, in fact, vary according to the interests of each State, and may, very often, even vary from one region to another within the same State. In any event, the Brazilian Government believes it would be more rational to organize the outline as follows:

- (a) *Social and domestic uses:*
1. *Consumption (drinking, cooking, washing, etc.);*
  2. *Waste disposal;*
  3. *Recreational (swimming, sport, fishing, boating, etc.);*
- (b) *Agricultural uses:*
1. *Irrigation;*
  2. *Drainage;*
  3. *Waste disposal;*
  4. *Aquatic food production;*
- (c) *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.).*

## Canada

[Original: English]  
[25 September 1975]

*Reply to questions D and E*

Commercial fishing should be added under "Economic and commercial uses". "Cooling" should also be identified as a separate use in this category. The word "abstractive" should be substituted for "consumptive" in the "Domestic and social uses" category. Finally, aesthetic values should be listed under this last heading.

## Colombia

[Original: Spanish]  
[9 July 1975]

*Reply to questions D and E*

My Government considers that the outline proposed as a basis for the study of water uses is appropriate and that no other uses need be included.

## Ecuador

[Original: Spanish]  
[5 August 1975]

With regard to this item of the questionnaire, it should be pointed out that the outline for the study of fresh water uses

does not specify any priorities for fresh water uses, nor is its wording limitative or restrictive. The Government of Ecuador considers that the outline is acceptable as a tentative guide for initial work on the recommended study and that, as the study progresses, any necessary changes should be introduced.

**Finland**

[Original: English]  
[21 August 1975]

The International Law Commission has prepared a provisional list of non-navigational fresh water uses to be used as an outline for its study. The Government of Finland has no particular observations to make with regard to this list, which enumerates the different kinds of agricultural uses, economic and commercial uses and domestic and social uses. Such a systematic classification of uses might well be applied as a framework for future codification. It seems, however, to be necessary to consider already now, how far into the technical details of different uses the study should be extended. At least in the beginning of the work of the Commission the examining and analysing of rules and principles of a more general nature concerning the main parts of the international law of waters is in our view more useful than a circumstantial elaboration of all possible details.

**France**

[Original: French]  
[11 July 1975]

*Reply to questions D and E*

*Use of watercourses*

1. Item (a) might be presented in a different manner, so as to distinguish between uses of the watercourse which have a quantitative effect on the water (influence on flow) and those which have a qualitative effect (deterioration or alteration of the water). This form of presentation would make the questionnaire more precise by removing certain ambiguities: for example, are not agricultural uses and domestic and social uses all economic uses? Furthermore, with regard to the quantitative effects on the water, a further distinction might be drawn between a use of the watercourse which reduces the quantity of water available downstream (domestic consumption, irrigation), and a use which changes the rate of flow downstream (drainage, dam construction, for example).

2. With regard to item (b), 7, it would be advisable to delete from the questionnaire the reference to the oil industry, since it has little bearing on the use of waterways. On the other hand, gravel extraction might usefully be included, in addition to quarrying.

**Federal Republic of Germany**

[Original: English]  
[6 October 1975]

1. In the Federal Government's view the Commission's study should cover the whole range of uses referred to

above even if these may vary in significance as between the individual riparian States.

2. A better categorization might also be achieved by a joint consideration of uses involving primarily qualitative and quantitative issues.

3. This would help at the same time to avoid overlapping which may result from a separate consideration of agricultural water uses as a subcategory of commercial as distinct from domestic and private uses.

4. It should be mentioned in this context that article 17 of the draft European convention for the protection of international watercourses against pollution defines as uses of international watercourses which may be affected by water pollution:

Production of drinking water for human consumption;

Consumption by domestic and wild animals;

Conservation of wild life, both flora and fauna, and securing conditions in which they thrive, and the conservation of the self-purifying capacity of water;

Fishing;

Recreational amenities, with due regard to health and aesthetic requirements;

The application of freshwater directly or indirectly to land for agricultural purposes;

Production of water for industrial purposes;

The need to preserve an acceptable quality of sea water.

**Hungary**

[Original: English]  
[14 July 1975]

1. The classification and enumeration of water exploitations as it is generally outlined in paragraph 19 and in detail in paragraph 30 of the Sub-Committee's report are in accordance with general practice in Hungary, too. We have to add, however, that this classification mainly deals with technical and economic questions and thus it is uncertain how suitable it is to the determination of legal relations regarding the utilization of water.

2. We mention as an example that from the point of view of pollution caused by the use of water, it is irrelevant that the pollution is caused by either agricultural, industrial or household and communal use of water. The industrial use of water has generally two forms: it takes out water for technological purposes and lessens the reserves and at the same time it deteriorates waters by letting the polluted water out. The generation of hydroelectricity has no effect on either the quantity or quality of water. The production of nuclear energy consumes a considerable quantity of water and can cause incalculable pollution; the production of mechanical energy requires a great quantity of water but does not cause pollution.

3. Therefore from the technical point of regulation, consequent upon our standpoint detailed in reply to questions

A, B and C<sup>1</sup> the following classification seems to be more suitable:

Water exploitations causing a deterioration in the quality of water reserves;

Other water exploitations.

<sup>1</sup> See above, p. 155, sect. II, question A, Hungary.

**Indonesia**

[Original: English]  
[17 July 1975]

*Reply to questions D and E*

1. As the basis of its study, the Commission is recommended to take all aspects of water resources as a whole, and in particular:

- (a) Water management institutions, functions and power;
- (b) Beneficial water uses;
- (c) Harmful effects of water;
- (d) Water use, quality and pollution control;
- (e) Ground-water exploration and exploitation;
- (f) Water works and structures control;
- (g) Aquatic weeds control.

2. The outline of fresh water uses which the Government of Indonesia follows is as follows:

- (a) Living quarters uses:
  - 1. Consumptive (drinking, cooking, washing, etc.);
  - 2. City water supply (flushing, sewerage, sanitary, etc.);
  - 3. Hospital uses;
- (b) Agricultural uses:
  - 1. Food production;
  - 2. Fishing;
  - 3. Other agricultural production;
- (c) Hydropower;
- (d) Economic and commercial uses:
  - 1. Industrial uses (including cooling purposes);
  - 2. Construction;
  - 3. Transportation and inland waterways;
  - 4. Extractive (mining, oil production, etc.);
- (e) Social uses:
  - Recreational and other social purposes.

*Note:* Some items mentioned above have been indicated in the Indonesian Water Law.

**Netherlands**

[Original: English]  
[21 April 1976]

(a) *Water uses other than transportation*

1. It seems that the study will on the one hand have to embrace all kinds of uses which may affect the quantity or quality of the surface water. These may include public works for flood control or for coping with erosion problems, as well as sand and gravel-industry in rivers and lakes (see below, question F). On the other hand it will have to pay attention to the uses that are dependent on the quantity or quality of the surface water.

(b) *Transportation*

2. Transportation other than navigation, and timber floating (parts (b), 4 and 5 of question D), will, like navigation, probably only be relevant to the study in so far as they impair the quality of the water.

(c) *Other risks*

3. The question arises whether attention will not have to be given also to pipelines constructed in a basin, especially over or under a watercourse, for transporting liquid substances or gas, which create risks of serious impairment of the water quality in the case of accidents.

**Nicaragua**

[Original: Spanish]  
[10 September 1975]

1. The Government of Nicaragua feels that the plan suggested as the basis for the studies which are being conducted is satisfactory, since it encompasses all aspects of agricultural, economic, commercial, domestic and social uses, but feels that the topics alluded to in question F should be included.

2. Consequently, it feels that it should encompass, in addition to the problems of flooding and erosion, those relating to the following uses:

- (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.).

**Pakistan**

[Original: English]  
[10 October 1975]

Yes.

**Philippines**

[Original: English]  
[25 August 1975]

*Reply to questions D, E and F*

1. The outline suggested for the work of the International Law Commission as a basis of study of fresh water uses is

an adequate one. However, the following items may be added:

- (a) Tourist zones and resorts;
- (b) Preservation of historic sites; and
- (c) Protection of endangered species of plants and animals.

2. Flood control and erosion problems would be useful additions to the outline of study.

#### Poland

[Original: English]  
[27 August 1975]

1. The Government of the Polish People's Republic is of the opinion that for the need of studies on legal aspects of non-navigational use of international watercourses the outline of water uses proposed by the Commission is acceptable, on the assumption that it does not constitute the hierarchy of water uses (agricultural uses prior to commercial or domestic uses). As is known, various types of water uses are frequently antagonistic, and in practice the necessity arises of establishing a hierarchy for its use.

2. The priority of navigation proclaimed at the beginning of the nineteenth century by the regulations of the Vienna Treaty and also recognized in a number of other international acts (e.g. the Madrid Resolution of 1911,<sup>1</sup> the Paris Convention of 1921 pertaining to the statute of the Danube river,<sup>2</sup> the Pan-American Declaration of 1933<sup>3</sup>) can no longer be maintained due to a considerable change of conditions—the development and dominant necessity of the use of international watercourses for other purposes as well.

3. It should be stated that article VI of the Helsinki Rules on the Uses of the Waters of International Rivers notes rightly that no use of international river waters should be given absolute priority over other uses. For defined geographical regions a certain use can be of decisive significance as, e.g., in particularly dry regions, the use of waters for irrigation of fields, or, in other regions, the use of waters for industrial purposes, in cases when the water for domestic purposes may be derived from another source. A proof of the priority granted to a defined type of water use dependent on the needs of the given geographical region are international agreements concluded between the interested States (e.g. article VIII of the Treaty of 11 January 1909, concluded between Great Britain and the United States relating to boundary waters and questions arising between the United States of America and Canada,<sup>4</sup> and article 3 of

<sup>1</sup> See "Texte de résolutions adoptées en ce qui concerne la réglementation internationale de l'usage des cours d'eau internationaux", *Annuaire de l'Institut de droit international, 1911* (Paris), vol. 24, p. 365.

<sup>2</sup> Convention instituting the definitive Statute of the Danube, signed at Paris, 23 July 1921. Text in League of Nations, *Treaty Series*, vol. XXVI, p. 174.

<sup>3</sup> Declaration of Montevideo concerning the industrial and agricultural use of international rivers, approved by the Seventh Inter-American Conference at its fifth plenary session, 24 December 1933. Text in *Yearbook . . . 1974*, vol. II (Part Two), p. 212, document A/5409, annex I, A.

<sup>4</sup> United Nations, *Legislative Texts and Treaty Provisions concerning the utilization of international rivers for other purposes than navigation* (United Nations publication, Sales No.: 63.V.4), pp. 262–263.

the Treaty of 3 February 1944, concluded between the United States of America and Mexico, relating to the utilization of the waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico.<sup>5</sup>

4. In view of the particular importance of the use of waters by municipal agglomerations and the necessity to assure sufficient quantities of water in the case of a dynamic development of those agglomerations it seems that even for the need of studies on the above problem and without giving priority to any of the uses, as mentioned above, the outline proposed by the Committee should be reversed, as follows:

#### (a) Domestic and social uses:

1. Consumptive (drinking, cooking, washing, laundry, etc.);
2. Waste disposal;
3. Recreational (swimming, sport, fishing, boating, etc.);

#### (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) Agricultural uses:

1. Irrigation;
2. Drainage;
3. Waste disposal;
4. Aquatic food production.

<sup>5</sup> United Nations, *Treaty Series*, vol. 3, p. 313.

#### Spain

[Original: Spanish]  
[22 September 1975]

#### Reply to questions D, E and G

1. The outline of fresh water uses prepared by the Subcommittee is perfectly acceptable, provided that it is not considered exhaustive and provided that it implies no established order of preferences, since those uses may vary greatly in importance depending on the watercourses, the riparian States and even on historical circumstances. Perhaps a more logical order would be: (a) Domestic and social uses; (b) Agricultural uses; (c) Economic and commercial uses. Under the present section (b) (Economic and commercial uses) a reference to tourism should be added, irrespective of the reference to recreational uses in section (c) (Domestic and social uses). A reference to drinking-troughs for animals might also be added under section (a) (Agricultural uses).

2. The interaction between navigational and other uses must inevitably be borne in mind. It is, in fact, quite unnatural to exclude navigation from this study, which nevertheless includes such uses as timber-floating and transportation other than navigation.



## Sweden

[Original: English]  
[24 June 1975]

On the whole, it could be possible to treat the matter according to the outline of fresh water uses laid down in the questionnaire. However, from certain points of view it may be doubted if this is completely rational. Waste disposal could perhaps better be dealt with separately, independently of where the waste derives from. Aquatic food production and drainage may also be said to have very little in common. Further it is not wholly clear why the items "use for manufacturing" and "use for construction" have been separated. It must, though, be conceded that even with another division which takes more into account the technical manner for using water (building in water, water regulation, drainage, procuring of surface water, waste disposal, etc.), important demarcation questions arise.

## United States of America

[Original: English]  
[12 June 1975]

The outline of non-navigational uses affords a generally satisfactory checklist of uses to be studied.

## Venezuela

[Original: Spanish]  
[15 March 1976]

1. Use of water resources (outline parallel to that contained in question D, proposed by the Government of Venezuela):

## 1.1 Use in an urban environment, including:

Domestic consumption;  
Public consumption;  
Industrial consumption;  
Commercial consumption;  
Effluent disposal;

## 1.2 Extra-urban industrial use, including:

Energy production;  
Consumption for industrial purposes;  
Refrigeration;  
Transportation other than navigation;  
Waste disposal;

## 1.3 Agricultural use, including:

Irrigation;  
Consumption by livestock;  
Pisciculture;  
Waste disposal;

## 1.4 Navigational use;

## 1.5 Recreational use;

## 1.6 Use for the maintenance of the ecological balance.

## 2. Conflicts inherent in the use of water resources:

- 2.1 Water shortage situations;
- 2.2 Floods;
- 2.3 Erosion;
- 2.4 Pollution.

(Proposal by COPLANARH (Comisión del Plan Nacional de Aprovechamiento de los Recursos Hidráulicos).)

## Question E

*Are there any other uses that should be included?*

## Argentina

[Original: Spanish]  
[26 August 1975]

Under item (a), specific mention should be made of uses relating to livestock production. The heading should therefore read: "(a) Agricultural and stock-raising uses".

## Austria

[Original: English]  
[18 July 1975]

Waters are ecological factors and constituent parts of the landscape as well as of the human environment.

## Brazil

[Original: English]  
[3 July 1975]

The Brazilian Government feels that it would be useful to include a new item, "Cattle raising" (referring specifically to the practice of watering herds) under "Agricultural uses", redesignated as section (b) under question D, so that the suggested (b) would read as follows:

## (b) Agricultural uses:

1. Irrigation;
2. Cattle raising;
3. Drainage;
4. Waste disposal;
5. Aquatic food production.

## Canada

[See above, p. 168, sect. II, question D, Canada.]

## Colombia

[See above, p. 168, sect. II, question D, Colombia.]

## Ecuador

[Original: Spanish]  
[5 August 1975]

The Government of Ecuador considers that the list of uses enumerated in the outline is not exhaustive and that others could therefore be included.

## Finland

[Original: English]  
[21 August 1975]

With the exception of watercourses as objects of international research and protection programmes, the Government of Finland has no other uses to propose to be included in the list mentioned above. In addition, however,

to what has already been said<sup>1</sup> about the importance of development of general rules and principles, it is necessary to point out that many of those rules and principles are common and equally relevant to most of the uses enumerated, and that beside a vertical, use-by-use study, an examination on the horizontal level of the common criteria and similar features of the uses should also be carried out by the Commission. The Salzburg Resolution of the Institute of International Law of 1961<sup>2</sup> and the Helsinki Rules of 1966 are good examples of the type of rules and principles which should form a basis for development and application of more detailed provisions. The list of uses should therefore be completed with a list of rules and principles, the latter being no less important than the former. There are still many significant and big-scale problems of a more general nature concerning the use and protection of international watercourses which need legal regulation. Such are, for example, the question of the use and division of boundary waters, the difference between consumptive and non-consumptive uses of an international watercourse, the constructions and installations needed for diverting or utilizing the boundary waters, problems concerning the constructions and installations needed for utilizing the boundary waters, seeing that these installations, particularly dams, must often be extended over the boundary line, and questions relating to regulation of the water flow and flood control.

<sup>1</sup> See above, p. 169, sect. II, question D, Finland.

<sup>2</sup> Resolution adopted by the Institute of International Law on 11 September 1961 at its session held at Salzburg, entitled "Utilization of non-maritime international waters (except for navigation)". For text, see *Yearbook . . . 1974*, vol. II (Part Two), p. 202, document A/5409, para. 1076.

#### France

[See above, p. 169, sect. II, question D, France.]

#### Federal Republic of Germany

[Original: English]  
[6 October 1975]

Problems of pollution resulting from inland shipping could be of relevance to a study of the legal aspects of the uses of international watercourses. For the reasons stated above<sup>1</sup> this would serve to provide a more comprehensive basis for the work of the Commission.

<sup>1</sup> See above, p. 163, sect. II, question B, Federal Republic of Germany.

#### Hungary

[Original: English]  
[14 July 1975]

Concerning this question—consequently upon the above mentioned<sup>1</sup>—we propose a negative answer.

<sup>1</sup> See above, p. 163, sect. II, question D, Hungary.

#### Indonesia

[Original: English]  
[17 July 1975]

[See above, p. 170, sect. II, question D, Indonesia.]

#### Netherlands

[Original: English]  
[21 April 1976]

A typically Dutch use of fresh water for agricultural purposes is the flushing out of polders, particularly those situated below sea level, which are affected by the continual encroachment of salt groundwater. This use is called "rinsing agricultural land". It is not included in the irrigation referred to in part (a), 1, of the outline in question D.

#### Nicaragua

[Original: Spanish]  
[10 September 1975]

In view of the broad scope of the topics set out under question D, Nicaragua considers that the list covers all the areas which should be studied.

#### Pakistan

[Original: English]  
[10 October 1975]

The problem of sediment discharge should also be included.

#### Philippines

[See above, p. 170, sect. II, question, D, Philippines.]

#### Poland

[Original: English]  
[27 August 1975]

It seems that the outline adopted by the Commission as the basis of studies on the non-navigational use of international watercourses exhausts the problem entirely.

#### Spain

[See above, p. 171, sect II, question D, Spain.]

#### Sweden

[Original: English]  
[24 June 1975]

The following items might possibly be added:

Recovery of ground for housing and industrial purposes; discharging of excavated material; treatment of fresh water with chemicals to neutralize acidification, influence

the vegetation, the stock of fish etc.; underwater blasting for seismic measurements.

**United States of America**

[Original: English]  
[12 June 1976]

Forestry could be added to the list of uses, as well as the use of water for thermal purposes (heat dissipation, etc.). A final addition to the list might be natural functions, including use as habitat for plant and animal species; transport of silt; and enrichment of flood-plains.

**Venezuela**

[Original: Spanish]  
[15 March 1976]

The parallel outline submitted by the Government of Venezuela<sup>1</sup> amplifies this question.

<sup>1</sup> See above, p. 172, sect. II, question D, Venezuela.

**Question F**

*Should the Commission include flood control and erosion problems in its study?*

**Argentina**

[Original: Spanish]  
[26 August 1975]

To the extent that such problems are directly related to the use of international watercourses, the Commission ought to consider them.

**Austria**

[Original: English]  
[18 July 1975]

Since the management of water resources forms an integrated whole, the problems of flood control and erosion cannot be left out of account.

**Brazil**

[Original: English]  
[3 July 1975]

The Brazilian Government believes that these problems, if occasioned by any form of use of the watercourses, and in cases in which there are really international repercussions as a result of significant harm to other States, should be included among the concerns of the Sub-Committee.

**Canada**

[Original: English]  
[25 September 1975]

Yes.

**Colombia**

[Original: Spanish]  
[9 July 1975]

It is considered that the study of such problems should be included, since it forms part of the planning that is needed in order to begin analysing the best ways of preventing the harm caused by both erosion and floods to the various uses of water.

**Ecuador**

[Original: Spanish]  
[5 August 1975]

The Government of Ecuador believes that consideration could now be given to international recommendations for flood and erosion control. In view of their effects on food production and the world hunger crisis, among other things, it also believes that it would be advisable to establish an international fund to provide compensation for damage caused by some floods; however, it is of the opinion that, in view of the economic imbalance between countries, and particularly between the developed and developing countries, no international legal rules should be adopted as yet on these two subjects. This does not mean that, in cases where floods and erosion are the result of improper use of international watercourses, the principle of the legal responsibility of States for damage caused by them should be disregarded.

**Finland**

[Original: English]  
[21 August 1975]

The answer should be in the affirmative. Particularly flood control, as well as questions concerning regulation of waterflow of an international watercourse, are without doubt among the most important of those needing an international legal regulation. As for flood control, some important preparatory work has already been carried out by the International Law Association which, at its fifty-fifth conference, held in New York in 1972, adopted draft articles on that subject.<sup>1</sup>

<sup>1</sup> See *Yearbook ... 1974*, vol. II (Part Two), p. 361, document A/CN.274, para. 409.

**France**

[Original: French]  
[11 July 1975]

*Use of watercourses*

Flood control and erosion problems, which have no bearing on the use of watercourses, should not be included in the study.

**Federal Republic of Germany**

[Original: English]  
[6 October 1975]

The Government of the Federal Republic of Germany believes that flood control and erosion problems can be of

considerable importance for the use of downstream sections of an international watercourse in connexion with its maintenance and expansion. It would therefore welcome an inclusion of these aspects in the study.

**Hungary**

[Original: English]  
[14 July 1975]

We propose a positive answer to this question. It can be discussed among the items belonging to the other water exploitations.

**Indonesia**

[Original: English]  
[17 July 1975]

Yes, the Commission should include in its study flood control and erosion problems as well as soil and water conservation problems.

**Netherlands**

[Original: English]  
[21 April 1976]

The reply is in the affirmative; compare paragraph 1 of the reply of the Netherlands to question D above.<sup>1</sup>

<sup>1</sup> See above, p. 170, sect. II, question D, Netherlands.

**Nicaragua**

[Original: Spanish]  
[10 September 1975]

In view of the importance of flood erosion and control for all countries as a means of protecting human life and conserving the natural wealth essential to the subsistence of mankind, it would be of vital importance to conduct studies on both those problems.

**Pakistan**

[Original: English]  
[10 October 1975]

Yes. Developing countries face flood and erosion problems causing excessive loss to the standing crops and human life. It would, therefore, be appropriate to take these problems at the international level.

**Philippines**

[See above, p. 170, sect. II, question D, Philippines.]

**Poland**

[Original: English]  
[27 August 1975]

It seems that the inclusion in the study on legal aspects of non-navigational use of waters and their protection against

pollution, as the need arises, of flood control and erosion problems is apt, due to their decisive significance for the balance of international watercourses. Besides erosion, rubble movement should also be included in these problems, that is, besides the problem of soil erosion, also that of sedimentation.

**Spain**

[Original: Spanish]  
[22 September 1975]

*Reply to questions F and H*

1. Flood control and erosion problems (as well as the draining and reclaiming of unhealthy terrain or swamplands) might be effectively tackled together with pollution control. The joint treatment of both aspects would foster an integrated approach to the protection or conservation of watercourses (including the water, the banks and the bed of the watercourse).

2. As for the possibility of giving priority to this aspect of the question in the Commission's study, it is evident that the Commission is in the best position to organize its own work. It should be pointed out, however, that there is a close connexion between the development of watercourses and the preservation of the quality of fresh water; sooner or later both aspects will have to be considered jointly. Moreover, although the urgency of the problem posed at present by pollution is bound to serve as an incentive to the Commission, the situation calls for concerted action by States on the regional or subregional level rather than the codification of rules of international law on the global level. This question (as is obvious from document A/CN.4/274<sup>1</sup>) has aroused the interest of numerous agencies which are implementing various specific studies and projects; in order to avoid any duplication of work, the Commission should concentrate on formulating general and universally valid principles.

<sup>1</sup> "Legal problems relating to the non-navigational uses of international watercourses: Supplementary report by the Secretary-General": reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 265.

**Sweden**

[Original: English]  
[24 June 1975]

Problems concerning flood control and erosion should be included in the studies.

**United States of America**

[Original: English]  
[12 June 1975]

Yes. In fact, all factors affecting water levels, water flows and water quality should be examined.

**Venezuela**

[Original: Spanish]  
[15 March 1976]

The variety of possible uses and users of water resources, and the changes that can result from utilization by, and the

various activities of, mankind, suggest that the study of the problem of water resources should be done on an over-all basis, analysing not only the possible uses and their interaction but also the conflicts that could arise from improper management of water resources, so as to ensure that water never becomes a restricting factor for the development of mankind.

### Question G

*Should the Commission take account in its study of the interaction between use for navigation and other uses?*

#### Argentina

[Original: Spanish]  
[26 August 1975]

1. The terms of reference of the Commission refer to "the non-navigational uses of international watercourses". The navigational uses of such watercourses have been the subject of study for quite some time. It would therefore seem best to avoid going into the navigation aspect in detail again.

2. However, in view of the close links between navigational and non-navigational uses and the various consequences which the latter may have for navigation, we believe that such interrelations should certainly be taken into account.

#### Austria

[Original: English]  
[18 July 1975]

Yes.

#### Brazil

[Original: English]  
[3 July 1975]

Since the study is about the uses of international watercourses for non-navigational purposes, the Brazilian Government is of the opinion that this subject can be considered in that context, while always taking into account the general principle of the particularities of the use of each watercourse.

#### Canada

[Original: English]  
[25 September 1975]

Yes.

#### Colombia

[Original: Spanish]  
[9 July 1975]

The Government of Colombia feels that the study of the interaction between navigation and other uses should be

pursued. Nevertheless, it feels that navigation should not be considered to be one of the uses under discussion.

#### Ecuador

[Original: Spanish]  
[5 August 1975]

Although the Commission has been entrusted with the study of the law of the non-navigational uses of international watercourses, it should be understood that the Commission must respect the existing rules regarding international river navigation and that it will consequently have to take account, in its study, of those rules and of the interaction between navigational and other uses, to avoid any conflict between rules; in other words, to ensure that freedom of navigation on navigable international watercourses is not jeopardized.

#### Finland

[Original: English]  
[21 August 1975]

The work of the Commission cannot successfully be carried out without taking into account the interaction between the use for navigation and other uses of international watercourses. Navigation was excluded from the terms of reference of the Commission because some States deemed that its study should be postponed. The exclusion of navigation does not, however, mean that all aspects concerning it should be outside the scope of work of the International Law Commission. In the view of the Government of Finland, the said exception concerns only the navigation itself, its freedom and rights and obligations of flag or riparian States, as well as vessels. On the other hand, the fact that a watercourse is used for navigation is one of its characteristics and the interaction between the use for navigation and other uses of the same watercourse cannot be excluded from the work of codification.

#### France

[Original: French]  
[11 July 1975]

#### *Use of watercourses*

It appears obvious that some degree of interaction exists between use for navigation and other uses. This interaction can occur in both the qualitative and quantitative effects of the use of the watercourse. To this extent, there appears to be no reason to consider the question in isolation, but instead within the framework of the outline suggested above.

#### Federal Republic of Germany

[Original: English]  
[6 October 1975]

For the reasons stated above,<sup>1</sup> the Government of the

<sup>1</sup> See above, pp. 163 and 169, sect. II, questions B and D, Federal Republic of Germany.

Federal Republic of Germany is in favour of the Commission's considering also the interaction between use for navigation and other uses.

**Hungary**

[Original: English]  
[14 July 1975]

1. The examples given do not represent clearly the relationship between the use of water for shipping and for other purposes. Shipping takes priority over the other uses of water, even the production of energy as it is regulated in article 8 of the Convention relating to the development of hydraulic power affecting more than one State signed on 9 December 1923.<sup>1</sup> It is also to be taken into consideration that "Each riparian State is bound . . . to refrain from all measures likely to prejudice the navigability of the waterway, or to reduce the facilities for navigation"—as is stipulated in article 10, paragraph 1, of the Statute annexed to the Barcelona Convention of 20 April 1921 on the régime of navigable waterways of international concern.<sup>2</sup> Special documents and conventions regulate the freedom and order of shipping on great rivers of international interest (Danube, Rhine).

2. Nevertheless, no theoretical objection can be raised against a more detailed study of these questions.

<sup>1</sup> For the text of the Convention, see League of Nations, *Treaty Series*, vol. XXXVI, p. 77.

<sup>2</sup> League of Nations, *Treaty Series*, vol. VII, p. 57.

**Indonesia**

[Original: English]  
[17 July 1975]

Yes, any interaction or conflict between the use for navigation and other uses should always be taken into consideration.

**Netherlands**

[Original: English]  
[21 April 1976]

*Navigation*

The reply is in the affirmative; compare paragraph 2 of the Netherlands Government's reply to question D above.<sup>1</sup>

<sup>1</sup> See above, p. 170, sect. II, question D, Netherlands.

**Nicaragua**

[Original: Spanish]  
[10 September 1975]

1. Since navigational activities may have important repercussions on the utilization of waters for other uses, the study should unquestionably be conducted taking into account the interaction between the various uses it is desired to make of international rivers.

2. If the various uses to which water may be put are to be considered separately, there would be a risk that the regulations which might be drafted for navigation might render the other activities impossible or be incompatible with them.

**Pakistan**

[Original: English]  
[10 October 1975]

Yes.

**Philippines**

[Original: English]  
[25 August 1975]

The navigational and non-navigational uses of international watercourses are so interlinked that there is no escaping the necessity of studying their interaction. The pollution arising from navigation, for example, may have the effect of nullifying the multipurpose uses and development of the international watercourse.

**Poland**

[Original: English]  
[27 August 1975]

In the studies on legal aspects of the non-navigational use of international watercourses, in considering the various types of this use, account should be taken, in this context, of their influence on the problems of navigation and vice versa.

**Spain**

[See above, p. 171, sect. II, question D, Spain.]

**Sweden**

[Original: English]  
[24 June 1975]

It seems appropriate to take account in the study of the interaction between use for navigation and other uses.

**United States of America**

[Original: English]  
[12 June 1975]

Yes.

**Venezuela**

[Original: Spanish]  
[15 March 1976]

Certainly. However, it is true that, technically speaking, navigation is only a means of transport and that the use of water for navigation is not the main priority, to which other uses should be subordinated, except as regards the legal

régime established in connexion with the delimitation of frontiers. If it were considered that, for technical or geopolitical reasons, a non-navigational priority should be given to an international watercourse, the States involved could enter into new agreements or conventions.

### Question H

*Are you in favour of the Commission taking up the problem of pollution of international watercourses as the initial stage of its study?*

#### Argentina

[Original: Spanish]  
[26 August 1975]

1. We do not believe that the Commission should take up the problem of pollution of international watercourses as the initial stage of its study, for the following reasons:

(a) The Commission's terms of reference call for a study of the law of the non-navigational uses of international watercourses in general. Accordingly, the Commission should now begin a study of all such uses, and not specifically of the problem of pollution, which is a result of improper use.

(b) We consider the outline of the study contained in question D of the questionnaire to be sufficiently broad.

2. With regard to the problem of pollution of international watercourses, it should be kept in mind that the water of an international river is a shared natural resource. The legal aspects in the field of environment concerning natural resources shared by two or more States are studied by the United Nations Environment Programme. The Executive Director of the Programme, in accordance with the decision entitled "Co-operation in the field of the environment concerning natural resources shared by two or more States"<sup>1</sup> adopted at the third session of the Government Council (Nairobi, April–May 1975), will transmit his report on this subject<sup>2</sup> to the Commission and will establish an intergovernmental working group of experts in order to prepare a draft code of conduct for the guidance of States in the conservation and harmonious exploitation of natural resources shared by two or more States.

3. In view of the foregoing, the Argentine Republic, as a developing country, gives the study of the law of the non-navigational uses of international watercourses priority over the study of the specific problem of pollution of such watercourses.

4. While recognizing the importance of considering in due course a study of pollution of water resources, we believe that the International Law Commission should first complete the task entrusted to it, and that it is for the Governing Council of UNEP to decide on an international code of conduct concerning shared natural resources. Then, at some

subsequent stage it will be appropriate to take up the specific subject of pollution of international watercourses.

#### Austria

[Original: English]  
[18 July 1975]

On past experience, the question of water pollution seems to be too difficult for the initial stages of international law studies; moreover, water pollution is usually the consequence of water utilization.

#### Brazil

[Original: English]  
[3 July 1975]

The Brazilian Government considers it opportune for the Commission to begin its work with a consideration of this aspect of the problem, in view of its importance, complexity, and the fact that the field of law governing this theme is still in its infancy. The International Law Commission could, therefore, by a precise examination of the comparative law, arrive at a proposal of norms to regulate, in an effective manner, the pollution resulting from the uses of international watercourses or transmitted by States to other States by means of these watercourses. In this connexion, once again, it would be worth while to examine closely the precedent of the River Plate Basin, since, in the working sessions of the Group of Experts on Water Resources, which was convened by the Intergovernmental Co-ordinating Committee of the River Plate Basin, several recommendations were made that earned the unanimous approval of the five signatory States of the Treaty of the River Plate Basin.

#### Canada

[Original: English]  
[25 September 1975]

No.

#### Colombia

[Original: Spanish]  
[9 July 1975]

The overriding importance of the problem of international watercourse pollution would amply justify the Commission's dealing with it in the first part of its study.

#### Ecuador

[Original: Spanish]  
[5 August 1975]

In dealing with the uses of international watercourses it must be understood that we are dealing with the use of fresh water in a manner which causes no harm to any living organism (human, animal or vegetable); that is to say that the problem of pollution and measures to prevent it is implicit in the topic. Consequently, from the outset of the

<sup>1</sup> Official Records of the General Assembly, Thirtieth Session, Supplement No. 25 (A/10025), annex I, decision 44 (III).

<sup>2</sup> UNEP/GC/44 and Corr.1 and 2 and Add.1.



study, attention must be paid to the problems caused by pollution resulting from the use of contiguous international watercourses, and pollution transmitted by one State to one or more other States along successive international watercourses.

#### Finland

[Original: English]  
[21 August 1975]

Although it would not be wise to advocate that priority be accorded to any specific use, it might, on the other hand, not be feasible to deal with all the complex matters simultaneously. Experience will show at a later stage whether some parts of the codification will be ready earlier to be presented for adoption. This practical approach should also give an answer to the question whether the Commission should take up the problem of pollution of international watercourses as the initial stage of its study. Of course, the great significance of pollution problems are generally acknowledged and nobody will deny the necessity of their international legal regulation. On the other hand much activity, both on international and national levels, has taken place within the field of pollution abatement and control. There is no shortage of rules applicable as models for codification. In these circumstances the Commission is expected to start a selective and co-ordinating activity, with a view to setting down the basic principles and closing the gaps which still exist, *inter alia* with regard to State responsibility for pollution damages. Because of many other important questions still unsolved, and needing international legal regulation, the problem of pollution as such should not be given any preference. It might be most advisable to study this problem in connexion with general principles of the international law of waters. The simultaneous preparation of all the questions concerning the legal aspects of international watercourses would be the best approach also with regard to problems of pollution.

#### France

[Original: French]  
[11 July 1975]

#### Organization of work

While the study of pollution is undoubtedly of the utmost importance, as the work in progress in almost every regional international organization (EEC, OECD, Council of Europe) demonstrates, the difficulties encountered at that level by States with common concerns give grounds for believing that the problem has not yet evolved to a stage at which it could usefully be dealt with on a world scale. Moreover, the work which the ILC would undertake on this question might constitute an unfortunate duplication of that now under way in the organizations referred to above.

#### Federal Republic of Germany

[Original: English]  
[6 October 1975]

1. The Federal Republic of Germany has for a long time participated in the intensive efforts of most of its neighbour

States to protect international watercourses from pollution. It considers this co-operation to be the prerequisite for success as reflected in the progress and agreements achieved so far and regards pollution as a vital issue in connexion with the uses of international watercourses. In view of the complexity of the subject it may be argued, however, whether the question of pollution is the appropriate starting point for the study.

2. The Federal Government is also aware of the fact that questions regarding both the quality and the quantity of water, including among the latter especially the growing recourse to rivers and lakes for the production of drinking water and for industrial and irrigational uses, are for many countries extremely important aspects of the use of an international watercourse. For this reason it feels that questions of quantity should at least be accorded the same attention in the Commission's study as pollution problems.

#### Hungary

[Original: English]  
[14 July 1975]

1. It is certain that one of the most important problems of today is the problem of water pollution as it is raised in question H. The increasing water pollution further reduces the utilization of the heavily exploited water resources.

2. The same can be said about the utilizations of water that cause lessening in water reserves. According to preliminary accounts the surplus of water reserves will be exhausted in Hungary in 1980–1990, and there is a similar situation in other States, too.

3. If any other field of regulation is liable to get priority, according to our opinion it is reasonable to add it to the above-mentioned two questions.

#### Indonesia

[Original: English]  
[17 July 1975]

Taking up the problem of pollution of international watercourses as the initial stage is very strongly recommended in order to ensure the safety of the utilization of water.

#### Netherlands

[Original: English]  
[21 April 1976]

1. Many of the different uses affect one another and partially exclude one another. Water pollution is the result of some uses (industry, navigation, waste disposal) and threatens other uses (drinking water production, agricultural uses, recreation). Water pollution cannot be studied apart from the various uses, and conversely it is not possible to study the different uses without regard to their effect on the quality of the water.

2. In view of this interaction there is much to be said, in the opinion of the Netherlands Government, for approaching the complex of questions first from the pollution angle.

**Nicaragua**

[Original: Spanish]  
[10 September 1975]

1. The listing under D should not be interpreted as the acceptance of an order of priority for the studies which are to be conducted.
2. It must be the responsibility of the Commission to determine such priorities, taking into consideration any problems which may emerge. It is felt that it would be imprudent to make an *a priori* judgement on that order since it will only be possible to determine the interrelations existing between the various aspects of the questionnaire which has been submitted as the work goes forward.

**Pakistan**

[Original: English]  
[10 October 1975]

The problem of agriculture, commercial and economic uses is more important and urgent. Hence it should be taken up for study by the Commission before the problem of pollution of international watercourses.

**Philippines**

[Original: English]  
[25 August 1975]

1. For the reason given with respect to question G,<sup>1</sup> the problem of pollution should be taken up as the initial stage of the Commission's study. Pollution that may arise either from navigation or particular non-navigational uses affects all possible fresh water uses of the waterway. It is a basic problem the solution of which is assumed by the possibilities of the multi-purpose development of the watercourse.
2. In this respect, it is suggested that account should be taken of the conclusions of the United Nations Conference on the Human Environment held at Stockholm in June 1972, particularly Recommendations Nos. 51 and 55 of the Action Plan adopted by the said Conference.<sup>2</sup>

<sup>1</sup> See above, p. 177, sect. II, question G, Philippines.

<sup>2</sup> 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. II, sect. C, pp. 17 and 18.

**Poland**

[Original: English]  
[27 August 1975]

1. Undoubtedly the problem of water protection against pollution is very significant at present. Thus it seems that the separation of water protection against pollution from non-navigational use of waters which in fact result in pollution would be an artificial structure. That is why the problem of water pollution should be considered simultaneously with its cause, i.e. domestic, agricultural and commercial uses.

2. But in view of the enormous amount of work required by complex studies on legal aspects of non-navigational uses of watercourses, simultaneously with the consideration of legal aspects of their protection against pollution, and in view also of the urgent necessity of working out legal norms concerning protection of waters against pollution, it seems desirable to start the studies by these problems. This would require, first of all, the elaboration of legal principles of the responsibility of States for the damage done due to the pollution of international watercourses on the territories of other States, the elaboration of the notion of damage as well as the principles of co-operation of States in protection of waters against pollution, etc.

3. The international agreements so far concluded on these problems, regional draft conventions and the recommendations made by international organizations may constitute the basis for working out the principles of co-operation of States in this respect, as well as their laws and obligations.

**Spain**

[See above, p. 175, sect. II, question F, Spain.]

**Sweden**

[Original: English]  
[24 June 1975]

1. In the main, the answer to the question is in the affirmative. However, special attention should be taken that the scope of the study does not become too wide. It should also be borne in mind that general problems concerning pollution are already being dealt with in other international organs (i.e. in UNEP and OECD). The pollution problems may by some countries be considered as something concerning mostly the industrial countries. From these points of view it could to a certain extent be said that the primary interest should in the first instance be devoted to the direct use of water.

2. Attention is drawn to the Convention on the Protection of the Environment adopted by the Nordic States on 19 February 1974.<sup>1</sup>

<sup>1</sup> An English version of the text of the Convention was attached to the Swedish Government's reply.

**United States of America**

[Original: English]  
[12 June 1975]

The United States considers that the problem of the pollution of fresh water is extremely important. It would support the Commission's taking up the study of pollution as the initial stage in its study or, at least, including this problem among the primary issues upon which attention will be focused.

## Venezuela

[Original: Spanish]  
[15 March 1976]

1. The study of the problem of pollution *per se* cannot be a priority issue, for two reasons:

(a) This problem basically affects the developed countries, which constitute a minority within the international community;

(b) The problem cannot be separated from the question of the socio-economic uses of water. Pollution *per se* does not exist. Pollution is the result of misuse or abuse of resources.

2. Emphasis should therefore be placed, from the outset, on the co-ordination and regulation of the socio-economic uses of watercourses, which will, in any case, subsequently lead to a study on the pollution of watercourses.

## 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?*

## Argentina

[Original: Spanish]  
[26 August 1975]

1. We do not consider the establishment of a Committee of Experts necessary.

2. In accordance with the decision on water resources development entitled "International river basin development", adopted by the Committee on Natural Resources of the Economic and Social Council at its fourth session (Tokyo, April 1975),<sup>1</sup> the International Law Commission will receive for its study the "necessary advice on related technical, scientific and economic problems" from the Centre for National Resources, Energy and Transport and other organizations of the United Nations system having direct interest in the field.

3. In addition, the aforementioned decision appeals to the International Law Commission to give priority to the study of the law of non-navigational uses of international watercourses and to submit a progress report to the United Nations Water Conference, which is to take place in 1977.<sup>2</sup>

4. Nevertheless, we believe that in accordance with the provisions of its statute the Commission could, if necessary, hold consultations on specific subjects. In any event, whatever advice and consultations the Commission may need should not retard its work on the topic, thus causing a delay in the completion of the important task entrusted to it.

<sup>1</sup> Official Records of the Economic and Social Council, Fifty-ninth Session, Supplement No. 3 (E/5663), chap. I, draft resolution II B, para. 1 (a). For the final text, see Economic and Social Council resolution 1955 (LIX).

<sup>2</sup> *Ibid.*, para. 3.

## Austria

[Original: English]  
[18 July 1975]

Yes, within the limits of available financial means.

## Brazil

[Original: English]  
[3 July 1975]

It is the understanding of the Brazilian Government that the first point to be made here is that the Commission enjoys the natural and necessary autonomy to request advice in any way the members judge will best serve its work and whenever they deem it to be the most opportune. Unquestionably, the Commission has the right to act in this field with all the flexibility warranted by the complexity, technical and otherwise, of the subject with which it is dealing, and it can, therefore, either organize an Advisory Committee of Experts, or, which would seem to be more practical, call in *ad hoc* specialists, without discarding the possibility of combining the two alternatives. In any case, however, it is essential that the treatment of legal aspects should always be left entirely to the Commission, or, naturally, the Sub-Committee created by the Commission, which (in the meetings it has already held) has given a thoroughly convincing demonstration of its grasp of the facts.

## Canada

[Original: English]  
[25 September 1975]

The Commission should seek any technical, scientific or economic advice which may be necessary. On the basis of an assessment of the effectiveness with which the Commission is able to seek and receive technical, scientific or economic advice from other sources, the Commission may in the future wish to recommend the creation of a Committee of Experts. However, for the present, the need for such a committee has not been established.

## Colombia

[Original: Spanish]  
[9 July 1975]

The nature of the topic which has been referred to the International Law Commission for study amply justifies calling on technical, scientific and geographic specialists for advice, or establishing a committee of experts to submit within a specified period of time a specialized report that would serve as a basis for the Commission's legal analysis of the subject.

## Ecuador

[Original: Spanish]  
[5 August 1975]

Regarding this question, the Government of Ecuador considers that the practices established within the United

Nations should be followed, that is, that both the International Law Commission and the Sub-Committee created specifically for the purpose of studying the question of the law of the uses of international watercourses must have the necessary facilities and co-operation to ensure that their work is as fruitful as possible. As part of this co-operation, the Commission and its Sub-Committee should be able to employ consultants, experts, specialists, technical and other necessary staff to ensure that the jurists on the Commission have access to all the information required for the successful accomplishment of their task. In seeking the necessary advice, the International Law Commission should endeavour to make use of existing United Nations agencies or bodies, thus avoiding the proliferation of *ad hoc* bodies and the creation of a larger international bureaucracy.

#### Finland

[Original: English]  
[21 August 1975]

The last question concerns arrangements for ensuring that the Commission is provided with technical, scientific and economic advice which will be required because of the very complicated nature of its work. Before this question is answered it should be pointed out that the work of the Commission should be started by studying the already existing drafts, rules, resolutions and recommendations, irrespective of the nature of the body which has prepared them, if they are deemed to be relevant for the work of codification. By doing so, the Commission will avoid repeating studies and investigations of a basic nature, already competently carried out by other organs. It is, however, evident that the work of the Commission cannot be based exclusively upon already existing material. Some expertise should be made available and the establishment of a special committee of experts could be an appropriate solution. The terms of reference and the working methods of such a committee should, however, be carefully considered, because the work to be accomplished by the Commission is of a legal nature and should not be burdened by too complicated technical or scientific details. In this connexion it can be pointed out that there are international treaties of recent date, particularly concerning the law of the environment, which are legally not satisfactory, because the preparation of the said treaties has been dominated by technical and scientific expertise.

#### France

[Original: French]  
[11 July 1975]

#### Organization of work

As for establishing a committee of experts, it appears that, under the terms of article 16 (e) of its statute, the International Law Commission may not establish a permanent body. The Commission may, however, consult any experts it deems to be necessary, but it should not resort to such consultations until it has determined the scope of the work to be done and identified the specific topics with which it feels able to deal. Since any consultation of experts entails

additional financial commitments, sound judgement will have to be exercised in deciding at what point such consultations will become essential to the attainment of the objectives set. Consequently, the French Government feels bound to urge the International Law Commission to obtain competent opinions from the specialized international organizations with long experience of the problems of the use of watercourses (Central Commission for the Navigation of the Rhine, Danube Commission).

#### Federal Republic of Germany

[Original: English]  
[6 October 1975]

1. In order to bring its study to a successful conclusion, the Commission should have at its disposal all necessary aids including in particular technological and scientific data and the latest legal texts on the subject. Its endeavours in this respect should be strongly supported and it should be left to the Commission's discretion to resort to such aids as it may think most helpful for its work.
2. The consultations held so far both in the Sub-Committee and the Commission suggest that a convincing and well-founded study of the legal aspects of the uses of international watercourses is to be expected.

#### Hungary

[Original: English]  
[14 July 1975]

In connexion with question I, we are of the opinion that all the possible means are to be applied to contribute to and speed up the codification activity. Among others the establishment of an advisory committee of experts should also give help to the Committee. We consider the participation of Hungary in such a committee desirable and useful.

#### Indonesia

[Original: English]  
[17 July 1975]

It will be more advantageous if the Commission could use the assistance of such a Committee of Experts.

#### Netherlands

[Original: English]  
[21 April 1976]

#### Guiding the study

1. When legal rules are evolved on the subject of water management, notably qualitative water management, the Netherlands Government considers that good use can be made of the knowledge and experience of experts in the ecological and technical fields. It has also been found that the economic aspects of water management cannot be left out of consideration.
2. It therefore seems a good idea, as question I suggests,

to place the expertise and experience in these fields at the disposal of the International Law Commission. There are two possibilities. The Commission could indeed be assisted by a committee of experts. It could also, by means of supplementary questionnaires, offer the Governments the opportunity of giving fuller and more detailed comments on some aspects.

**Nicaragua**

[Original: Spanish]  
[10 September 1975]

In view of the recognized ability and competence of the members of the Commission, it should devolve upon them to decide whether and at what stage technical, scientific, economic and any other kind of advice should be sought.

**Pakistan**

[Original: English]  
[10 October 1975]

Yes. Technical, economic and scientific advice from those countries which share international drainage basins must be taken by including their experts in the Committee of Experts.

**Philippines**

[Original: English]  
[25 August 1975]

The nature of the study does require that the work of the Commission should have all the benefits of the technical, scientific and economic advice of a Committee of Experts.

**Poland**

[Original: English]  
[27 August 1975]

With respect to the necessity of considering, in conducting studies on the legal aspects of non-navigational use of international watercourses and their protection against pollution, complicated technical and economic problems, it seems desirable for the Commission to establish an auxiliary body such as a Committee of Experts and, as the need arises, *ad hoc* working groups. But above all the already existing bodies working on the use of international watercourses and their protection against pollution should be made use of, including, e.g., in the European region, in the United Nations Economic Commission for Europe, the Senior Government Advisers of ECE Member Countries on Environment or the Committee on Water Problems.

**Spain**

[Original: Spanish]  
[22 September 1975]

1. It must be pointed out once again that the Commission

itself is in the best position to decide on the adoption of its method of work within the limits of its Statute and its budgetary resources.

2. This is undoubtedly a multifaceted topic, and the law must take fully into account scientific, technical and economic factors which have some bearing on it.

3. In this regard, the Commission might do well to enlist the aid of an advisory committee of experts. Problems would inevitably arise, however, since such a body would, for the sake of greater effectiveness, have to be limited in size, and at the same time would have to be sufficiently representative of the different regions of the world and the various specialities involved. Moreover, the information provided in the Secretary-General's supplementary report on legal problems relating to the non-navigational uses of international watercourses<sup>1</sup> suggests that there is already within the United Nations system a considerable body of data, studies and proposals which, taken in conjunction with the preparations for the United Nations Water Conference (scheduled for 1977), should adequately meet the present needs of the Commission. In this regard, the Commission acted wisely in deciding to request the international agencies involved to appoint one or several officials to channel information and extend co-operation.

<sup>1</sup> *Yearbook ... 1974*, vol. II (Part Two), p. 265, document A/CN.4/274.

**Sweden**

[Original: English]  
[23 June 1975]

In view of the complicated character of the subject it seems advisable to create an Expert Group to assist and advise the Commission.

**United States of America**

[Original: English]  
[12 June 1975]

Yes. The nature of the subject-matter is such that the Commission will require scientific and other specialized advice in the course of its work on international watercourses.

**Venezuela**

[Original: Spanish]  
[15 March 1976]

In view of the complexity of the problem, it would certainly seem appropriate. However, it would be necessary to specify the exact composition and functions of such a committee so as to avoid infringement of the legitimate rights of any country concerned.

## DOCUMENT A/CN.4/295

**First report on the law of the non-navigational uses of international watercourses,  
by Mr. Richard D. Kearney, Special Rapporteur**

[Original: English/French]  
[7 May 1976]

*Quid prohibetis acquis,  
Usus communis aquarum est.*  
(OVID, *Metamorphoses*, VI, 349)

1. As a first step in undertaking its study of the law of the non-navigational uses of international watercourses, the International Law Commission decided that the views of States should be sought on a number of basic issues relating to the scope and content of the study.<sup>1</sup> General Assembly resolution 3315 (XXIX) of 14 December 1974 confirmed this decision by recommending that the Commission continue its study, taking into account "... comments received from Member States on the questions referred to in the annex to chapter V of the Commission's report."

2. The replies of Member States<sup>2</sup> to the Commission's questionnaire are scanty.<sup>3</sup> This should not be taken as evidence of a general lack of interest in the topic. The Commission's report on the work of its twenty-seventh session contained only a paragraph to the effect that the subject of international watercourses was not taken up at the session pending receipt of governmental comments.<sup>4</sup> Nonetheless, many delegations commented on the subject in the course of the Sixth Committee debate on the report at the thirtieth session of the General Assembly.

3. All of these delegations, with two exceptions, urged that work on the subject proceed without delay. They stressed the importance of developing principles to govern the non-navigational uses of international watercourses. Many urged that this task be taken up at the twenty-eighth session of the Commission, in 1976, or that work be commenced as a matter of priority, or without delay.

4. In paragraph 4 of its resolution 3495 (XXX) of 15 December 1975 concerning the report of the International Law Commission on the work of its twenty-seventh session, the General Assembly recommended that the Commission continue its work on the topic. This first report will discuss the decisions which should be made by the Commission in order to provide a basis for commencing the substantive work on international watercourses.

5. Judge Taslim O. Elias in 1974 inquired whether the imposing polysyllables in the title meant much more than

"economic uses of international rivers". Similar questions by other members of the Commission led to Member States being asked to indicate the meaning which should be given to "international watercourse". More specific views were solicited on whether "the geographical concept of an international drainage basin" is an "appropriate basis for a study of the legal aspects", on the one hand "of non-navigational uses of international watercourses"<sup>5</sup> and on the other "of the pollution of international watercourses".<sup>6</sup>

6. A small majority of replies to this question supported the view that it would be desirable to begin the work on the basis of a less general term than "international drainage basin".

7. Canada, in recommending that the basic definition should encompass a body of fresh water which crosses or forms an international boundary, pointed out that use of a geographically narrow definition would not preclude consideration of a natural drainage basin or other functional unit where the circumstances of the case so require.<sup>7</sup>

8. Hungary stated that there is no general geographic term that could be applied to all of the legal relations relating to waters that are on the territory of more than one State. Consequently the question to study is not the meaning of terms but what term is suitable to the regulation of certain legal relations.<sup>8</sup>

9. Considerable support was expressed for traditional definitions such as "international river" in the sense of the Final Act of the Congress of Vienna of 1815.<sup>9</sup> Colombia, for example, while considering that the definition of an international drainage basin as contained in the Helsinki Rules<sup>10</sup> is appropriate in itself<sup>11</sup> would consider it more appropriate to refer to a river which traverses or separates

<sup>5</sup> See above, p. 161, document A/CN.4/294 and Add.1, para. 6, question B.

<sup>6</sup> *Ibid.*, question C.

<sup>7</sup> *Ibid.*, p. 153, sect. II, question A, Canada, and p. 162, question B, Canada.

<sup>8</sup> *Ibid.*, p. 155, sect. II, question A, Hungary.

<sup>9</sup> See para. 21 below. 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.

<sup>10</sup> The Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association at its fifty-second Conference, held at Helsinki in 1966. For text, see *Yearbook ... 1974*, vol. II (Part Two), p. 357, document A/CN.4/274, part four, sect. C, 1.

<sup>11</sup> See above, p. 162, document A/CN.4/294 and Add.1, sect. II, question B, Colombia.

<sup>1</sup> *Yearbook ... 1974*, vol. II (Part One), pp. 301-304, document A/9610/Rev.1, chap. V and annex.

<sup>2</sup> See above, p. 147, document A/CN.4/294 and Add.1.

<sup>3</sup> *Ibid.*, para. 6.

<sup>4</sup> *Yearbook ... 1975*, vol. II, p. 183, document A/10010/Rev.1, para. 138.

the territories of two or more States.<sup>12</sup> Brazil<sup>13</sup> and Ecuador<sup>14</sup> both refer to the recognition this latter concept has received in the Inter-American juridical system in expressing support for its use in carrying out the Commission's study. Spain,<sup>15</sup> Poland<sup>16</sup> and Austria<sup>17</sup> also support this approach.

10. Some of the States which submitted comments would accept the drainage basin concept as a basis for the consideration of pollution problems but not for uses. Thus Nicaragua remarked that "the drainage basin is a territorial concept which can constitute a single unit for certain development and integration projects only when particular local characteristics are present and through the conclusion of special treaties,"<sup>18</sup> and that "in the specific instance of pollution, it would be advisable to take into account the geographical concept of a drainage basin . . . The damage which the pollution of the waters forming the drainage basin can cause in the principal river makes it imperative to extend the scope of the study on the legal aspects of pollution."<sup>19</sup> France expressed similar views.<sup>20</sup> The Federal Republic of Germany, on the other hand, stated that a study of the pollution of international watercourses should not be based on the drainage basin concept. "Only trans-boundary pollution, as distinct from pollution confined to some point in the river basin, is of relevance . . ."<sup>21</sup> The same position is advanced in a number of other replies.

11. The States which supported using the concept of the drainage basin for all purposes generally stressed the unity of a water system. Sweden pointed out the need to include both surface water and ground water.<sup>22</sup> Both Finland<sup>23</sup> and the United States of America<sup>24</sup> accepted the hydrographic coherence of the basin. Argentina pointed out that "The principal and secondary tributaries of an international river must also be considered 'international', even when they lie entirely within a national territory, since they form part of the river system of an international drainage basin."<sup>25</sup> Argentina points out, however, that "In view of the current acceleration in the development and progress of knowledge and of scientific and technological advances, the specification and limitation of definitions is unnecessary and even inappropriate. It is felt that this could give rise to prolonged academic discussions whose conclusions might be overtaken by events."<sup>26</sup> There is much merit in this observation. It is rooted in the same considerations that underlie many of the comments. As the Canadian memorandum states: "A legal definition should be a

workable starting point and not a limiting factor that would preclude consideration of any appropriate geographic unit when specific concrete problems are considered."<sup>27</sup> The Federal Republic of Germany, another State that strongly prefers the international watercourse concept, points out:

It should not be overlooked, however, that the supply of water to countries below stream may depend just as much on water withdrawals from a national tributary as from the international watercourse concerned. It may therefore be useful to extend a legal study of questions of quantity to aspects of the river basin as a whole, taking duly into account the sovereign rights of the riparian States.<sup>28</sup>

12. Almost all the States responding recognized, either expressly or implicitly, that the purpose of a definition of international watercourses should be to provide a context for examination of the legal problems that arise when two or more States are present in the same fresh water system and that a definition should not ineluctably bring with it corollary requirements as to the manner in which those legal problems should be solved. Thus some States objected to use of the drainage basin concept because they considered that its use implied the existence of certain principles, especially in the field of river management. Other States considered that traditional concepts such as contiguous and successive waterways would be too restricted a basis on which to carry out the study in view of the need to take account of the hydrologic unity of a water system.

13. Consequently, it would seem wise for the Commission to follow the advice proffered by a number of the commenting States that the work on international watercourses should not be held up by disputes over definitions. This approach is, of course, in line with the customary practice of the Commission in deferring the adoption of definitions, or at the most adopting them on a provisional basis, pending the development of substantive provisions regarding the legal subject under review.

14. To the extent that a definition of international watercourses is needed, it is required in connexion with non-navigational uses of the water concerned. What these uses encompass must be considered. In question D of its questionnaire, the Commission set forth an outline of fresh water uses under three headings: agricultural uses, economic and commercial uses and domestic and social uses. The individual uses listed under each heading, ranging from irrigation to energy production to fishing and boating, are illustrative of the range of human activities for which water is required. Water is viewed as a resource necessary to the particular use.

15. In order to determine whether its compilation of the resource uses of water was reasonably complete, the Commission asked States whether any other uses should be included. A number of additional uses have been suggested, such as use for stock-raising and for cooling. Some of the replies expressed in general terms the view that such a catalogue of specific uses has value mainly as a checklist, and that the development of legal rules and principles could comprise broader issues than those raised by the list of specific uses. The Commission had, in fact, indicated its awareness of this aspect by asking States, in question F,

<sup>12</sup> *Ibid.*, p. 154, question A, Colombia.

<sup>13</sup> *Ibid.*, p. 152, Brazil.

<sup>14</sup> *Ibid.*, p. 154, Ecuador.

<sup>15</sup> *Ibid.*, p. 159, Spain.

<sup>16</sup> *Ibid.*, p. 158, Poland.

<sup>17</sup> *Ibid.*, p. 152, Austria.

<sup>18</sup> *Ibid.*, p. 164, question B, Nicaragua, para. 3.

<sup>19</sup> *Ibid.*, p. 167, question C, Nicaragua.

<sup>20</sup> *Ibid.*, p. 155, question A, France.

<sup>21</sup> *Ibid.*, p. 163, question B, Federal Republic of Germany, para. 3.

<sup>22</sup> *Ibid.*, p. 160, question A, Sweden.

<sup>23</sup> *Ibid.*, p. 154, Finland.

<sup>24</sup> *Ibid.*, p. 160, United States of America.

<sup>25</sup> *Ibid.*, p. 152, Argentina, para. 5.

<sup>26</sup> *Ibid.*, p. 152, Argentina, para. 1.

<sup>27</sup> *Ibid.*, p. 153, Canada, para. 2(a).

<sup>28</sup> *Ibid.*, p. 163, question B, Federal Republic of Germany.



whether flood control and erosion problems should be included in its study. Neither flood control nor erosion is a direct use of water as a resource. Either can be the consequence of a use or of uses. Simple examples would be erosion caused downstream by the operation of a dam for hydroelectric production or a flood caused by operation of a dam for hydroelectric production without regard to downstream high water effects. On the other hand, downstream floods or downstream erosion may be caused not by upstream water uses but by certain land uses—runoffs resulting from the conversion of land from agricultural to residential use, or lumbering which has reduced the water-retention capability of land.

16. States replying to this question supported the inclusion of flood control and erosion problems in the study to be carried out by the Commission, although the Government of Ecuador expressed doubt whether legal rules on these issues should be developed at this time except as to responsibility for loss due to floods or erosion resulting from improper use of international watercourses.<sup>29</sup> Several States suggested that sedimentation problems should also be dealt with.

17. In supporting inclusion of flood and erosion problems, a number of States expressed the view that inclusion was required because of the need to protect the watercourse and the uses to be made of the water. On the other hand, a few States linked the inclusion of floods or erosion to whether these problems are, as Brazil put it, "occasioned by any form of use of the watercourses".<sup>30</sup> Brazil also referred to cases "in which there are really international repercussions as a result of significant harm to other States."<sup>31</sup> This qualification raises issues that are not definitional in nature and should be discussed in connexion with the substantive proposals relating to erosion and floods as well as the responsibility issue mentioned in the comment of Ecuador referred to above.

18. The issue that should be dealt with at the present time is whether the Commission's task is limited to the effects or consequences of non-navigational uses of international watercourses. In most of the situations that might be envisaged the Commission undoubtedly will be examining the effects upon the uses of an international watercourse in one State of the uses of that watercourse in another State. The discussion of flood and erosion problems, however, illustrates that flooding or erosion can be caused in one State by activities in another that do not involve direct use of the international watercourse. The watercourse serves as the means or conduit through which the non-fluvial use in one State produces fluvial consequences in the other State.

19. A substantial number of illustrations of this type of problem could be given. The area of pollution provides many examples. One that has recently been occurring in various parts of the world is that of the factory producing herbicides and fungicides which contain compounds of arsenic and mercury. Over the years these poisons build up in the soil surrounding the factory through the loss of minute quantities in the course of transportation and

manufacture. Surface water and underground seepage carry off a proportion of these chemicals into a watercourse in diluted form. The build-up in the soil eventually reaches a stage at which the concentrations carried off by water can destroy aquatic life in the watercourse. The contaminated water, if it flows into another State, can affect a variety of uses of the watercourse in that State, including domestic uses, fishing, and various recreational activities. The contamination may prohibit other uses in the realms of consumption or manufacturing unless measures are taken to eliminate or dilute the residues.

20. The example given differs from the customary pollution problem in that the watercourse is not intended to be used for the purpose of waste disposal. Nonetheless the relationship of the contamination of the watercourse to its character as an international watercourse is such that the consequences of the activity upon the watercourse should be studied by the Commission even though they do not result from a use of the watercourse. Similarly, the study should include the problems of floods and erosion, as well as sedimentation, if there are consequences to the watercourse as an international watercourse without regard to whether the flood or erosion results from the use of a river or not. As Colombia stated "... the study of such problems should be included, since it forms part of the planning that is needed in order to begin analysing the best ways of preventing the harm caused by both erosion and floods to the various uses of water."<sup>32</sup> These examples illustrate that, while a full definition of the term "international watercourse" may be deferred until the content of the subject has been clarified by further study, it would be desirable to agree upon the minimum elements that the Commission should study in order to codify and progressively develop the international law of the use of fresh water.

21. The traditional description of an international watercourse as suggested in a number of the replies is any river, canal or lake forming the frontier or traversing the territories of two or more States. This definition is substantially that which has been used for making provision for river navigation. The Final Act of the Congress of Vienna of 1815 contains a rule for the free navigation of rivers. Its article 108 provides as follows:

The Powers whose States are separated or crossed by the same navigable river engage to regulate, by common consent, all that regards its navigation. For this purpose they will name Commissioners, who shall assemble, at latest, sixth months after the termination of the Congress, and who shall adopt, as the bases of their proceedings, the principles established by the following articles.<sup>33</sup>

A definition devised for purposes of navigation is not necessarily the best choice for the requirements of the wide range of uses other than navigation.

22. The 1815 definition, however, by distinguishing waters that form a boundary from waters that cross a boundary, concentrates attention on the relationship that the physical properties of water have to the metaphysical aspects of a boundary writ in water. A boundary, although it is

<sup>29</sup> *Ibid.*, p. 174, question F, Ecuador.

<sup>30</sup> *Ibid.*, p. 174, Brazil.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*, p. 174, Colombia.

<sup>33</sup> For reference, see foot-note 9 above.

determined by reference to physical phenomena—the crest of a mountain range, the thalweg of a river, or is physically marked by a wall or a row of granite markers—remains an abstraction. At this point on the mountain the authority of State A ends. It is replaced by the power of State B. On this side of the granite marker it is legal to make beer. On the other side it is illegal. On this side of the lake it is a crime to dump oil into the water. On the other side it is not. On State A's side of the river, reduction of the water level is prohibited. On State B's side, withdrawals not in excess of a one-foot reduction are permitted.

23. There is a real difference when the authority of the State ends at a point on land and when it ends at a point in the water. The difference is not in the concept of authority but in its applicability to physical phenomena. State A can require that beer not be manufactured on its territory by the exercise of its own authority and this is not affected by whether or not beer is brewed in State B. However, the prohibition against the introduction of oil into waters of a lake that lies partly on one side of a boundary cannot be effective if the State on the other side does not prevent such discharges into the lake. The physical properties of liquids, and the normal movements of the water will result in some oil crossing the border. The prohibition against reducing the water level in the river on State A's side is ineffective if water users in State B act under the authorization to withdraw water up to a one-foot reduction in the level as measured on B's side. The principle of sovereignty will not keep water on one side of the river up when water on the other side goes down.

24. This leads to consideration of the question whether the relationship of sovereignty to water is such that the uses of a boundary water have to be governed by a different set of rules from the uses of water that is crossed rather than divided by a boundary. The issue is whether the concept of the boundary with an equal and opposing sovereignty on each side is the starting point or whether it is the physical characteristics of water over which different sovereignties are exercised at different times that must be taken into account.

25. From the standpoint of the physical characteristics of water, what is the difference if the intangible boundary line is drawn across the watercourse instead of lengthwise—if it segments a watercourse rather than bisects it? The river flows through the territory of riparian States successively rather than simultaneously. But, if an upstream State takes water out of a river flowing through its territory and does not replace it, the quantity of water that crosses the boundary will be less and the level of the river in the downstream State will be lower. The end result is a loss of water and is the same as the end result of diversion from a boundary river. If a factory in an upstream State dumps oil into a stream, which is not removed or disposed of before the oil reaches the boundary, the oil will be carried into the downstream State even as it is carried across the frontier in a boundary lake.

26. As far as fundamental effects upon quantity and quality of water are concerned, there appears to be no basic difference in whether the act or inaction producing the effect occurs in an upstream State or in a boundary-water State. Differences that exist relate principally to timing, certainty

and quantum of result. Organic wastes dumped into a trans-boundary river far enough up from the boundary may be transformed by bacterial action before reaching the boundary. The same result would be possible in a large and quiet boundary lake but unlikely in a boundary river. These variations in probability and result, however, do not change the basic physical consequences which result from fresh water being mobile, movable and the most universal of solvents, to list only three of its qualities that give rise to legal consequences.

27. Is there any fundamental difference in these inter-relationships if it is not riparian States adjacent to each other on an international watercourse which are involved in a water problem but States riparian on the same stream which have no common boundaries? The headwaters of the Niger are in the Loma Mountains near the border between Sierra Leone and Guinea and flow through Mali and Niger as well as boundary areas of Benin in reaching Nigeria and emptying into the Gulf of Guinea. If Mali were to make a substantial diversion of water from the Niger to the Senegal river system there would be less water not only for Mali's neighbour, Niger, but also for Benin and Nigeria. To revert to the original theme, the political boundaries are irrelevant to the physical unity of a river system. Like the ripples which spread out from a stone cast into a pond, the physical effects of a man-made diversion, or pollution, or change in rate of flow, will move through and with the water until the physical characteristics of water eliminate the change.

28. The Niger basin is an excellent illustration that the legal aspects of the uses of an international watercourse raise issues beyond the boundary-water or boundary-crossing aspects. At Lokoja in Nigeria the Niger is joined by a major tributary, the Benue River which flows from the United Republic of Cameroon and has substantial tributaries rising in Chad. Farther west the Sirba rises in Upper Volta and empties into the Niger River at Hooussa in Niger. Obviously each of these rivers could be treated as an international watercourse in itself—and possibly should be for certain purposes. But also obviously a diversion of the Sirba in Upper Volta could have effects in Nigeria and some types of pollution in Chad could be carried by the Benue into Nigeria. It is also obvious that a persistent effect upon the Benue produced in Chad could combine with a persistent effect produced upon the Sirba in Upper Volta to create a compound result at Onitisha, Nigeria, which is downstream from the junction of the Niger and the Benue.

29. Problems of this character are not uncommon and the ever greater demands upon the available supply of fresh water occasioned by vast increases in population, continually growing industrial requirements and the pressures of urbanization make the likelihood of occurrence in any multistate river basin a mathematical certainty.

30. A set of legal principles regarding the use of international watercourses that limits itself to dealing with fresh water when it crosses a specific international boundary and to rivers, lakes and canals that constitute a particular national boundary would not be broad enough to deal with the complex problems of a multistate river system. Where river systems are wholly within the territory of two States, as is the case in those dealt with in the Treaty of 1909 relating to boundary waters between Canada and the

United States,<sup>34</sup> variations of the 1815 formula such as the one used in that treaty may be applied with a reasonable measure of utility. Even in a two-State situation, however, whenever issues engendered by modern technology are involved, such as benefit-sharing from co-ordinated river regulation for hydroelectric production, the river has to be dealt with as a whole. The Canadian-United States Columbia River Treaty<sup>35</sup> illustrates this requirement.

31. A guideline of substantial significance for the development of international law is that the newly-independent States, the developing States, have recognized that the problems arising in multistate river basins cannot be dealt with by using a theory adopted by the Holy Alliance in 1815. In the Act of 1963 regarding navigation and economic co-operation between the States of the Niger Basin,<sup>36</sup> the States signatories recognized that the complex physical characteristics of the basin required "close co-operation" of all riparian States on the river, its tributaries and sub-tributaries "... for the judicious exploitation of the resources of the River Niger basin."<sup>37</sup> The operative provisions of the Act include the following articles:

#### Article 2

The utilisation of the River Niger, its tributaries and sub-tributaries, is open to each riparian State in respect of the portion of the River Niger basin lying in its territory and without prejudice to its sovereign rights in accordance with the principles defined in the present Act and in the manner that may be set forth in subsequent special agreements.

The utilisation of the said River, its tributaries and sub-tributaries, shall be taken in a wide sense, to refer in particular to navigation, agricultural and industrial uses, and collection of the products of its fauna and flora.

#### 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.

#### Article 4

The riparian States undertake to establish close co-operation with regard to the study and the execution of any project likely to have an appreciable effect on certain features of the regime of the River, its tributaries and sub-tributaries, their conditions of navigability, agricultural and industrial exploitation, the sanitary conditions of their waters, and the biological characteristics of their fauna and flora.<sup>38</sup>

32. The Niger River Act was supplemented in November 1964 by the Agreement concerning the Niger River Commission and the navigation and transport on the River Niger,<sup>39</sup> article 2 of which states the Commission's functions as follows:

- (a) to prepare General Regulations which will permit the full

<sup>34</sup> Treaty between Great Britain and the United States relating to boundary waters, and questions arising between the United States and Canada, signed at Washington on 11 January 1909: text in United Nations, *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. 260.

<sup>35</sup> Treaty relating to co-operative development of the water resources of the Columbia River Basin, signed at Washington on 17 January 1961: text in United Nations, *Treaty Series*, vol. 542, p. 244.

<sup>36</sup> *Ibid.*, vol. 587, p. 9.

<sup>37</sup> *Ibid.*, p. 11.

<sup>38</sup> *Ibid.*, p. 13.

<sup>39</sup> *Ibid.*, p. 19.

application of the principles set forth in the Act of Niamey, and to ensure their effective application.

The General Regulations and the other decisions of the Commission shall, after approval by the riparian States and after a time-limit fixed by the Commission, have binding force as regards relations among the States as well as their internal regulation.

(b) to maintain liaison between the riparian States in order to ensure the most effective use of the waters and resources of the River Niger basin.

(c) to collect, evaluate and disseminate basic data on the whole of the basin, to examine the projects prepared by the riparian States, and to recommend to the Governments of the riparian States plans for common studies and works for the judicious utilization and development of the resources of the basin.

(d) to follow the progress of the execution of studies and works in the basin and to keep the riparian States informed, at least once a year thereon, through systematic and periodic reports which each State shall submit to it.

(e) to draw up General Regulations regarding all forms of navigation on the river.

(f) to draw up staff regulations and to ensure their application.

(g) to examine the complaints and to promote the settlement of disputes and the resolution of differences.

(h) generally, to supervise the implementation of the provisions of the Act of Niamey and the present Agreement.<sup>40</sup>

33. The enlightened spirit which animates these two agreements is recognition that all the riparians in a river basin have an interest in what happens in the basin as a whole. The same spirit shown by the nine Niger River States led the four African States of the Senegal basin to adopt in 1963 a Convention relating to the general development of the Senegal River Basin.<sup>41</sup> The preamble notes that the co-ordinated development of the Senegal River basin for the rational exploitation of its varied resources offers prospects of a fruitful economic co-operation. This was followed in 1964 by the Convention relating to the status of the Senegal River,<sup>42</sup> article 8 of which provides that the waters flowing into the Senegal will be subject in every respect to the same régime as the rivers or lakes of which they are the tributaries. Article 11 provides as follows:

*Art. 11.* In addition to the provisions of Title I of the Convention of 26 July 1963 relating to the general development of the Senegal River basin, the Inter-State Committee shall have, *inter alia*, the following tasks:

(a) The preparation of joint regulations permitting the full application of the principles affirmed by the present Convention.

The joint regulations and other decisions adopted by the Committee shall have binding force, after approval by the States concerned, in the relations between those States and in regard to their internal regulations.

(b) The Committee shall be responsible for ensuring observance of the regulations referred to above.

(c) It shall assemble basic data relating to the river basin as a whole, and prepare and submit to the Governments of the riparian States co-ordinated programmes for studies and works for the development and rational utilization of the resources of the Senegal River.

(d) It shall examine projects prepared by the States for the development of the river, as defined in article 3 of the present statute.

(e) It may be instructed by one or more riparian States to study and execute projects for development of the river.

(f) It shall inform the riparian States of all projects or problems relating to the development of the river basin, co-ordinate relations between States in this field and help to settle disputes.

<sup>40</sup> *Ibid.*, p. 23.

<sup>41</sup> For the French text of the Convention, see *Journal officiel de la République du Sénégal*, 20 February 1965, year 110, No. 3727, p. 171.

<sup>42</sup> For French text see *Revue juridique et politique, indépendance et coopération*, vol. 19, No. 2 (April-June 1965), p. 302.

(g) The Committee may, on behalf of the riparian States, draw up requests for bilateral or multilateral financial and technical assistance in carrying out studies and works for the development of the river. Management of the technical and financial assistance so obtained may be entrusted to the Committee.<sup>43</sup>

34. The Convention and Statutes relating to the Development of the Chad Basin of 1964<sup>44</sup> also take as their starting point the necessity for treating a fresh water system as a unit. Article 4 of the Statutes provides:

*Art. 4.* The exploitation of the Chad Basin and especially the utilization of surface and underground waters has the widest meaning and refers in particular to the needs of domestic and industrial and agricultural development and the collecting of its fauna and flora products.<sup>45</sup>

35. Article 5 provides basic principles for use of the waters:

*Art. 5.* The Member States undertake to refrain from adopting, without referring to the Commission beforehand, any measures likely to exert a marked influence either upon the extent of water losses, or upon the form of the annual hydrograph and limnograph and certain other characteristics of the Lake, upon the conditions of their exploitation by other bordering States, upon the sanitary condition of the water resources or upon the biological characteristics of the fauna and the flora of the Basin.

In particular, the Member States agree not to undertake in that part of the Basin falling within their jurisdiction any work in connexion with the development of water resources or the soil likely to have a marked influence upon the system of the water courses and levels of the Basin without adequate notice and prior consultation with the Commission, provided always that the Member States shall retain the liberty of completing any plans and schemes in the course of execution or such plans and schemes as may be initiated over a period of three years to run from the signature of the present Convention.<sup>46</sup>

36. While the Chad, Niger and Senegal river treaties are the outstanding examples of international recognition of the interdependence of the various parts of a river basin, they are not the only such examples. In article 1 of the Treaty on the River Plate Basin of 1969<sup>47</sup> the five South American riparian States undertake to combine their efforts to promote the harmonious development and physical integration of the basin and of its areas of influence which are immediate and identifiable. Specific areas of promotion are identified as:

- (a) Advancement and assistance in navigation matters;
- (b) Reasonable utilization of water resources, particularly through regulation of water courses and their multiple and equitable uses;
- (c) Conservation and development of animal and vegetable life;
- (d) Perfection of highway, rail, river, air, electrical and telecommunication interconnexions;
- (e) Regional complementation through the promotion and installation of industries of interest to the Basin development;
- (f) Economic complementation in frontier areas;
- (g) Reciprocal co-operation in matters of education, health and combating of disease;

<sup>43</sup> *Ibid.*, p. 304.

<sup>44</sup> For the English and French texts of the Convention and Statutes, see *Journal officiel de la République fédérale du Cameroun*, Yaoundé, 15 September 1964, 4th year, No. 18, pp. 1003 *et seq.*

<sup>45</sup> *Ibid.*, p. 1005.

<sup>46</sup> *Ibid.*

<sup>47</sup> United Nations, *Treaty Series*, vol. 875, No. 12550. For the Spanish text, see Organization of American States, *Rios y Lagos Internacionales (utilización para fines agrícolas e industriales)*, 4th ed., revised (OEA/Ser.I/VI, CIJ-75, rev. 2) (Washington, D.C., American Society of International Law, 1971), pp. 167–170.

(h) Promotion of other projects of common interest, particularly those related to inventory, assessment and utilization of the area's natural resources; and

(i) Total familiarity with the River Plate Basin.<sup>48</sup>

37. The Declaration of Asunción on the use of international rivers, issued as resolution No. 25 annexed to the Act of Asunción which was adopted at the fourth meeting of Foreign Ministers of the countries of the River Plate Basin,<sup>49</sup> states that its object is to "... record the fundamental points on which agreement has already been reached."<sup>50</sup> As the Brazilian comment points out,<sup>51</sup> the Declaration maintains a distinction between boundary waters and "successive international rivers." The pertinent paragraphs are:

1. In contiguous international rivers, which are under dual sovereignty, there must be a prior bilateral agreement between the riparian States before any use is made of the waters.

2. In successive international rivers, where there is no dual sovereignty, each State may use the waters in accordance with its needs provided that it causes no appreciable damage to any other State of the Basin.<sup>52</sup>

38. The distinction made in the two paragraphs is not contrary to the thesis that in formulating rules for an international river it is necessary to take into account the unity of the river. At this stage it would be premature to discuss the content of the legal principles contained in the two paragraphs. However, the fact that one rule is made applicable to boundary waters and another made applicable to successive international rivers is merely a recognition of what has been pointed out above. While anything affecting quantity, quality or rate of flow of water produces the same type of result across vertical boundaries as across lateral ones, there are differences in the certainty, quantity and timing of the result. Differences may well justify a more restrictive set of legal requirements for boundary waters than for successive rivers. This question is clearly one of the most important and difficult that the Commission must deal with.

39. Paragraph 2 of the Declaration of Asunción, nonetheless, in authorizing use of water by a State in accordance with its needs "provided that it causes no appreciable damage to any other State of the Basin" makes it crystal clear that this principle applies throughout the whole Plate basin without reference to the particular location of any State within the basin, whether the use of the water involves a tributary or sub-tributary, and whether the "appreciable damage" is caused by an adjacent or a non-adjacent State. The principles set forth in paragraphs 1 and 2 of the Declaration are in accord with recognition of the hydrologic unity of the basin.

40. This is confirmed by the requirements of paragraphs 3 and 4:

3. As to the exchange of hydrological and meteorological data:

(a) Processed data shall be disseminated and exchanged systematically through publications;

<sup>48</sup> *Ibid.*, pp. 167–168.

<sup>49</sup> For the text of the Act and of the Declaration, see *Yearbook ... 1974*, vol. II (Part Two), pp. 322–324, document A/CN.4/274, para. 326.

<sup>50</sup> *Ibid.*, p. 324, Act of Asunción, resolution No. 25.

<sup>51</sup> See above, p. 152, document A/CN.4/294 and Add.1, sect. II, question A, Brazil.

<sup>52</sup> *Yearbook ... 1974*, vol. II (Part Two), p. 324, document A/CN.4/274, para. 326, Act of Asunción, resolution No. 25.

(b) Unprocessed data, whether in the form of observations, instrument measurements or graphs, shall be exchanged or furnished at the discretion of the countries concerned.

4. The States shall try as far as possible gradually to exchange the cartographic and hydrographic results of their measurements in the River Plate Basin in order to facilitate the task of determining the characteristics of the flow system.<sup>53</sup>

41. In May 1968, the Committee of Ministers of the Council of Europe proclaimed the European Water Charter, adopted in May 1967,<sup>54</sup> which contains 12 principles. This set of principles is well thought out and provides an excellent basis for making a body of rules on the uses of fresh water. For present purposes the most important of the principles are Nos. I, II, VI, VII, VIII, XI and XII, which read as follows:

I. *There is no life without water. It is a treasure indispensable to all human activity*

Water falls from the atmosphere to the earth mainly in the form of rain and snow. Streams, rivers, glaciers and lakes are the principal channels of drainage towards the oceans. During its cycle, water is retained by the soil, vegetation and animals. It returns to the atmosphere principally by means of evaporation and plant transpiration. Water is the first need of man, animals and plants.

Water constitutes nearly two-thirds of man's weight and about nine-tenths of that of plants.

Man depends on it for drinking, food supplies and washing, as a source of energy, as an essential material for production, as a medium for transport, and as an outlet for recreation which modern life increasingly demands.

II. *Fresh water resources are not inexhaustible. It is essential to conserve, control, and wherever possible, to increase them*

The population explosion and the rapidly expanding needs of modern industry and agriculture are making increasing demands on water resources. It will be impossible to meet these demands and to achieve rising standards of living, unless each one of us regards water as a precious commodity to be preserved and used wisely.

VI. *The maintenance of an adequate vegetation cover, preferably forest land, is imperative for the conservation of water resources*

It is necessary to conserve vegetation cover, preferably forests, and whenever it has disappeared to reconstitute it as quickly as possible.

The conservation of forests is a factor of major importance for the stabilization of drainage basins and their water régime. As well as their economic value, forests provide opportunities for recreation.

VII. *Water resources must be assessed*

Fresh water that can be put to good use represents less than one per cent of the water on our planet and it is distributed in very unequal fashion.

It is essential to know surface and underground water resources, bearing in mind the water cycle, the quality of water and its utilization.

Assessment, in this context, involves the survey, recording and appraisal of water resources.

VIII. *The wise husbandry of water resources must be planned by the appropriate authorities*

Water is a precious resource requiring planning which combines short- and long-term needs.

A viable water policy is needed, which should include various measures for the conservation, flow-control and distribution of water resources. Furthermore, maintenance of quality and quantity calls for development and improvement of utilization, recycling and purification techniques.

XI. *The management of water resources should be based on their natural basins rather than on political and administrative boundaries*

Surface waters flow away down the steepest slopes, converging to form

watercourses. A river and its tributaries are like a many-branched tree, and they serve an area known as a watershed or drainage basin.

Within a drainage basin, all uses of surface and underground waters are interdependent and should be managed bearing in mind their interrelationship.

XII. *Water knows no frontiers; as a common resource it demands international co-operation*

International problems arising from the use of water should be settled by mutual agreement between the States concerned, to conserve the quality and quantity of water.<sup>55</sup>

This is a brief but cogent summing up of inevitable requirements that the very nature of fresh water imposes upon States and their management of international river basins.

42. It is a fact of international life that States are more willing to support a course of conduct in a charter that is considered a statement of political intent rather than in a treaty which imposes a legal burden to take action instead of positions. The Commission's task is to draw up a set of draft articles which may be adopted in treaty form. Consequently, it should take into account the probable reaction of States to its proposals. If a substantial number of States balk at the idea of using the drainage basin concept as the starting point for constructing a set of rules on the non-navigational uses of international watercourses because it is too sweeping a concept, then this is a dubious starting place. If a substantial number of States indicate that the Treaty of Vienna limitations with respect to boundary and trans-boundary waters are unacceptable because those concepts do not recognize the hydrographic unity of fresh water, the traditional formula is a doubtful choice for working out the basis of the Commission's studies.

43. The fact that relatively few States replied to the Commission's questionnaire adds to the difficulties in determining the scope of the study that the differences of position give rise to. The situation is not clarified by reference to the Sixth Committee debate, which, in general, did not include analysis of the different aspects of the questionnaire.

44. It seems appropriate to turn to the modern State practice that is available in order to find a solution. As has been pointed out, the major multilateral conventions that deal with the uses of the Niger, the Plate and the Senegal Rivers, as well as subsequent instruments implementing these Conventions, express their scope of application in terms of the river basin. The term, in these treaties, includes not only the main stem of the river but also all the streams, watercourses and other bodies that carry water which finds its way to the main stem of the river. As the Niger River treaty provides, the basin includes tributaries and sub-tributaries of the river.<sup>56</sup> The concept of a river basin is not as broad as that of a drainage basin, at least in the sense in which that term is used in the Helsinki Rules, which refer to a "system of waters, including surface and underground waters, flowing into a common terminus."<sup>57</sup> However, "international river basin" is a concept that recognizes the hydrological unity of the water, that permits taking account

<sup>53</sup> *Ibid.*

<sup>54</sup> For the text of the Charter, *ibid.*, pp. 342-343, document A/CN.4/274, para. 373.

<sup>55</sup> *Ibid.*

<sup>56</sup> United Nations, *Treaty Series*, vol. 587, pp. 11 and 13.

<sup>57</sup> *Yearbook ... 1974*, vol. II (Part Two), p. 357, document A/CN.4/274, para. 405.

of the physical characteristics of water, and that accepts the possibility of interrelationships of cause and effect throughout the entire river system.

45. The other questions posed by the questionnaire do not give rise to decided divergencies in response. As was previously noted, there were a number of suggestions for additions to the outline of fresh water uses suggested in the questionnaire and substantial agreement that flood and erosion control should be included as well as sedimentation problems. There was a consensus that the Commission had to provide the interface between navigation and other uses of fresh water.

46. The replies to the question whether pollution should be taken up as the first stage of the Commission's study in general either favoured dealing first with uses or with uses and pollution problems together. As Poland stated:

... Thus it seems that the separation of water protection against pollution from non-navigational use of waters which in fact result in pollution would be an artificial structure. That is why the problem of water pollution should be considered simultaneously with its cause, i.e. domestic, agricultural and commercial uses.<sup>58</sup>

Poland, like a number of other States, was in favour of the Commission's beginning its work by concentrating on pollution aspects, if that appeared to be the best work plan.

<sup>58</sup> See above, p. 180, document A/CN.4/294 and Add.1, sect. II, question H, Poland, para. 1.

In view, however, of the majority opinion, it would seem appropriate for the Commission to concentrate upon uses at the outset and to consider particular aspects of pollution in the context of specific uses, such as the heating of water in connexion with atomic energy production, or the effects of chemical fertilizers upon aquatic life.

47. The final question (question I) was whether a Committee of Experts should be established to assist the Commission in its work. While the general view was in favour of the establishment of such a Committee if it were essential, a number of States considered it premature to reach any final position on the point at the opening stage of the Commission's work. As an interim measure, the Special Rapporteur has been in communication with some twelve of the United Nations family of agencies and organizations which are involved in one or another aspect of river development. They were asked whether they would participate in assisting the Commission with the technical expertise without which it will not be possible to achieve a sound and workable set of legal rules. The response has been very favourable.

48. There is then but one major question which, at this stage, requires decision by the Commission in order to permit the work to go forward—the scope of that work.

49. On this point, it is recommended that the Commission adopt the principle that its task is to formulate legal principles and rules concerning the non-navigational uses of international river basins.



## CO-OPERATION WITH OTHER BODIES

(Agenda item 9)

DOCUMENT A/CN.4/296

**Report on the session of the Inter-American Juridical Committee held in January and February 1976, by Mr. A. H. Tabibi, observer for the Commission**

[Original: English/Spanish]  
[11 June 1976]

1. The Inter-American Juridical Committee held a session in Rio de Janeiro (Brazil) during the months of January and February 1976. In accordance with the decision taken by the International Law Commission at its twenty-seventh session,<sup>1</sup> I attended the session, in my capacity as Chairman of the International Law Commission, as an observer.

2. The Committee met under the Chairmanship of Mr. Reynaldo Galindo Pohl (El Salvador). A list of participants is to be found in annex I.

3. The statement which I delivered to the meeting, which was warmly received and commented upon by the members of the Committee, is contained in annex II.

4. During the meeting the main work of the Committee was concentrated on the study of the legal problems resulting from the presence and activities of transnational enterprises in developing countries, and particularly in Latin America. On the basis of the report and conclusions proposed by the Rapporteur, Mr. R. Galindo Pohl, the Committee approved a 130-page report on transnational enterprises (*Dictamen sobre Empresas Transnacionales*). The issue of transnational enterprises has been on the agenda of the Committee for two years and has been the subject of eight previous reports. The Committee will continue the study of this matter with the aim of achieving an agreement on more precise and effective rules to govern regional co-operation regarding transnational enterprises.

5. The Committee also approved a resolution concerning the situation prevailing, from a juridical point of view, in the Malvinas or Falkland Islands, and called upon the parties to negotiate and to reach a pacific settlement of the problem.

6. The Committee will dedicate its forthcoming session, in July–August 1976, to the final preparation of six draft conventions which will be submitted to the Second Inter-American Specialized Conference on Private International Law scheduled to convene in Montevideo (Uruguay) some time in 1977.

7. The Committee welcomed me warmly and accorded me every consideration and hospitality during my stay in Rio de Janeiro.

8. I want also to thank the Academy of Letters of Brazil, its President, Mr. Austragesilo de Athayde, and its members

for the warm reception they gave me, as well as the family of the late Gilberto Amado who expressed their appreciation for the annual memorial lectures and meetings held in honour of the late Brazilian jurist and poet, Gilberto Amado.

9. The Committee decided to send Mr. Alberto Ruiz Eldredge as its observer to the twenty-eighth session of the International Law Commission.

### ANNEX I

#### List of participants

Mr. Jorge A. AJA ESPIL (Argentina)  
Mr. José Joaquín CAICEDO CASTILLA (Colombia)  
Mr. Reynaldo GALINDO POHL (El Salvador)  
Mr. Antonio GÓMEZ ROBLEDÓ (Mexico)  
Mr. Juan MATERNO VÁSQUEZ (Panama)  
Mr. Kenneth OSBORNE RATTRAY (Jamaica)  
Mr. José Eduardo do PRADO KELLY (Brazil)  
Mr. Américo PABLO RICALDONI (Uruguay)  
Mr. Seymour J. RUBIN (United States of America)  
Mr. Alberto RUIZ ELDRIDGE (Peru)  
Mr. Edmundo VARGAS CARREÑO (Chile)

### ANNEX II

#### Text of the statement delivered by Mr. A. H. Tabibi, observer for the International Law Commission

May I begin by saying how pleased I am to see you Mr. President, as a son of the great region of Latin America—an important part of the third world—and with great juridical and political qualifications, in charge of this important Committee. I am confident, and in fact all the juridical circles share this confidence, that with the great ability, quality and kindness that you possess, the work this year of the Inter-American Juridical Committee, as in the past year, will be crowned with success under your leadership. At the same time my best wishes go to your vice-president and to Mr. Renato Ribeiro, your able secretary, as well as all members of this Committee for the excellent duty which they perform in the interest of law and order. In the meantime I cannot help but confess the fact that I feel extremely happy to find myself among you, and in the heart of Latin America, surrounded with kindness, beauty and hospitality in the best tradition of your great people, a people geographically far from the rest of the third world but close culturally and historically and with many common interests at all times. We in the International Law

<sup>1</sup> See *Yearbook ... 1975*, vol. II, p. 186, document A/10010/Rev.1, para. 159.



Commission are aware of the great practical task that you perform, and it is a source of great pleasure for our Commission to hear every year from your observer on the noble task that you perform in building modern international law. Indeed Mr. Ricaldoni delivered an impressive report last summer, which we all admired and praised.

May I add also that I myself have witnessed in the last thirty years, during my participation in the Sixth (Legal) Committee of the General Assembly and in the International Law Commission, as well as in United Nations plenipotentiary conferences, the great contribution which has been made by Latin-American jurists to the progressive development of international law and its codification, and we in Asia and Africa consider your work as a model of legal achievements.

In our Commission we have always admired and respected the Latin-American jurists who have served in the last twenty-seven years as our colleagues, some of whom have made the common journey to eternity, and some of whom are now among the distinguished judges of the International Court of Justice, while others are still with us pursuing the noble task of fashioning the new law of nations, which once was the monopoly of western chancelleries and European jurists.

It is in line with this feeling that our Commission, after the passing of our late dear friend, Gilberto Amado of Brazil, the dean of the Sixth Committee of the General Assembly, as well as the dean of the International Law Commission, has, in the last four years, held memorial lectures by prominent jurists and has published those lectures for the benefit of jurists.

Let me turn now to the progress in the work of our Commission during its past (twenty-seventh) session. Although our annual report,<sup>9</sup> which you have, explains the details of our activities and was received with great satisfaction and appreciation by the Assembly, I will nevertheless try to report to you its salient and important points.

May I add that when the Commission began its work in 1975, it shaped its programme and established the priority to be given to the topics to be considered in line with a draft resolution of the Sixth Committee, which was adopted on 14 December 1974 by the General Assembly as resolution 3315 (XXIX).

It is in the order in which the topics are set forth in that resolution that I shall report the progress in the Commission's work. In this connexion, I should mention that we made considerable progress in all the items last year. The Commission adopted a total of thirty-five draft articles plus additional provisions to two already existing articles. This is the largest number ever to be adopted in first reading in one single session. Fourteen of those draft articles concerned the most-favoured-nation clause. The Commission has set the goal of completing the first reading of the draft on that topic this year for consideration by the Sixth Committee and Governments, as is explained in paragraph 141 of the 1975 report.

Although our report covers the activity of the Commission and needs no repetition by me, I will try briefly to indicate the main points in the consideration of the topics and other activities of the Commission during its twenty-seventh session.

### 1. State responsibility

Chapter II of the Commission's report, which deals with the topic of State responsibility, begins with a useful historical review of the work done hitherto by the Commission, followed by general remarks concerning the conclusions reached so far by the Commission concerning the form, scope and structure of the draft articles in preparation. In this connexion, allow me to recall that the draft articles are limited to the responsibility of States for internationally wrongful acts and do not extend to the international liability of States for any injurious consequences arising out of the performance of certain activities that are not prohibited by international law. This latter question has become a separate topic on the general programme of work of the Commission, as recommended in General Assembly resolutions 3071 (XXVII) and 3315 (XXIX),

The draft articles—and this is another point that should be underlined—deal with the international responsibility of the State for the breach of any international obligation, and are not limited to responsibility for the breach of obligations belonging to a particular sector of international law. This does not mean, of course, that the importance attached by the international community to respect for some obligations—for instance,

for obligations relating to the maintenance of international peace and security—is to be overlooked in the draft. Insofar as distinctions between different categories of international obligations may be relevant, they will be fully studied by the Commission. In this respect, I would like to draw your attention to chapter III of the table reproduced in paragraph 45 of the Commission's report and, particularly, to article 17, entitled "Breach of a legal obligation essential to the international community. International crimes", a provision which the Commission will examine at its next session. That having been said, it should be added that the draft is not intended to define the obligations whose violation may be a source of international responsibility—the so-called "primary rules"—but is exclusively devoted to the codification of the general rules concerning the international responsibility of States for internationally wrongful acts as such, namely, the rules governing all the new legal relationships that follow from an internationally wrongful act of a State as a consequence of the failure to fulfil an international obligation.

The structure of the draft articles corresponds to the plan for studying the international responsibility of States adopted by the Commission on the basis of the proposals made by Mr. Roberto Ago of Italy, the Special Rapporteur. Part 1 of the plan, namely, the one now under consideration, is concerned with the origin of international responsibility, and part 2 with the content, forms and degrees of international responsibility. Once these two essential parts are completed, the Commission might decide to add a part 3 to the draft, in which certain problems concerning the settlement of disputes and the "implementation" of international responsibility would be considered. To facilitate the understanding of the draft as a whole and of the specific provisions already adopted, the Commission decided to include, in paragraphs 42 to 44 of its report, a general description of the matters to be studied within each of the parts of the draft to which I have just referred.

As you can see from our report, part 1 will contain about thirty-one articles, divided into the following five chapters: General principles (chapter I); The act of the State under international law (chapter II); Breach of an international obligation (chapter III); Participation by other States in the internationally wrongful act of a State (chapter IV) and, Circumstances precluding wrongfulness and attenuating or aggravating circumstances (chapter V). At its last session, the Commission completed its consideration of chapter II (The act of the State under international law), dealing with the determination of the conditions in which a particular kind of conduct must be considered as an "act of the State" under international law, i.e. the subjective element of the internationally wrongful act. Chapter I having been completed previously, two chapters of the draft have thus been adopted. Provisions relating to the breach of an international obligation (chapter III) will be examined at the next session of the Commission. I will refer later—in connexion with the programme and organization of future work—to the concrete conclusions reached by the Commission with regard to the best way of completing, as early as is reasonably possible, the study of this delicate and difficult topic, which is at the core of international law.

In addition to the nine articles which were adopted during the twenty-fifth and twenty-sixth sessions on the basis of the scholarly reports of Mr. Ago, the Commission succeeded, as I said, in adopting at its twenty-seventh session the remaining provisions of chapter II, namely, articles 10 to 15, together with the corresponding commentaries. These articles are as follows:

Article 10: Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

Article 11: Conduct of persons not acting on behalf of the State

Article 12: Conduct of organs of another State

Article 13: Conduct of organs of an international organization

Article 14: Conduct of organs of an insurrectional movement

Article 15: Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State.

In articles 5 to 7 of the draft articles, provision has been made for the attribution of the State, *qua* subject of international law as a possible source of international responsibility, of the conduct of organs which form part of the State machinery proper, and of the conduct of organs of territorial governmental entities or other entities also empowered by internal law to exercise elements of the governmental authority. These provisions apply, of course, only to the conduct which the persons

<sup>9</sup>Yearbook . . . 1975, vol. II, p. 47, document A/10010/Rev.1.

constituting the organ have adopted in performing their functions as members of those organs and not as private individuals.

Article 10, adopted at the twenty-seventh session, provides that such conduct is attributed to the State even if the perpetrators have exceeded their competence under internal law or contravened instructions received concerning their activities—in other words, even if they have acted *ultra vires* with regard to internal law. For reasons developed in the commentary, the Commission considered that there is no exception to this rule even in the case of “manifest incompetence” of the organ and even if other organs of the State have disowned the conduct of the offending organ. On the other hand, under the system adopted by the Commission, the actions of human beings constituting the organs in question and performed in their capacity as private individuals are not regarded as acts of the State and do not as such incur international responsibility. Acts performed in a purely private capacity by persons having the status of organs are entirely on the same footing as acts of the “private individuals” dealt with in article 11 and consequently are not considered as “an act of the State” for the purposes of the draft articles.

Articles 12, 13 and 14 provide respectively that the conduct of an organ of a State, of an international organization or of an insurrectional movement, acting respectively in that capacity, remains an act of the State, international organization or insurrectional movement to which the organ in question belongs and is not considered an act of the State in the territory of which such conduct may have been adopted. Those provisions presuppose that the organ concerned is not under the control of the territorial State, this latter case having been dealt with in article 9 of the draft. The same basic principle inspires articles 12, 13 and 14. However, for reasons related to the scope of the draft, which is limited to State responsibility, and to the particularities of the legal personality and status in international law of international organizations and insurrectional movements, which are carefully explained in the commentary, the Commission decided to formulate in three separate articles the rules corresponding to the conduct of organs of another State (article 12), the conduct of organs of an international organization (article 13) and the conduct of organs of an insurrectional movement (article 14). This approach allows a more accurate solution.

I will conclude my remarks on chapter II of the Commission's report by referring briefly to the last article so far adopted, namely, article 15, relating to the attribution to the State of the act of an insurrectional movement which becomes the new Government of a State or which results in the formation of a new State. The question of attribution contemplated in the article arises solely in the case where the insurrectional movement, having triumphed, has substituted its structures for those of the previous government of the State in question or where the structures of the insurrectional movement have become those of a new State, constituted by succession or decolonization in part of the territory which was previously subject to the sovereignty or administration of the pre-existing State. The article, which is essentially based on the continuity principle, is divided into two paragraphs. It provides that in both hypotheses the act of an insurrectional movement shall be considered an act of the State with which the insurrectional movement identified itself after its triumph. With regard to the case of an insurrectional movement which becomes the new government of a State, the second sentence of paragraph 1 specifies that the attribution to the State in question of the acts of the insurrectional movement shall be without prejudice to the attribution to that State of any conduct which would have been previously considered as an act of the said State by virtue of articles 5 to 10 of the draft. The attribution to the State in such a case of the behaviour of the organs of the insurrectional movement in no way excludes, therefore, the parallel attribution to that State of the actions carried out, during the conflict, by the organs of the government then established.

## 2. Succession of States in respect of matters other than treaties

The Commission continued to make progress in its work on an important, yet difficult and complicated topic, that of succession of States in respect of matters other than treaties. Members of the Committee will recall that on the basis of various scholarly and detailed reports submitted by the Special Rapporteur, Mr. Mohammed Bedjaoui of Algeria, the Commission had, at its twenty-fifth session, adopted eight articles on the topic, concentrating for the time being on succession to State property. One of the important new articles provisionally adopted by the Commission at its twenty-seventh session is article 9 entitled

“General principle of the passing of State property”. That general principle provides that:

“Subject to the provisions of the articles of the present Part and unless otherwise agreed or decided, State property which, on the date of the succession of States, is situated in the territory to which the succession of States relates shall pass to the successor State.”

The Commission also provisionally adopted an article X spelling out the absence of effect of a succession of States on third State property, and a new sub-paragraph to be included in the article on use of terms, defining the term “third State”. I would like to draw your attention in particular to the text of and commentary to article 11, entitled “Passing of debts owed to the State”. During the discussion of this article in the Commission, several members expressed reservations on the text. The view was expressed, *inter alia*, that the article was not relevant to the topic, that its wording was not adequate to express the desired rule and that the article's effect might be to make more difficult negotiations between the predecessor and successor States. For these and other reasons noted in the commentary, the Commission decided to place the entire article in square brackets for further consideration.

The Commission intends to continue its work on State property, upon which considerable progress has already been made, and then proceed to the consideration of “public debts”, possibly confining its study to State debts.

## 3. The most-favoured-nation clause

The chapter of the report dealing with the most-favoured-nation clause (chapter IV) explains how this question has been dealt with by the Commission since 1964, when the draft articles on the law of treaties were under discussion in the Commission, and what the position of the Commission has been since 1967, when a Special Rapporteur, Mr. Endre Ustor of Hungary, was appointed for the subject. In his first two reports, the Special Rapporteur discussed the historical evolution of this topic and analysed three relevant cases dealt with by the International Court of Justice, as well as the replies from international organizations to a questionnaire on the matter sent by the Commission. It was during the twenty-fourth and twenty-fifth sessions of the Commission, in 1972 and 1973 that the Special Rapporteur submitted his third and fourth reports, containing a first set of eight draft articles on the most-favoured-nation clause, with commentaries. On the basis of those reports the Commission adopted in 1973 articles 1 to 7 as the initial stage of its work in the preparation of final draft articles, and submitted them to the General Assembly for its information during its twenty-eighth session. In 1975 the Commission considered the fourth, fifth and sixth reports submitted by the Special Rapporteur, which contained a further series of draft articles, and adopted fourteen additional articles, giving a total thus far of twenty-one articles, the text of which you will find in the Commission's report on its twenty-seventh session. Since the background, the scope, character and other general aspects of the draft articles are dealt with in the report, I wish to draw your attention to only a few salient points.

Firstly, I wish to mention the relationship between the most-favoured-nation clause and the *national treatment clause*. Because of the interaction between the operation of the most-favoured-nation clause and the national treatment clause, which often appear in treaties side by side and are sometimes combined, the Special Rapporteur in his fifth report proposed several draft articles dealing with national treatment and national treatment clauses. In his sixth report he reaffirmed his belief in the need to mention explicitly both the most-favoured-nation clause and national treatment clauses in the articles applicable to the two clauses. After a general discussion in which divergent views were expressed, the Commission agreed to concentrate its work at its twenty-seventh session on rules concerning most-favoured-nation clauses and most-favoured-nation treatment. Nevertheless, it adopted two provisions (articles 16 and 17) touching upon national treatment.

A second point which I wish to emphasize concerns the relationship between the most-favoured-nation clause and the different levels of economic development, a question of great importance to the third world and developing nations. According to the increasingly predominant trends in the General Assembly and in UNCTAD, the application of the most-favoured-nation clause to all countries regardless of their level of economic development involves implicit discrimination against the countries of the third world. For the purposes of economic development, it is necessary that for a certain period of time the most-favoured-nation

clause should not apply to certain types of international trade relations. General Principle Eight of the recommendations adopted by UNCTAD at its first session supports this view.

Since this question has a significant bearing on the final codification of the topic, the Commission, recognizing its importance, began at its last session to examine the question of exceptions to the operation of the clause, and provisionally adopted a first article (article 21) concerning most-favoured-nation clauses in relation to treatment under a generalized system of preferences.

The Commission intends to study the question of the application of the most-favoured-nation clause to developing countries further at its next session so as to determine whether some additional provisions may be necessary in order to provide adequate protection for their interests and, within that context, it intends to review article 21 with a view to its possible improvement.

According to members of the Commission who, for the most part, belong to the third world, article 21, which should be the first step in a series of draft articles devoted to the question, is not sufficient. I personally favour a carefully-drafted set of articles to cover the interests of the third world and the economically weaker nations.

A third point on which I wish to draw the attention of the Committee relates to the question whether a most-favoured-nation clause does or does not attract benefits granted within customs unions and similar associations of States. The Commission held a preliminary discussion on the matter at its last session, in connexion with article 15 and on the basis of a short study submitted by the Special Rapporteur in his sixth report. The Commission, however, did not take a definite stand partly because it wishes to take into account the reactions of the representatives of States when it considers the matter again in the course of its next session. To this end, the Commission deemed it useful to include in paragraphs 25 to 65 of the commentary to article 15 some of the materials contained in the Special Rapporteur's report as well as a summary of his findings and conclusions on the subject. Although some members of the Commission supported the position taken by the Special Rapporteur, several other members expressed reservations to his approach, as is indicated in paragraphs 67 to 70 of the commentary to article 15.

Finally, it must be emphasized that the articles on the most-favoured-nation clause are designed as supplementary to the Vienna Convention on the Law of Treaties. Since the general rules pertaining to treaties have been stated in the Vienna Convention, the draft articles contain particular rules applicable to a certain type of treaty provision, namely, most-favoured-nation clauses. The draft articles are in general without prejudice to the provisions which the parties may agree to in the treaty containing the clause or otherwise. To emphasize this residual character, two alternative approaches may be adopted: either to introduce in each individual article, as appropriate, an opening clause such as that included in brackets at the beginning of article 16: "Unless the treaty otherwise provides, or it is otherwise agreed"; or to insert in the draft an article expressly recognizing that residual character, which will be of general application to all those provisions which are of the same nature. The Commission will take a decision at its next session on which of these two approaches to follow.

#### 4. *Question of treaties concluded between States and international organizations or between two or more international organizations*

As the historical background on this topic in chapter V of the report reveals, the Commission, as in 1974, made substantial progress in its study of this question at its twenty-seventh session, on the basis of the reports of Mr. Paul Reuter of France. The chapter reviews in detail the work done so far in this field and explains the scope and character of the draft articles; it also explains the close relationship between the draft articles and the Vienna Convention on the Law of Treaties as a whole, as well as specific articles of that Convention.

In 1974 the Commission approved five articles dealing, in particular, with the scope of the draft, the use of terms, non-retroactivity, and finally and most importantly, the capacity of international organizations to conclude treaties. At its twenty-seventh session, in addition to filling certain gaps in article 2 on the use of terms, the Commission adopted twelve additional articles, as follows: article 7 (Full powers and powers), article 8 (Subsequent confirmation of an act performed without authorization), article 9 (Adoption of the text), article 10 (Authentication of the text), article 11 (Means of establishing consent to be bound by a

treaty), article 12 (Signature as a means of establishing consent to be bound by a treaty), article 13 (An exchange of instruments constituting a treaty as a means of establishing consent to be bound by a treaty), article 14 (Ratification, act of formal confirmation, acceptance or approval as a means of establishing consent to be bound by a treaty), article 15 (Accession as a means of establishing consent to be bound by a treaty), article 16 (Exchange, deposit or notification of instruments of ratification, formal confirmation, acceptance, approval or accession), article 17 (Consent to be bound by part of a treaty and choice of differing provisions), and article 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force).

The Commission is largely following the provisions of the Vienna Convention on the Law of Treaties, which is applicable to treaties between States, for those treaties covered by the present topic, namely, (a) treaties concluded between one or more States and one or more international organizations; (b) treaties concluded between two or more international organizations. In doing so, however, the Commission is not overlooking the fact that international organizations cannot, at the present stage of development of international law, be assimilated to States. Consequently, the rules laid down in the Vienna Convention for treaties between States are being adapted by the Commission, whenever it feels it necessary, to international organizations, a task which is not always easy to do given the special features which are frequently present in each organization and the need to introduce some measure of uniformity in a draft devoted to the codification of general rules on the matter. The difficulties involved became apparent in 1975, when the Commission considered some of the draft articles adopted, and in particular when it began to examine the provisions of the Vienna Convention relating to reservations, which will continue to be studied at the Commission's next session. The particular nature of international organizations has also made it necessary, in some instances, for the terms used in the Vienna Convention to be conveniently supplemented by new ones. For instance, in matters relating to "full powers" and "ratification", the Commission preferred to make some distinctions in the present draft between the terms used for States and those used for international organizations.

#### 5. *Other decisions and conclusions of the Commission*

As I have already mentioned, the Commission's twenty-seventh session was one of its most productive ones: thirty-five draft articles were adopted in first reading—a figure never reached at any previous session—and progress was made in the preparation of draft articles relating to four of the topics to which priority had been given in the light of relevant General Assembly recommendations.

In addition, the Commission has paid particular attention to the wish expressed by the General Assembly that an effort should be made to rationalize further the organization of the work of the Commission and, as stated in paragraph 6 of section I of General Assembly resolution 3315 (XXIX), to adopt methods of work well suited to the realization of the tasks entrusted to it. A planning group was established in the Enlarged Bureau to study the functioning of the Commission and formulate suggestions regarding its work, under the chairmanship of Mr. Kearney of the United States of America. The Group undertook a review of the existing work load of the Commission with a view to proposing general goals towards which the Commission might direct its efforts. On the basis of this review, the Commission reached certain important conclusions. It believes that while the adoption of any rigid schedule of operations would be impracticable, the use of the goals in planning its activities would afford a helpful framework for decision-making. It also agreed that the planning group should continue to review the progress of the Commission's work as well as offer suggestions regarding its activities and needs.

The Commission intends, at its twenty-eighth session, to continue consideration of the topics included in its current programme, namely, State responsibility, succession of States in respect of matters other than treaties, the most-favoured-nation clause, the question of treaties concluded between States and international organizations or between two or more international organizations and the law of the non-navigational uses of international watercourses, with a view to attaining the general goals stated in paragraphs 141 to 146 of its report.

Co-operation with regional legal bodies, which is useful both to the

Commission and to the regional legal committees, continued during the past year as in previous years. Observers from the Commission participated in meetings of the regional legal bodies, and the Commission, at its last session, heard statements from the observers for those bodies, including Mr. Ricaldoni.

The International Law Seminar was held, as usual, during the twenty-seventh session of the Commission, and all members of the Seminar attended meetings of the Commission and heard lectures given by many of its members. I am happy to say that during the last Seminar a large number of participants were young jurists from the developing world. I

have a special interest in this Seminar since it was established through my proposal under the item concerning the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law. It trains jurists to carry the torch which we give to them today.

These, then, are the brief remarks on the work of the twenty-seventh session of the International Law Commission which I have had the honour to present to you. Since it is my habit to be brief I tried my best to consolidate as much as possible my report and the voluminous printed report of our Commission, so as not to tax your patience.

**CHECK-LIST OF DOCUMENTS OF THE TWENTY-EIGHTH SESSION  
NOT REPRODUCED IN VOLUME II**

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/288	Provisional agenda	Mimeographed. For the agenda as adopted, see A/31/10, para. 8 (vol. II (Part Two), p. 4).
A/CN.4/289/Add.1 and Corr.1	Filling of casual vacancies: Addendum to the note by the Secretariat—list of candidates and <i>curricula vitae</i>	Mimeographed.
A/CN.4/L.241	The law of the non-navigational uses of international watercourses: Economic and Social Council resolution 1955 (LIX), entitled "International river basin development"—note by the Secretariat	<i>Idem.</i>
A/CN.4/L.243 and Add.1 and Add.1/Corr.1	Draft articles on State responsibility: texts adopted by the Drafting Committee—title of chap. III and articles 15 <i>bis</i> and 16–18	Texts reproduced in the summary records of the 1401st and 1402nd meetings (vol. I). See also 1403rd meeting, para. 6.
A/CN.4/L.244	Draft articles on the most-favoured-nation clause (articles 1–21, E, F, B, C, D and 21 <i>bis</i> )	Mimeographed. Contains the entire set of draft articles resulting from decisions taken by the Drafting Committee at the twenty-eighth session.
A/CN.4/L.245 and Corr.1	Draft report of the International Law Commission on the work of its twenty-eighth session (chap. I)	Mimeographed. For the final text, see A/31/10 (vol. II (Part Two), p. 1).
A/CN.4/L.246 and Add.1–3, A/CN.4/L.247 and Add.1–8, A/CN.4/L.248 and Add.1–4 A/CN.4/L.249 and Add.1. A/CN.4/L.250 and Add.1 and 2	Draft report of the International Law Commission on the work of its twenty-eighth session (chaps. II–VI)	<i>Idem.</i>
A/CN.4/L.251	Draft articles on succession of States in respect of matters other than treaties: texts adopted by the Drafting Committee—title of section 2 of part I and articles 3 ( <i>f</i> ) and 12–16	Texts reproduced in the summary record of the 1405th meeting (vol. I)
A/CN.4/L.252	Draft report of the International Law Commission on the work of its twenty-eighth session (chap. VI): amendments proposed by Mr. Kearney to document A/CN.4/L.250/Add.1	Mimeographed. See 1413th meeting (vol. I).
A/CN.4/SR.1360–1413	Provisional summary records of the 1360th to 1413th meetings of the International Law Commission	Mimeographed. For the final text, see vol. I.









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