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**Third Report on State responsibility, by Mr. Roberto Ago, Special Rapporteur, the internationally wrongful act of the State, source of international responsibility**

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## DOCUMENT A/CN.4/246 AND ADD.1-3

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

*The internationally wrongful act of the State, source of international responsibility*

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[5 March, 7 April, 28 April and 18 May 1971]

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## Introduction

1. When presenting to the International Law Commission, at its twenty-first session,<sup>1</sup> his first report on the international responsibility of States, containing a review of previous work on the codification of this topic,<sup>2</sup> the Special Rapporteur stated that his intention was to provide the Commission with a general conspectus of that work so that it could study the past and derive from it some useful guidance for its future work. The main aim was to avoid, in the future, committing the errors which in the past had prevented the codification of this branch of international law.

2. In this context the Special Rapporteur was concerned to illustrate some of the most serious difficulties encountered when dealing with the topic of international responsibility and to bring out the reasons for those difficulties as they emerge from an examination of the various attempts at codification made hitherto under the auspices of official bodies, in particular the League of Nations and the United Nations itself. On concluding this review the Special Rapporteur drew attention to the ideas which had guided the International Law Commission since the time when, having had to recognize that its previous efforts had reached a deadlock, it had decided to resume the study of the topic of responsibility from a new viewpoint. In particular, he summarized the methodological conclusions reached by the Sub-Committee on State Responsibility created in 1962, and later by the Commission itself at its fifteenth (1963) and nineteenth (1967) sessions, on the basis of which the Commission decided to take up the work of codification again and try to achieve some positive results in conformity with the recommendations formulated by the General Assembly in its resolutions 1765 (XVII), 1902 (XVIII), 2045 (XX), 2167 (XXI), 2272 (XXII) and 2400 (XXIII).

3. After this introduction, the International Law Commission discussed the Special Rapporteur's first report in detail at its 1011th, 1012th, 1013th and 1036th meetings. All the members of the Commission present at the twenty-first session participated in the discussion. Replying to comments and summing up the debate, the Special Rapporteur gave an account of the views of members and in doing so was able to note that there was a great identity of ideas in the Commission as to the most appropriate way of continuing the work on

State responsibility and as to the criteria that should govern the preparation of the different parts of the draft articles which the Commission proposed to draw up. The Commission's conclusions were subsequently set out in chapter IV of its report on the work of its twenty-first session, which was devoted to State responsibility.<sup>3</sup> The criteria laid down by the Commission may be summarized as follows.

4. Adhering to the system consistently adopted for all the topics it has undertaken to codify, the Commission intended to confine its study of international responsibility for the time being to the responsibility of States. Nevertheless, it did not underrate the importance of studying questions relating to the responsibility of subjects of international law other than States; but the overriding need to ensure clarity in the examination of the topic, and the organic nature of the draft, were obvious reasons for deferring consideration of these other questions.

5. While recognizing the importance, alongside that of responsibility for internationally wrongful acts, of questions relating to responsibility arising out of the performance of certain lawful activities—such as space and nuclear activities—the Commission believed that questions in this latter category should not be dealt with simultaneously with those in the former category. The majority of the members of the Commission observed that owing to the entirely different basis of the so-called responsibility for risk, the different nature of the rules governing it, its content and the forms it may assume, a simultaneous examination of the two subjects could only make both of them more difficult to grasp. The Commission therefore decided to proceed first to consider the topic of the responsibility of States for internationally wrongful acts; it intends to consider separately the topic of responsibility arising from lawful activities as soon as progress with its programme of work permits.

6. The Commission agreed on the need to concentrate its study on the determination of the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may be a source of responsibility. A consideration of the various kinds of obligation placed on States in international law, and in particular a grading of such obligations according to their importance to the international community, should probably be regarded as a necessary element for assessing the gravity of an internationally wrongful act and as a criterion for determining the consequences it should have. But this must not obscure the essential fact that it is one thing to define a rule and the content of the obligation it imposes and another to determine whether that obligation has been violated and what should be the consequences of the violation. Only the second aspect comes within the sphere of responsibility proper; to encourage any confusion on

<sup>1</sup> See *Yearbook of the International Law Commission*, 1969, vol. I, pp. 104 *et seq.*, 1011th meeting, paras. 2 *et seq.*

<sup>2</sup> *Ibid.*, vol. II, p. 125, document A/CN.4/217 and Add.1. The Special Rapporteur also submitted, as annexes to that report, the main texts drafted during the previous work on codification. A further annex was issued as document A/CN.4/217/Add.2 and has been reproduced in the present volume, p. 193.

The Commission also had before it two documents published by the Secretariat in 1964 and supplemented by documents issued in 1969: (a) Summary of the discussions in the various United Nations organs and the resulting decisions (*ibid.*, 1964, vol. II, p. 125, document A/CN.4/165), and supplement (*ibid.*, 1969, vol. II, p. 114, document A/CN.4/209); (b) Digest of the decisions of international tribunals relating to State responsibility (*ibid.*, 1964, vol. II, p. 132, document A/CN.4/169), and supplement (*ibid.*, 1969, vol. II, p. 101, document A/CN.4/208).

<sup>3</sup> *Ibid.*, p. 233, document A/7610/Rev.1, paras. 80-84.

this point would be to raise an obstacle which might once again frustrate the hope of successful codification.

7. The study of the international responsibility of States to which the Commission was to devote itself comprised two broad, separate phases, the first covering the origin of international responsibility and the second the content of that responsibility. The first task was to determine what facts and what circumstances must be established in order to attribute to a State the existence of an internationally wrongful act which, as such, is a source of international responsibility. The second task was to determine the consequences attached by international law to an internationally wrongful act in different cases, in order to arrive, on this basis, at a definition of the content, forms and degrees of responsibility. Once these two essential tasks had been accomplished, the Commission would be able to decide whether a third should be added in the same context, namely, the consideration of certain problems concerning what has been termed the "implementation" of the international responsibility of States, and of questions concerning the settlement of disputes arising out of the application of rules relating to responsibility.

8. The conclusions thus reached by the Commission at its 1969 session were favourably received at the twenty-fourth session of the General Assembly.<sup>4</sup> The over-all plan for the study of the topic, the successive stages in the execution of that plan and the criteria to be applied to the different parts of the draft to be prepared, as established by the Commission, met with the general approval of the members of the Sixth Committee. On the basis of the latter's report, the General Assembly, in its resolution 2501 (XXIV) of 12 November 1969, which also recalled its resolution 2400 (XXIII) on the same subject, recommended that the Commission should "continue its work on State responsibility".

9. On the basis of the directives laid down by the International Law Commission and the recommendations of the General Assembly, the Special Rapporteur began to consider, in succession, the many and diverse questions raised by the topic as a whole. He submitted to the Commission at its twenty-second session a second report on State responsibility, entitled "The origin of international responsibility".<sup>5</sup> The Commission considered that report at its 1074th and 1075th meetings.<sup>6</sup> At the same time, the Special Rapporteur submitted a questionnaire listing a number of points on which he particularly wished to know the views of members of the Commission, with a view to the continuation of his work. In view of the short space of time available to it, the Commission had only a general discussion on the report by way of a first broad review, postponing a more detailed discussion of specific points until its twenty-

third session. The discussion took place at the 1075th, 1076th, 1079th and 1080th meetings. At the 1081st meeting, the Special Rapporteur dealt with a number of points on which questions had been raised during the discussion and summarized the main conclusions to be drawn from the Commission's broad review. The Commission's conclusions are set forth in chapter IV of its report on the work of its twenty-second session.<sup>7</sup> Those conclusions were, on the whole, considered acceptable in the debate in the Sixth Committee at the twenty-fifth session of the General Assembly. The debate is summarized in the report of the Sixth Committee.<sup>8</sup>

10. The introduction to the Special Rapporteur's second report on State responsibility contained a detailed plan of work for the first phase of the study of the topic: the phase which is to focus on the subjective and objective conditions for the existence of an internationally wrongful act. The first task, which may seem limited in scope but is particularly delicate because of its many possible implications, consists in formulating the basic general principles. Once these principles have been established, the next step will be to deal with all the questions relating to attribution to the State, as a subject of international law, of the conduct (action or omission) in particular circumstances, of certain persons, certain groups or certain entities—questions which are often designated by the global term of "imputability". It will also be necessary to determine in what conditions the action or omission thus attributed to the State could be regarded as constituting a violation of an international legal obligation and thus having the constituent elements of an internationally wrongful act which, as such, generates State responsibility at the inter-State level. All this would be followed by an examination of the questions arising in connexion with the various circumstances which might possibly result in the conduct attributed to the State not being wrongful: *force majeure* or act of God, the consent of the injured State, legitimate application of a sanction, self-defence, state of necessity and so on. After that, it would be possible to go on to the second phase of the work, that covering the content, forms and degrees of international responsibility.

11. The plan of work recalled above was approved as a whole by the Commission, which also expressed its agreement in principle that the more general questions should be treated first and that there should be a gradual transition from the general to the particular. That obviously did not preclude the possibility of including rules of a very general character in the body of the draft, as had been the case in other drafts adopted by the Commission. The views of the Commission on that subject were welcomed by certain members of the Sixth Committee who took part in the debate on State responsibility. The Special Rapporteur is therefore encouraged to follow closely the plan of work recalled above in

<sup>4</sup> See *Official Records of the General Assembly, Twenty-fourth Session, Sixth Committee*, 1103rd-1111th meetings and 1119th meeting and *ibid.*, *Annexes*, agenda items 86 and 94 b, document A/7746, paras. 86-89.

<sup>5</sup> See *Yearbook of the International Law Commission, 1970*, vol. II, p. 177, document A/CN.4/233.

<sup>6</sup> *Ibid.*, vol. I, pp. 175 *et seq.*

<sup>7</sup> *Ibid.*, vol. II, pp. 305 *et seq.*, document A/8010/Rev.1, paras. 64-83.

<sup>8</sup> See *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, paras. 98-107.

preparing the successive reports which he intends to submit on this topic.

12. The introduction to the second report then went on to mention certain questions of methodology on which the Special Rapporteur was particularly anxious to secure the Commission's agreement, with a view to the continuation of his work. The Special Rapporteur recalled that, in accordance with the decisions taken at the twenty-first session, his reports on the topic would be so conceived as to provide the Commission with a basis for the preparation of draft articles, with a view to the eventual conclusion of an international codification convention. That being so, he proposed to adopt, at least in the first stage of the work on responsibility, certain criteria which would apply, on an experimental basis, to the first subjects to be dealt with. Generally speaking, each draft article would be preceded by a full explanation of the reasons which had led him to propose a particular wording, as well as of the practical and theoretical data on which his arguments were based. More specifically, he would indicate the questions arising in connexion with each of the points successively considered and state the differences of opinion which had appeared regarding them and the ways in which they had in fact been settled in international life. Reference would therefore be made to the most important cases which had arisen in diplomatic practice and international jurisprudence.

13. As mentioned in his statements to the Commission, the Special Rapporteur was thus indicating his preference for an essentially inductive method, rather than for the deduction of theoretical premises, whenever consideration of State practice and judicial decisions made it possible to follow such a method. He recalled, however, that the precedents offered by State practice and judicial decisions were not equally numerous on the different subjects, being abundant on some and relatively scarce on others. The Special Rapporteur also pointed out that despite the extra work it involved it was necessary to take due account of a very large number of opinions of writers. The topic of State responsibility, particularly in some of its aspects, is one of those on which a great many views have been expressed by writers<sup>9</sup> and it is sometimes essential to clear away in advance certain disputes—as well as certain complications which have artificially taken root in theoretical discussions—in order to be able to define the problems to be solved in clear and simple terms. At the same time, the method of taking full account of the various trends, and particularly the most modern ones, would meet the double requirement of ascertaining and harmonizing the approaches adopted in the different legal systems and also of establishing which of those trends were supported by the majority of writers and which were merely the expression of an individual point of view.

<sup>9</sup> The Special Rapporteur pointed out that in order to avoid overburdening the reports, he would confine himself as far as possible to references to the views of the very numerous writers who had dealt specifically with the points in question. He intends to supply the Commission with a separate document containing as complete and up-to-date a bibliography as possible on international responsibility.

14. During the consideration of the second report the members of the International Law Commission expressed their agreement with the methodological criteria thus proposed. The report of the Sixth Committee shows that in that body some representatives expressly stated that they favoured the essentially inductive method preferred by the Special Rapporteur and said they were glad that he had been encouraged to continue the consistent application of the system whereby any proposal for a particular form of wording was preceded by a full explanation of the arguments in its favour and a broad indication of the precedents offered by State practice and judicial decision as well as the various views expressed by writers. The Special Rapporteur therefore intends to continue applying the criteria which were previously employed on an experimental basis.

15. The introduction to the second report also contained other comments of a general nature. It was observed that State responsibility differs widely, in its aspects, from the other topics which the Commission has previously set out to codify. In its previous drafts, the Commission has generally concentrated on defining the rules of international law which, in one sector of inter-State relations or another, impose particular obligations on States, and which may, in a certain sense, be termed "primary", as opposed to the other rules—precisely those covering the field of responsibility—which may be termed "secondary", inasmuch as they are concerned with determining the consequences of failure to fulfil obligations established by the primary rules. Now the statement of primary rules often calls for the drafting of a great many articles, not all of which necessarily require a very extensive commentary. Responsibility, on the other hand, comprises relatively few principles, which often need to be formulated very concisely. But the possible brevity of the formulation is by no means indicative of simplicity in the subject-matter. On the contrary, on every point there may be a whole host of complex questions, which must all be examined, since they affect the formulation to be adopted. It should come as no surprise, therefore, that the present report contains very long passages dealing with a whole series of problems, followed by a few short articles. Those remarks, too, met with full understanding on the part of the members of the Commission.

16. To complete the series of methodological questions considered by the International Law Commission, it should be mentioned that latter agreed that the topic of international responsibility was one of those where the progressive development of law could be particularly important, especially—as the Special Rapporteur had said—with regard to the determination of the content and the degrees of responsibility. Some members of the Sixth Committee also expressed their agreement on that point. It should be noted, however, that the International Law Commission indicated expressly that in its view the relative importance of progressive development and codification of accepted principles could not be fixed in accordance with a pre-established plan; it would have to emerge in concrete terms from the pragmatic solutions adopted for the various points.

17. With regard to the substantive questions dealt with in the second report relating to the definition of basic general rules on State responsibility, the discussion in the Commission centred on the consideration of the substantive questions posed by the Special Rapporteur in his questionnaire. The discussion brought out the views and concerns of the members of the Commission and revealed a broad agreement in principle with some of the solutions suggested by the Special Rapporteur. It should be remembered, of course, that the discussion was general and brief and that some members stressed that they were expressing purely provisional views on certain points.

18. At the suggestion of some of its members, the Commission briefly discussed, in that context, the desirability of prefacing the draft by a definitions article or by an article indicating what matters were excluded from its scope. The Commission acknowledged, however, that it would be better to postpone any decision on that point until later. When solutions to the different problems have reached a more advanced stage, it will be easier to see whether or not such preliminary clauses were needed in the general economy of the draft. The Special Rapporteur will therefore refrain from submitting any draft clauses of that kind in this report.

19. The International Law Commission appreciated the fact that the Special Rapporteur had seized the opportunity offered by the particularly difficult search for a definition of the general rule which constituted the starting-point and basis of the whole draft to make a number of suggestions regarding possible solutions to certain problems concerning the content of international responsibility. Those suggestions will therefore be maintained in the present report, in which the whole subject will be re-examined. However, the members of the Commission also agreed with the Special Rapporteur that in defining the initial rules it was necessary to avoid formulae which might prejudice solutions to be adopted later, when the Commission would be dealing with the determination of the content and degrees of responsibility. Consequently, in the first part of the over-all plan for the study of the topic, the work will continue to be based on a general notion of responsibility, meaning thereby the set of new legal relationships to which an internationally wrongful act by a State may give rise in the various possible cases. Later, it will be for the Commission to say whether such relationships may arise between that State and the injured State or between the injured State and other subjects of international law, or possibly even with the international community as a whole.<sup>10</sup>

20. The International Law Commission also agreed that in defining the general principle attaching responsibility to any internationally wrongful act, it was necessary to adopt a formula which did not prejudice the

existence of responsibility for lawful acts. In that connexion, some members of the Commission reverted to the idea that this second topic should also be studied, and it was suggested that an initial article might perhaps be included in the present draft to indicate the two possible sources of international responsibility. Those ideas were taken up by some members of the Sixth Committee, who gave further examples of cases in which, in their view, responsibility was attached to lawful acts or to activities which fell half way between lawful and wrongful acts. However, the Special Rapporteur, like several members of the International Law Commission and the Sixth Committee, still feels that it is preferable to adhere to the already acceptable criterion and not to cover in one and the same draft two matters which, though possessing certain common aspects and characteristics, are quite distinct. Being obliged to assume the possible risks arising from the exercise of a lawful activity and being obliged to face the consequences—which are not necessarily limited to compensation—of the breach of a legal obligation are not comparable situations. It is only because of the relative poverty of legal language that the same term is habitually used to designate both. These remarks do not, of course, prevent the Commission from also undertaking, if it sees fit, a study of this other form of responsibility, which is a safeguard against the risks of certain lawful activities. It could do so after the study on responsibility for wrongful acts has been completed, or it could even do so simultaneously but separately. Consequently, the Special Rapporteur feels he should not depart from the criteria originally approved by the Commission in that connexion. Wishing to avoid any misunderstanding, he feels it would be desirable to follow the suggestion made by some members of the Commission and change the title (“The origin of international responsibility”) which he gave, in his second report, to the first part of the draft on State responsibility. The present report is therefore entitled: “The internationally wrongful act of the State, source of international responsibility”. If, in order to be even clearer, the Commission should wish to make the title of the general topic more specific, the Special Rapporteur would suggest that the latter should be entitled: “State responsibility for internationally wrongful acts”.

21. During the discussion of the various points listed in the questionnaire submitted by the Special Rapporteur at the twenty-second session,<sup>11</sup> the International Law Commission considered a series of questions which must be taken into account in defining the basic general rules on State responsibility. In that connexion it discussed the possible responsibility of a State for a wrongful act by another State, the importance to be accorded in the draft on responsibility for internationally wrongful acts to the notion of abuse of right, the advisability of taking into account in the definition to be formulated the distinction between action and omission and the distinction between an internationally wrongful act consisting only of a wrongful conduct and an internationally

<sup>10</sup> Views along those lines were expressed by several members of the International Law Commission. In the Sixth Committee, on the other hand, some members said they favoured a traditional concept and expressed concern regarding the tendency to allow States which were not directly injured by a wrongful act to invoke the international responsibility of the State which was the author of that act.

<sup>11</sup> See *Yearbook of the International Law Commission, 1970*, vol. I, p. 175, 1074th meeting, para. 1.

wrongful act consisting also of a wrongful event, and the possibility of taking into consideration the economic element of damage in determining the conditions for the existence of an internationally wrongful act. The Commission also examined certain terminological problems arising from the need to express in the various languages the concept for which the Special Rapporteur proposes to use, in French, the expressions "*fait illicite international*" or "*fait internationalement illicite*". In particular, it tried to find a term capable of expressing in the most appropriate and unambiguous way the idea of attaching to the State some particular conduct, which represents the subjective element of the internationally wrongful act. In revising the material which was the subject of sections I and II of chapter I of his second report, the Special Rapporteur based his work in respect of all those matters on the views which prevailed in the Commission. The various questions and the views on them expressed by the Commission will be discussed in due course later in this report.

22. In his second report, the Special Rapporteur dealt lastly with what several writers term the "capacity" of States to commit internationally wrongful acts and the possible limits of such "capacity" in certain circumstances. On that point, the Commission agreed with the Special Rapporteur that this notion has nothing to do with capacity to conclude treaties, or more generally, to act internationally. Some members of the Commission even had doubts about the use of the term "capacity" itself, since it might lead to misunderstanding, and the Special Rapporteur therefore agreed to consider the possibility of using a different term; consequently a new term is proposed in the present report.

23. At the end of its consideration of the second report, the Commission invited the Special Rapporteur to continue his study of the topic and the preparation of the draft articles. It was agreed that he would include in his third report all of the part which had been examined provisionally at the twenty-second session, revised in the light of the discussion and the summary conclusions which it had produced. The new report would also include a detailed analysis of the various conditions which must be met if an internationally wrongful act is to be attributed to a State as an act giving rise to international responsibility.

24. The first chapter of this report therefore reproduces the material included in chapter I of the second report, revised as indicated. Section 1 deals with the definition of the principle attaching responsibility to any internationally wrongful act of the State; section 2 is devoted to the determination of the conditions for the existence of a wrongful act under international law, while in section 3 an effort is made to define the principle that each State may, at the international level, be considered the author of a wrongful act which is a source of responsibility. The Special Rapporteur has now added to these three sections a fourth section dealing with the principle according to which the provisions of a State's municipal law cannot be invoked to prevent an act by that State from being characterized as wrongful in international law.

25. The basic general principles having thus been defined, chapter II is devoted to a detailed examination of the conditions in which the actual conduct of a specific individual or group of individuals should be considered as an "act of the State" from the point of view of international law. Section 1 contains preliminary considerations designed to clear away certain difficulties caused basically by incorrect premises and to assert the autonomy of international law in this matter. The following sections are devoted to establishing the individuals or groups of individuals whose conduct may be considered to constitute conduct attributable to the State at the international level. In the remaining sections of chapter II, which will be included in a further report, it will be determined which of the various types of conduct engaged in by those individuals or groups should be specifically attributed to the State. The analysis will then be concluded from a negative viewpoint, indicating the categories of individuals or groups whose conduct cannot be considered conduct of the State and determining the international situation of the State in relation to such conduct.

26. In the context of the first group of questions, chapter II, section 2, defines the rule which represents the starting-point in this field, namely, that an action or omission may be taken into consideration for the purpose of attributing it to the State as an internationally wrongful act if it was committed by an individual or group of individuals who constituted an organ of the State according to the legal order of the State concerned and acted in that capacity in the case in question. Section 3 poses the question whether, in the light of the rule thus defined, a distinction should be drawn according to whether the organ in question belongs to one or other of the main branches of the State machinery or according to whether its functions relate to international relations or are concerned solely with domestic matters, or again according to whether those functions are of a superior or subordinate nature. Section 4 is devoted to an examination of the question whether one should take into account, for the purpose of attribution to the State as a subject of international law, an action or omission by individuals or groups who, in the internal legal order, are not, properly speaking, organs of the State but organs of separate public institutions: autonomous national public institutions or territorial public entities (States members of a federal State, cantons, regions, *départements*, municipalities, autonomous administrations of certain territories or dependent territories, and so on). Section 5 deals with the possibility of considering as attributable to the State—again with a view to assigning international responsibility to the latter—the conduct of individuals or groups which although formally not organs have in fact acted in that capacity (*de facto* organs, State auxiliaries, private persons who occasionally perform public functions, and so on). Lastly, section 6 discusses the specific question of the possibility of attributing to a State an action or omission by an organ placed at its disposal by another State or an international organization.

27. The second group of questions will be considered in a seventh section of chapter II, which will be devoted

essentially to an examination of the controversial question of attributing to the State the conduct of an organ which has exceeded its competence or ignored its instructions, and the possible limitations of such attribution.

28. The third group of questions will be dealt with in an eighth section of chapter II, in which the possibility of attributing to the State, at the international level, the actions of individuals who have acted as such will be ruled out in principle and the circumstances in which the existence of an internationally wrongful act of the State can be envisaged in connexion with certain types of conduct by individuals will then be examined. In the same context we shall deal, in a separate section, with the exclusion, in principle, of the possibility of attributing to a State actions or omissions by individuals acting as organs of insurrectional movements directed against that State and the limitation of that exclusion. We shall also examine the possibility of attaching the conduct of such individuals to the insurrectional movement itself as a separate subject of international law.

29. At this stage, the examination of the conditions permitting specific conduct to be considered as an "act of the State" may be considered completed. We shall then proceed, in another chapter (devoted to "the violation" according to international law), to an examination of the various aspects of what has been called the objective element of the internationally wrongful act: the failure to fulfil an international obligation. First of all, we shall show that the source of the international legal obligation which has been violated (customary, treaty or other) has no implications when it comes to determining whether the violation is an internationally wrongful act. We shall then seek to define the features of the violation of an obligation concerning conduct and the distinction to be drawn in that connexion between the cases in which the specific aim of the obligation in question is to ensure some particular conduct as such, and the cases in which the obligation consists only in ensuring that a given event shall not occur. We shall deal next with the characteristics of the violation when the obligation violated is one of those which require, in a general way, that a certain result should be ensured, without specifying the means by which the result is to be obtained. In this connexion we shall also examine the value of the requirement that local remedies must have been exhausted in order for an international obligation relating to the treatment of individuals to be violated. Lastly, we shall examine the problem of determining the *tempus commissi delicti* in the cases where the failure to fulfil an international obligation creates a permanent situation or is the result of distinct and successive types of conduct. Once all these points have been settled, there will still be some special problems to consider: the possibility of attributing an internationally wrongful act simultaneously to more than one State in connexion with a single specific situation; and the possibility of making a State responsible, in certain circumstances, for an act committed by another State. After that, the detailed consideration of the various circumstances precluding wrongfulness

will complete the first part of the study of State responsibility for internationally wrongful acts.

## CHAPTER I

### General principles

#### 1. PRINCIPLE ATTACHING RESPONSIBILITY TO EVERY INTERNATIONALLY WRONGFUL ACT OF THE STATE

30. One of the principles most deeply rooted in the doctrine of international law and most strongly upheld by State practice and judicial decisions is the principle that any conduct of a State which international law classifies as a wrongful act entails the responsibility of that State in international law. In other words, whenever a State is guilty of an internationally wrongful act against another State, international responsibility is established "immediately as between the two States", as was held by the Permanent Court of International Justice in the *Phosphates in Morocco* case.<sup>12</sup> Moreover, as stated by the Italian-United States Conciliation Commission set up under article 83 of the Treaty of Peace of 10 February 1947,<sup>13</sup> no State may "escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law".<sup>14</sup>

31. Theoreticians have sometimes sought a justification for the existence of this fundamental principle, and they have usually considered that they have found it in the actual existence of an international legal order and in the *legal* nature of the obligations it imposes on its subjects.<sup>15</sup> For it is obvious that if one attempts, as certain advocates of State absolutism have done in the past, to deny the idea of State responsibility because it allegedly conflicts with the idea of sovereignty, one is forced to deny the existence of an international legal order.

<sup>12</sup> *Phosphates in Morocco* case (Preliminary Objections), 14 June 1938, *P.C.I.J.*, series A/B, No. 74, p. 28.

<sup>13</sup> United Nations, *Treaty Series*, vol. 49, p. 167.

<sup>14</sup> *Armstrong Cork Company Case*, 22 October 1953 (United Nations, *Reports of International Arbitral Awards*, vol. XIV (United Nations publication, Sales No.: 65.V.4), p. 163).

<sup>15</sup> Among the authors of classic works on the subject, see D. Anzilotti, *Teoria generale della responsabilità dello Stato nel diritto internazionale* (Florence, Lumachi, 1902), reprinted in *Scritti di diritto internazionale pubblico* (Padua, CEDAM, 1956), vol. II, t. 1, pp. 25 and 62, and *Corso di diritto internazionale*, 4th ed. (Padua, CEDAM, 1955), vol. I, p. 384; P. Schoen, "Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen", *Zeitschrift für Völkerrecht* (Breslau, J.U. Kern's Verlag [Max Müller], 1917), Supplement 2 to vol. X, p. 16; K. Strupp, "Das völkerrechtliche Delikt", *Handbuch des Völkerrechts* (Stuttgart, K. Kohlhammer, 1920), vol. III, part one, pp. 4 *et seq.*

Among recent affirmations of the principle, mention should be made of the very cogent statement by A. Verdross in *Völkerrecht*, 5th ed. (Vienna, Springer, 1964), p. 373: "Eine Leugnung dieses Grundsatzes würde das VR zerstören, da mit der Verneinung der Verantwortlichkeit für begangenes Unrecht auch die Pflicht der Staaten, sich völkerrechtsgemäss zu verhalten, aufgehoben würde". [A denial of this principle would destroy international law, since the negation of responsibility for a wrongful act would also do away with the duty of States to behave in accordance with international law.] (Translation by the United Nations Secretariat.)



The Swiss Government pointed this out in its reply to point II of the request for information addressed to Governments by the Preparatory Committee for the Conference for the Codification of International Law (The Hague, 1930):

... the actual basis of the reciprocal responsibility of States lies in the actual existence of an international juridical order and in the need which States experience to observe certain rules of conduct *inter se*.<sup>16</sup>

Others prefer to think that, in the international order, State responsibility derives from the fact that States mutually recognize each other as sovereign. The rule establishing responsibility would then be the necessary corollary to the principle of the equality of States.<sup>17</sup> However, these differences of opinion are of little importance; there is no need to justify or establish this fundamental principle by deducing it from other principles. Despite certain variations in its formulation, it is expressly recognized, or at least clearly assumed by doctrine and practice unanimously.<sup>18</sup>

32. As regards the meaning and scope of the correlation thus established between a wrongful act and responsibility, Grotius had already observed that in the law of nations, too, *maleficium* was an independent source of legal obligations.<sup>19</sup> Translated into terms of modern legal technique, this amounts to saying that internationally wrongful acts by States create new international legal relations characterized by subjective legal situations

<sup>16</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. 24. The Swiss Government's reply was based on a quotation from Anzilotti.

<sup>17</sup> Cf. Ch. de Visscher, "La responsabilité des Etats", *Bibliotheca Visseriana* (Leyden, Brill, 1924), t. II, p. 90. See also C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), pp. 5-6.

The idea that the legal basis of international responsibility is to be found in the "recognition of a political unit as a member of the community governed by international law" was expressed in point II of the request for information addressed to Governments by the Preparatory Committee for the 1930 Conference. However, some Governments criticized the idea (League of Nations, *Bases of Discussion*... [op. cit.], pp. 20-24).

<sup>18</sup> Belief in the existence of the general rule whereby responsibility attaches to any internationally wrongful act by a State was clearly expressed in point II of the above mentioned request for information drawn up by the Preparatory Committee for the 1930 Conference. The same conviction also emerges from all the replies from Governments. Moreover, the Third Committee of the Conference, unanimously approved article 1, which laid down that:

"International responsibility is incurred by a State if there is any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner on the territory of the State." (See *Yearbook of the International Law Commission*, 1956, vol. II, p. 225, document A/CN.4/96, annex 3.)

Among codification drafts emanating from private institutions, the draft convention prepared by the Harvard Law School in 1961 states as a "basic principle" of State responsibility the rule that "A State is internationally responsible for an act or omission which, under international law, is wrongful..." (Italics supplied by the Special Rapporteur). (*Yearbook of the International Law Commission*, 1969, vol. II, p. 142, document A/CN.4/217 and Add. 1, annex VII).

<sup>19</sup> H. Grotius, *De Jure Belli ac Pacis Libri Tres* (Amsterdam, MDCCXX), lib. II, cap. XVII, pp. 462 et seq.

distinct from those which existed before the acts took place. The fact that the legal relations between States established as a result of an internationally wrongful act are new relations has been pointed out both by jurists whose writings are now legal classics<sup>20</sup> and by authors of recent works.<sup>21</sup>

33. Notwithstanding this unanimous recognition of the principle, there are serious differences of opinion on the definition of the legal relationships created by an internationally wrongful act and the legal situations which occur in these relationships. One conception, which may be considered classical in international law doctrine and which proceeds from certain theoretical premises—though it has some solid support in judicial decisions and State practice—describes the legal relations deriving from an internationally wrongful act in one single form: that of an obligatory bilateral relationship established between the State which committed the act and the injured State, in which the obligation of the former State to make reparation—in the wide sense of the term, of course—is set against the subjective right of the latter State to require such reparation.<sup>22</sup> In a community like

<sup>20</sup> D. Anzilotti, *Corso di diritto internazionale* (op. cit.), p. 383: "Al fatto illecito, cioè, in generale parlando, alla violazione di un dovere internazionale, si collega così il sorgere di un nuovo rapporto giuridico, tra lo Stato al quale è imputabile il fatto di cui si tratta [...] e lo Stato verso cui sussisteva il dovere inadempito." [The wrongful act, that is to say, generally speaking, the violation of an international obligation, is thus accompanied by the appearance of a new legal relationship between the State to which the act is imputable [...] and the State with respect to which the unfulfilled obligation existed] (Translation by the United Nations Secretariat).

<sup>21</sup> W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), t. 1, p. 499: "Völkerrechtliche Unrechtsfolgen in Gestalt der Entstehung neuer konkreter Rechtspflichten, die durchweg den Völkerrechtverletzer direkt oder indirekt schlechter stellen sollen, als dies vorher der Fall war, liegen durchweg vor (...)" [Unquestionably the consequences of an internationally wrongful act which take the form of the creation of new and concrete legal obligations always aim, directly or indirectly, to place the author of the violation of international law in a more unfavourable situation than the one existing previously (...)]. G. I. Tunkin, *Droit international public - Problèmes théoriques* (Paris, Pédone, 1965), p. 220: "La violation par l'Etat du droit international engendre certains rapports juridiques", [The violation by the State of international law gives rise to certain legal relations] and *Teoria mezhdunarodnogo prava* (Moscow, 1970), p. 470: "Naruszenie gosudartvom mezhdunarodnogo prava porozhdaet opredelennye pravovye otnosheniya" [The violation by the State of international law gives rise to the definition of legal relations]. E. Jiménez de Aréchaga, *International Responsibility - Manual of Public International Law* (London, published by Sorensen, 1968), No. 9, p. 533: "Whenever a duty established by any rule of international law has been breached by act or omission, a new legal relationship automatically comes into existence."

The "legal relationships" which are formed when international responsibility exists are also mentioned in: Institute of the State and of Law of the Academy of Sciences of the Soviet Union, *Kurs mezhdunarodnogo prava* [Course in international law], edited by F. I. Kozhevnikov et al., (Moscow, Nauka, 1969), vol. V: *Osnovnye instituty y otrasli sovremennogo mezhdunarodnogo prava* [Principal institutions and branches of international law], p. 426.

<sup>22</sup> Article 36 of the Statute of the International Court of Justice, which, on this point, reproduces unchanged the corresponding provisions of the Statute of the Permanent Court of International Justice, provides that the Court may have jurisdiction with respect to an internationally wrongful act only in order to establish the existence of such an act and to determine the nature and extent of the reparation to be made. On this basis, conduct that is wrongful under international law has been judged by the Permanent Court of International Justice to give rise to a duty of the State concerned

the international community, in which the relations between States and the community as such are not legally organized, the creation of an obligatory relationship of this nature would appear to be the only effect that can be attached to the wrongful act.<sup>23</sup>

to make reparation for the injury caused; this was held as early as Judgement No. 1 of 17 August 1923 in the S.S. "Wimbledon" case (*P.C.I.J.*, series A. No. 1, pp. 30 and 33). The same Court later defined its basic attitude in the matter in its Judgements No. 8 of 26 July 1927 (Jurisdiction) and No. 13 of 13 September 1928 (Merits) in the Case concerning the factory at Chorzów (*P.C.I.J.*, Series A. No. 9, p. 21 and No. 17, p. 29). In the second of these judgements, the Court observed that:

"... it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation..."

The principle stated by the Permanent Court was expressly reaffirmed by the International Court of Justice in its Advisory Opinion of 11 April 1949 concerning Reparation for injuries suffered in the service of the United Nations (*I.C.J. Reports* 1949, p. 184). The Court also applied this principle in its Judgement of 9 April 1949 in the Corfu Channel case (*ibid.*, p. 23).

In arbitration cases, the idea that all internationally wrongful conduct uniformly gives rise to a legal relationship between the offending State and the injured State, characterized by the right of the latter State to demand adequate reparation, has been stated many times. In this connexion, it is sufficient to refer to Mr. Huber's report of 1 May 1925, as arbitrator in the case concerning British claims in the Spanish zone of Morocco (United Nations, *Reports of International Arbitral Awards*, vol. II [United Nations publication, Sales No.: 1949.V.1], p. 641 and the decision of 22 October 1953, cited above, of the Italian-United States Conciliation Commission in the Armstrong Cork Company case (*ibid.*, vol. XIV [Sales No.: 65.V.4], p. 163) in which, quoting the opinion of Strupp, the Commission described wrongful actions as "producing the responsibility of those performing such actions and allowing the State which has suffered or whose subjects have suffered damage to demand reparation".

As to the practice of States, reference should be made first of all to the fact that article 3 of the IVth Hague Convention of 1907 respecting the Laws and Customs of War on Land provided that a belligerent which violated the provisions of the Regulations "shall, if the case demands, be liable to pay compensation". Article 12 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War (United Nations, *Treaty Series*, vol. 75, p. 146) established the responsibility of the State, but does not indicate what form that responsibility takes. With regard to the special sector of international responsibility for injuries to aliens, attention may be drawn once again to the general agreement on point II of the request for information addressed to States by the Preparatory Committee for the 1930 Conference for the Codification of International Law, according to which "a State which fails to comply with this obligation [...] incurs responsibility and must make reparation in such form as may be appropriate." (League of Nations, *Bases of Discussion...* [*op. cit.*], pp. 20 *et seq.*, and *Supplement to vol. III* [C.75 (a).M.69 (a).1929.V], pp. 2 and 6). According to article III, adopted on first reading by the Third Committee of the Conference, "The international responsibility of a State imports the duty to make reparation for the damage sustained [...]" (See *Yearbook of the International Law Commission*, 1956, vol. II, p. 225, document A/CN.4/96, annex 3).

It should, however, be noted that although international jurisprudence and State practice undoubtedly justify the conclusion that in general international law an internationally wrongful act imposes on the offending State an obligation to make reparation, it would be reading too much into this jurisprudence and State practice to try to draw the further conclusion that the creation of such an obligation is necessarily the only consequence which general international law attaches to an internationally wrongful act. In reality, this idea has its origin in a particular conception of the legal order in general and of the international legal order in particular.

<sup>23</sup> This is the well-known theory of Anzilotti (*Teoria generale...* [*op. cit.*], pp. 62 *et seq.*, and 81-82; *La responsabilità internazionale*

34. This view does not admit of the possibility of a real sanction which the injured State itself, or possibly a third party, would have the faculty to impose upon the offending State. Although it recognizes that a coercive act may become applicable following a wrongful act, it regards the former only as a means of enforcement intended to ensure, by coercion, that the recalcitrant State fulfils its obligations, and not as a "sanction" in the proper sense of the term, i.e. having a punitive purpose.<sup>24</sup> In conclusion, international responsibility is said to be characterized by the unity of the legal relationship created by the wrongful act: <sup>25</sup> an obligatory relationship in which the restoration or compensation aspects may be accompanied by punitive aspects, without the distinction being easy to make or having more than a theoretical interest.<sup>26</sup>

*des Etats a raison des dommages soufferts par des étrangers* (Paris, Pédone, 1906), reprinted in *Scritti...* [*op. cit.*], p. 161; *Corso...* [*op. cit.*], pp. 385-386). A similar view is maintained in works dealing specifically with the subject although some of them are already rather old (P. Schoen, *op. cit.*, pp. 22 and 122-123; K. Strupp, "Das völkerrechtliche Delikt", *Handbuch...* [*op. cit.*], p. 217; Ch. de Visscher, *op. cit.*, pp. 115-116; C. Eagleton, *op. cit.*, p. 182; R. Laß, "Die Rechtsfolgen völkerrechtliche Delikte", Institut für internationales Recht an der Universität Kiel, *Erste Reihe Vorträge und Einzelschriften* (Berlin, Stilke, 1932), Heft 18, pp. 19-20; etc.); but the same view is also to be found, with the normal variations from one writer to another, in recent treatises and monographs: for example, G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens, 1957), vol. 1, pp. 568 *et seq.*; A. Schüle, "Völkerrechtliches Delikt", *Wörterbuch des Völkerrechts* 2nd ed. (Berlin, de Gruyter, 1960), Bd. I, pp. 337 *et seq.*; D. P. O'Connell, *International Law* (London, Stevens, 1965), vol. II, pp. 1019 *et seq.*; and E. Jiménez de Aréchaga, *International Responsibility...* [*op. cit.*], pp. 533, 564 *et seq.*

<sup>24</sup> It follows that when the advocates of this theory deal, for example, in general international law, with an institution such as reprisals—whether peaceful or armed—they tend not to regard them as a form of sanction which may, as such, have its own punitive and repressive purpose, as is so well indicated by the term "retaliation" in English, but only as a means of coercion used to secure performance, or restoration of the impaired right, or reparation for the damage sustained. See, for example, K. Strupp, "Das völkerrechtliche Delikt", *Handbuch...* (*op. cit.*), pp. 195 *et seq.*, and *Eléments du droit international public: universel, européen et américain* (Paris, Editions internationales, 1930), vol. I, p. 345; Ch. de Visscher, *op. cit.*, p. 117; and G. Balladore Pallieri, "Gli effetti dell'atto illecito internazionale", *Rivista di Diritto Pubblico—La Giustizia Amministrativa*, Rome, January 1931—IX, fasc. 1, pp. 64 *et seq.*

<sup>25</sup> P. Reuter ("Principes de droit international public", *Recueil des cours de l'Académie de droit international de La Haye*, 1961-II [Leyden, Sijthoff, 1962], t. 103, pp. 584 *et seq.*) states clearly this aspect of the theory, which he calls "l'unité de la théorie de la responsabilité". In his view, "l'absence d'une distinction entre la responsabilité pénale et la responsabilité civile n'est en droit international que la conséquence de l'absence d'autorité ayant pour fonction propre de défendre les intérêts communs". [The absence of any distinction between criminal responsibility and civil responsibility in international law is essentially the result of the absence of an authority responsible for protecting the common interests.] (Translation by the United Nations Secretariat.)

<sup>26</sup> The unity of the theory which regards the creation of an obligatory relationship as the sole consequence of an internationally wrongful act is not affected by the fact that some writers refer to a penal aspect of responsibility in connexion with the particular characteristics which the content of the offending State's obligation may sometimes have and which are designated by the term "satisfaction" (see for example G. Morelli, *Nozioni di diritto internazionale*, 7th ed. (Padua, CEDAM, 1967), pp. 357-358; Ch. de Visscher, *Théories et réalités en droit international public* (Paris, Pédone, 1953), pp. 344 *et seq.*; P. Reuter, *La responsabilité internationale* (Paris, 1956-1957), pp. 191-192). In reality, a separate

(Continued on next page.)

35. Another view, put forward by certain writers on essentially theoretical grounds, leads to a position almost diametrically opposed to that just described, despite the fact that it, too, upholds, though in an entirely different way, the idea of a single legal relationship arising from the wrongful act and thus falling within the concept of responsibility. Starting from the idea that the legal order is a coercive order, this view sees in an act of coercion not only the sole possible form of sanction, but also the sole legal consequence following directly from the wrongful act. The obligation to make reparation is—and this, according to this view, is true in any system of law—no more than a subsidiary duty placed between the wrongful act and the application of measures of coercion, by the law in municipal law, and in international law by a possible agreement between the offending State and the injured State. Accordingly, general international law would not regard the wrongful act as creating any obligatory relationship between the offending State and the injured State, but would authorize the latter to react to the wrongful act of the former by applying to it a sanction in the proper sense of the term.<sup>27</sup>

(Foot-note 26 continued)

term is used here to distinguish a form of moral reparation from a reparation which is essentially economic in character. On this point, see P.-A. Bissonnette, *La satisfaction comme mode de réparation en droit international* (thesis, Geneva University), 1952.

Similarly, the unity of the theory in question is not affected by the assertion made by certain writers—not without encountering strong opposition—that the obligation placed on a State committing a wrongful act may also include what are called “penal damages”. This term is used to denote the character of a real pecuniary penalty which seems to be possessed by certain indemnities demanded and sometimes granted. Among the writers who share this view, see J. H. Ralston, *The Law and Procedure of International Tribunals* (Stanford [Calif.], Stanford University Press, 1926), pp. 267 *et seq.*; E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International Claims* (New York, the Banks Law Publishing Co., 1928), p. 419; C. Eagleton, “Measure of Damages in International Law”, *Yale Law Journal* New Haven [Conn.], vol. XXXIX, November 1929, No. 1, pp. 61 *et seq.*, and “International Organization and the Law of Responsibility”, *Recueil des cours de l'Académie de droit international de La Haye, 1950-I* (Paris, Sirey, 1951), pp. 379-380; Briggs, “The Punitive Nature of Damages in International Law and State Responsibility...”, *Essays in Political Science in Honour of W. W. Willoughby* (Oxford, 1937), pp. 339 *et seq.*; L. Oppenheim, *International Law: A Treatise*, 8th ed. [Lauterpacht] (London, Longmans, Green and Co., 1955), vol. I, pp. 354-355; P. Guggenheim, *Traité de droit international public* (Geneva, Librairie de l'Université, Georg et Cie, 1954), t. II, p. 81; D. P. O'Connell, *op. cit.*, pp. 1205 *et seq.* The idea of attributing to these forms of “damages” a “distinctively punitive purpose” and the character of a penalty was adopted F.V. by García Amador in his first report on State responsibility to the International Law Commission (*Yearbook of the International Law Commission, 1956*, vol. II, pp. 182 *et seq.*, document A/CN.4/96, paras. 49 *et seq.*), in his course of lectures “State Responsibility: Some New Problems” (*Recueil des cours... 1958-II* [Leyden, Sijthoff, 1959], t. 94, pp. 396-397), and in his sixth report to the Commission (*Yearbook of the International Law Commission, 1961*, vol. II, p. 35, document A/CN.4/134 and Add.1, paras. 140 *et seq.*). The approach of C. Th. Eustathiades (“Les sujets du droit international et la responsabilité internationale — Nouvelles tendances”, *Recueil des cours... 1953-III* Leyden, Sijthoff, 1955], t. 84, pp. 434-435) is critical as regards the so-called “punitive damages”, although rather cautious. For the view that international law does not recognize “penal damages”, see B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (London, Stevens, 1953), pp. 234-235.

<sup>27</sup> This view has been progressively developed by H. Kelsen, “Unrecht und Unrechtsfolge im Völkerrecht”, *Zeitschrift für*

36. Lastly there is a third view which, while not taking either of the other two extreme positions, recognizes what is sound in each of them, while stressing that they provide only a partial and incomplete description of the consequences of a wrongful act as manifested in real international life. This view, therefore, diverges from the other two in bringing out that in any system of law a wrongful act may give rise, not to a single type of legal relationship, but to a dual form of relationship, each form being characterized by the different legal situations of the subjects involved. So far as the international legal order in particular is concerned, in principle it attaches to an internationally wrongful act the same sort of consequences as an internal legal order generally attaches to an act of the same kind. These are consequences of different kinds which amount, according to the case, either to giving the subject of international law whose rights have been infringed by the wrongful act the subjective right to claim reparation—again in the broad sense of the term—from the author of the act or to giving that subject, or possibly a third subject, the faculty to impose a sanction on the subject which has engaged in wrongful conduct. In the first case, it is the subject which has engaged in wrongful conduct which *must* act to eliminate the consequences of the act; in the second case, it is the subject injured by the wrongful act which *may* act to punish its author, since by “sanction” here is meant the application of a measure which, although not necessarily an act of coercion and not necessarily involving the use of force, is nevertheless characterized by the fact that its purpose is, in part at least, to impose a penalty. Such a purpose is not the same as an attempt to secure by coercion the fulfilment of the obligation or restoration of the right infringed or compensation for the injury.<sup>28</sup>

*öffentliches Recht* (Vienna, Springer, 1932), Bd. XII, Heft 1, pp. 545-546, and 568-569; *Principles of International Law* 2nd ed. (New York, Holt, Rinehart and Winston, 1966), pp. 18-19; and “Théorie du droit international public”, *Recueil des cours... 1953-III* (Leyden, Sijthoff, 1955), t. 84, pp. 19 *et seq.*, and 29 *et seq.* The sanctions provided for by classical general international law are, according to Kelsen, reprisals and war; in applying them, the injured State acts as an organ of a decentralized international community. The United Nations Charter, on the other hand, gives—in Kelsen's opinion—a monopoly of force to the Organization. Kelsen's ideas were taken up by A. Carlebach. (*Le problème de la faute et sa place dans la norme du droit international* [Paris, Librairie générale de droit et de jurisprudence, 1962], pp. 2 *et seq.*). P. Guggenheim (*op. cit.*, p. 63) takes the same view in principle, but adopts a much more realistic approach. This writer, too, considers that the obligation to make reparation is not the “sanction” for the offence and that neither is it the consequence of a wrongful act under general international law. He regards reparation as an obligation to be agreed upon by special treaty. However, differing from Kelsen's opinion on this point, Guggenheim considers that the State has an obligation to submit its claim before resorting to measures of coercion such as war or reprisals. It should also be noted that according to this writer acts of coercion carried out under international law cannot be regarded as “penalties” in the penal law sense, because they lack the “retributive and preventive” character of a penalty and do not differ from enforcement measures (*ibid.*, p. 83). See also A. V. Freeman, *The International Responsibility of States for Denial of Justice* (London, Longmans, Green, 1938), pp. 17 *et seq.*, 571 *et seq.*

<sup>28</sup> On the existence, in international law, of sanctions proper (meaning repressive acts which in this sense have an undeniably penal character), see in particular R. Ago, “Le délit international”, *Recueil des cours... 1939-II* (Paris, Sirey, 1947), t. 68, pp. 527

37. For those who hold this view it is therefore obviously correct to describe as a "subjective right" the particular legal situation of the injured subject whereby it can legitimately require reparation: this legal situation is the logical concomitant of the obligation placed on the author of the wrongful act. This is not true, however, of the other legal situation which consists in the possibility of legitimately applying a sanction and which should rather be described as a "legal faculty". In the first case, a new obligatory legal relationship is established as a result of the wrongful act; in the second case there is also a new relationship, but it is clearly of a different kind. Consequently, in so far as an internationally wrong-

*et seq.*; L. Oppenheim, *op. cit.*, pp. 356 *et seq.*; C. Th. Eustathiades, "Les sujets...", *Recueil des cours...* (*op. cit.*), pp. 442 *et seq.*, and 448-449; G. Morelli, *op. cit.*, p. 363; W. Wengler, *op. cit.*, pp. 551-552.

Modern Soviet writers on international law (see A. N. Traĭnin, *Zashchita mira i borba s prestupleniami protiv chelovechestva* [The preservation of peace and the repression of criminal acts against humanity], (Moscow, Vychinsky Institute of Law of the Academy of Sciences of the Soviet Union, 1956), pp. 41 *et seq.*; G. I. Tunkin, *Droit international...* [*op. cit.*], pp. 202 *et seq.*, "Alcuni nuovi problemi della responsabilità dello Stato nel diritto internazionale", Istituto di Diritto Internazionale e Straniero della Università di Milano, *Comunicazioni e Studi* (Milan, Giuffrè, 1963), t. XI [1960-1962], pp. 16 *et seq.*, and *Teoria...* [*op. cit.*], pp. 447 *et seq.*; and Institute of the State and of Law of the Academy of Sciences of the Soviet Union, *op. cit.*, pp. 424 *et seq.*) sharply criticize the concept of a penal responsibility of States as developed by certain writers (Pella, Donnedieu de Vabres, etc.). This criticism is, however, directed primarily against the facile transplantation to international law of notions and institutions characteristic of municipal law and, more specifically, against certain trends towards the creation of supranational organs of "international penal justice". On the other hand, the aforementioned Soviet writers in no way deny the existence in international law of sanctions that are repressive and, hence, punitive in nature. Soviet writers (see G. I. Tunkin, *Droit international...* [*op. cit.*], pp. 224 *et seq.*, "Alcuni nuovi problemi..." [*op. cit.*], pp. 45 *et seq.*, and *Teoria...* [*op. cit.*], pp. 476 *et seq.*; and Institute of the State and Law of the Academy of Sciences of the Soviet Union, *op. cit.*, pp. 412 *et seq.*, and particularly pp. 433 *et seq.*) draw a clear distinction, in respect of the legal relationships which result from an internationally wrongful act, between the relationships which involve the application of sanctions and those which imply the simple obligation to make reparation for damage. They even criticize severely the older theory which disregarded "sanctions". Some of these writers (see M. Rapoport, "K voprosu ob otvetstvennosti za prestupleniya protiv chelovechestva" [The question of responsibility in respect of crimes against humanity], *Vestnik Leningradskogo Universiteta* [University of Leningrad Review], No. 5, 1965, p. 81) regard sanctions as real "penalties", and when responsibility involves their application, as in the case of aggression, it becomes a "penal" responsibility. The other writers already cited prefer to use the terms "political" and "material" responsibility to designate the two possible kinds of consequence of a wrongful act. (Tunkin, however, has certain reservations about the use of these terms.) On this specific point it may therefore be said that, terminological questions apart, the views of the Soviet writers are analogous to those of the writers mentioned at the beginning of this note.

In connexion with the aforementioned terminological aspect of the question, it may be remembered that the Government of Czechoslovakia, in the nineteenth principle of the declaration contained in the draft resolution it submitted at the seventeenth session of the United Nations General Assembly, during the discussion on principles of international law concerning friendly relations and co-operation among States (*Official Records of the General Assembly, Seventeenth Session, Annexes, Agenda item 75, document A/C.6/L. 505*) used the term "political responsibility" to characterize the responsibility of the State in relation to the "penal responsibility" of the "physical persons who committed acts qualified by international law as crimes against humanity".

ful act is described as an act giving rise in law to international responsibility, the general term responsibility (still according to this view) should be understood to mean the situation of a subject of international law confronted either with the right of another subject to claim reparation from it, or with the faculty of another subject to impose a sanction on it—in the sense given to these terms above.<sup>29</sup>

38. The above-mentioned position of principle amounts in the last analysis to drawing a parallel between the reaction of the international legal order to a wrongful act and the reaction of other legal orders. It is nevertheless recognized that in international law, unlike municipal law, no clear distinction has been established between acts of coercion according to whether their purpose is to impose a sanction in the true sense of the term or to compel the author of the wrongful act to fulfil his obligations. These two aspects, though in theory distinct and clearly identifiable in certain specific cases, are often combined and blended in a single action. Similarly, the holders of this view themselves observe that international law—because of the nature of the international community and its members rather than because of any alleged but non-existent primitive character of international law—has not worked out a distinction between civil and penal offences comparable to that established in municipal law.<sup>30</sup>

39. It is not easy, therefore, to distinguish clearly defined classes of wrongful acts, some of which only give the injured State the "right" to claim reparation from the guilty State, while others also give it the "legal faculty" to impose a sanction upon that State. What can be said is that modern international law has tended progressively to deny the faculty of resorting to measures of coercion as a reaction against less serious wrongful acts, in particular those of a purely economic nature; more generally speaking, it must be recognized that there is also a clear tendency to restrict the injured State's faculty of resorting to sanctions unilaterally.<sup>31</sup>

<sup>29</sup> This view was formulated by the author of the present report in his early writings on international responsibility. See R. Ago, "Le délit international", *Recueil des cours...* (*op. cit.*), pp. 426-427 and 524 *et seq.* The same idea is put forward by G. Sperduti ("Introduzione allo studio delle funzioni della necessità nel diritto internazionale", *Revista di diritto internazionale*, Padua, series IV, vol. XXII, fasc. I-II, 1943, pp. 22 *et seq.*), by C. Th. Eustathiades, ("Les sujets...", *Recueil des cours...* [*op. cit.*], pp. 429 *et seq.*), by A. P. Sereni (*Diritto internazionale* [Milan, Giuffrè, 1962], t. III, pp. 1541-1542), and by G. Morelli (*op. cit.*, pp. 356 *et seq.* and 361 *et seq.*). Substantially analogous opinions are to be found in L. Oppenheim (*op. cit.*, pp. 356 *et seq.*), A. Verdross (*op. cit.*, pp. 398 *et seq.*, 424 *et seq.*, and 647 *et seq.*), G. Dahm (*Völkerrecht* [Stuttgart, W. Kohlhammer, 1961], Bd. III, pp. 265 *et seq.*), W. Wengler (*op. cit.*, pp. 499-503), and D. B. Levin (*Otvetstvennost gosudarstv v sovremennom mezhdunarodnom prave* [Moscow, Izdatelstvo Mezhdunarodnye otnosheniya, 1966], pp. 9-10), and the authors of volume V of *Kurs mezhdunarodnogo prava* (Institute of the State and Law of the Academy of Sciences of the Soviet Union, *op. cit.*) who contrast (pp. 426 *et seq.*) the "subjects of the international offence" with the "subjects of the legal claims" which are created in the case of international responsibility.

<sup>30</sup> R. Ago, "Le délit international", *Recueil des cours...* (*op. cit.*), pp. 530-531.

<sup>31</sup> On this point see G. Dahm, *op. cit.*, p. 266; W. Wengler, *op. cit.*, pp. 504 *et seq.*

What seems also to emerge clearly from State practice is the existence of an order of priority between the two possible consequences of an internationally wrongful act, in the sense that the claim for reparation must as a rule precede the application of the sanction, even where recourse to a sanction would be permissible in principle.<sup>32</sup> By offering adequate reparation—that is to say, by eliminating the consequences of its wrongful conduct as far as possible—the guilty State should normally be able to avoid the sanction. Of course, this principle does not preclude recognition of the fact that there may be exceptional cases in which the faculty of reacting against an internationally wrongful act by applying a sanction must necessarily be immediately exercisable and cannot be made conditional on a prior attempt to obtain reparation, especially if this attempt has, *a priori*, no real prospect of success.<sup>33</sup> According to some writers, moreover, there are cases in which a State held to be guilty of very serious wrongful acts may have to face both sanctions and an obligation to make reparation.<sup>34</sup>

40. In spite of the divergence of the views described above, the different conceptions of responsibility nevertheless coincide in agreeing that every internationally wrongful act creates new legal relations between the State committing the act and the injured State. As has already been pointed out, this in no way precludes the establishment of other relations between the former State and other subjects of international law. What must be ruled out, it appears, at least at the present stage in international relations, is the idea that as a result of an inter-

nationally wrongful act general international law can create a legal relationship between the guilty State and the international community as such, just as municipal law creates a relationship between the person committing an offence and the State itself. International law can have no such effect, so long as it does not recognize a personification of the international community as such. But this situation has certainly not prevented international law from providing that in certain cases a particular internationally wrongful act may be the source of new legal relationships, not only between the guilty State and the injured State, but also between the former State and other States or, especially, between the former State and organizations of States.<sup>35</sup> The development of the international organization—as early as the League of Nations but more particularly with the United Nations—has led to consideration of the possibility that a State committing an internationally wrongful act of a certain kind and of a certain importance might be placed in a new legal relationship not only with the injured State, but also with the Organization. It might thus be subject to the faculty or even the duty of the Organization and its members to react against the internationally wrongful conduct by applying sanctions collectively decided upon.

41. In connexion with this last point, attention must also be drawn to the growing tendency of a group of writers to single out, within the general category of internationally wrongful acts, certain kinds of acts which are so grave and so injurious, not only to one State but to all States, that a State committing them ought to be automatically held responsible to all States. It is tempting to relate this view<sup>36</sup> to the recent affirmation of the International Court of Justice, in its Judgment of 5 Feb-

<sup>32</sup> This principle has been given clear expression in international practice and judicial decisions, especially in the arbitral award of 31 July 1928 in the case concerning the responsibility of Germany for damage caused in the Portuguese colonies in South Africa (Naulilaa incident) (United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No.: 1949.V.1), pp. 1027-1028). For an account of the practice, see L. Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (Paris, Sirey, 1938), pp. 36 *et seq.*

<sup>33</sup> For examples of cases in which this situation may arise, especially where a state of war exists, see R. Ago, "Le délit international", *Recueil des cours*... (op. cit.), pp. 526 *et seq.*; P. Guggenheim, op. cit., pp. 65-66.

<sup>34</sup> This view seems to be the basis of the nineteenth principle of the declaration contained in the draft resolution submitted by the Government of Czechoslovakia at the seventeenth session of the United Nations General Assembly (for the reference, see footnote 28 above). This principle reads:

"The principle of State responsibility

"The State shall be held responsible for a violation of rules of international law, particularly for acts endangering peace and security and friendly relations among nations, as well as for acts violating legitimate rights of other States or their nationals.

"The State which has violated international law shall be liable to remedy in an adequate form the detriment thus caused, and shall bear also the corresponding political responsibility. Irrespective of the responsibility of the State, the physical persons who committed acts qualified by international law as crimes against humanity shall be subject to penal responsibility."

This formulation is supported by the authors of volume V of *Kurs mezhdunarodnogo prava* (Institute of the State and Law of the Academy of Sciences of the Soviet Union, op. cit.), pp. 411-412. The theory of a double consequence for particularly serious violations is defended by the same authors on pp. 429 *et seq.* See also G. I. Tunkin ("Alcuni nuovi problemi...", *Comunicazioni e Studi* [op. cit.], p. 38, and D. B. Levin (*Otvetstvennost gosudarstv...* [op. cit.], p. 115).

<sup>35</sup> On this question see the comments of Guggenheim (op. cit., pp. 99 *et seq.*), Eustathiades ("Les sujets...", *Recueil des cours*... (op. cit.), p. 433), Sereni (op. cit., pp. 1514-1542), Wengler (op. cit., pp. 500, 506 *et seq.*, and 580 *et seq.*), Tunkin (*Droit international*... (op. cit.), pp. 191 and 220 *et seq.*, "Alcuni nuovi problemi...", *Comunicazioni e Studi* (op. cit.), pp. 39 *et seq.*, and *Teoria*... (op. cit.), pp. 430 and 470 *et seq.*) [these comments were taken up and developed by Mr. Ushakov during the discussion on the first report at the twenty-first session of the International Law Commission (*Yearbook of the International Law Commission*, 1969, vol. I, p. 112, 1012th meeting, paras. 37-39)], and the comments of the authors of volume V of *Kurs*... (Institute of the State and Law of the Academy of Sciences of the Soviet Union, op. cit., pp. 432 *et seq.*).

<sup>36</sup> It has been particularly developed in Soviet doctrine. D. B. Levein ("Problema otvetstvennosti v nauke mezhdunarodnogo prava" *Izvestia Akademii Nauk SSSR*, No. 2, 1946, p. 105, and "Ob otvetstvennosti gosudarstv v soverennom mezhdunarodnom prave", *Sovetskoe gosudarstvo i pravo*, Moscow, No. 5, May 1966, pp. 75 and 76a) distinguishes between "simple violations of international law and international crimes which undermine its very foundations and most important principles". He identifies as such "genocide, aggression and colonial oppression". G. I. Tunkin (*Droit international*... (op. cit.), pp. 220 *et seq.*, "Alcuni nuovi problemi...", *Comunicazioni e Studi* (op. cit.), pp. 39 *et seq.*, and *Teoria*... (op. cit.), pp. 472 *et seq.*), who refers in this connexion to the opinions of certain older writers such as Heffter and Bluntschli, especially stresses threats to peace, breaches of the peace and acts of aggression. The authors of volume V of the *Kurs*... mention in the same context violations of the freedom of peoples, such as colonial oppression, the suppression by force of national

<sup>a</sup> For a summary in French, see *L'URSS et les pays de l'Est* (Paris, Editions du C.N.R.S. 1967), vol. VIII N° 2, pp. 340 *et seq.*

ruary 1970 in the case concerning the *Barcelona Traction, Light and Power Company, Limited*, that there are certain international obligations of States which are obligations *erga omnes*, that is to say, obligations to the whole international community. In the terms used by the Court :

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.<sup>37</sup>

Ideas of this kind may perhaps be worth studying in detail, for the writers concerned do not always seem to be quite clear whether, in such cases, the relationship established with States in general would originate in a rule of general and customary international law or in a rule of treaty law. Furthermore, it is not very clear whether it would be a relationship with States *ut singuli* or with States as members of an international organization which would alone be competent to decide on the action to be taken. In any event, these views are of particular interest, inasmuch as they reveal a trend towards incipient personification of the international community and are a factor which will make it possible gradually to outline a concept of "crime" in international law, within the general context of the internationally wrongful act. This idea appears, moreover, to be confirmed by the second paragraph of the first principle in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970 in its resolution 2625 (XXV). This paragraph reads : "A war of aggression constitutes a *crime* against the peace, for which there is responsibility under international law". (Special Rapporteur's underlining).

42. If the various questions that arise concerning the legal relations which result from an internationally wrongful act and thus enter into the concept of international responsibility, and the existing differences of opinion about them, have been discussed in the preceding paragraphs—which follow closely the exposition given in the second report<sup>38</sup>—it is not because of any conviction that the Commission will have to take position on these questions from the beginning of its work, when formulating the basic general rule on State responsibility. The Special Rapporteur has always believed that this rule should be stated as concisely as possible and that belief was confirmed by the position on that subject

taken by the Commission in the discussion at the twenty-second session. The principle to be established from the outset is the unitary principle of responsibility, which it should be possible to invoke in every case. In establishing that principle there is no question of embarking upon the task of defining the various categories of wrongful acts and the consequences of those acts. The reason for going into the above-mentioned details once again is that it is thought necessary for the Commission to bear in mind, throughout its work on this topic, the extremely complex nature of the notion of responsibility for an internationally wrongful act—with respect to which, incidentally (as was recognized by both the International Law Commission and the Sixth Committee of the General Assembly), the claims of progressive development of international law may assert themselves, alongside those of codification pure and simple, more forcefully than they do with respect to other notions.

43. The Commission will, of course, have to take a position on all these questions, as it decided after discussing the first report at its twenty-first session;<sup>39</sup> the time to do so will be in the second phase of its study of the topic, when it will have to define the content, forms and degrees of State responsibility for an internationally wrongful act. However, as the Special Rapporteur pointed out in his second report, it is by no means impossible that the implications of these questions may already become apparent, to some extent, in the first phase, devoted to determining the notion of the internationally wrongful act as an act generating the international responsibility of a State. During the consideration of the second report the Commission unanimously recognized that for the purpose of formulating the basic principle on responsibility for an internationally wrongful act it is essential to take this fact into account and adopt a text which is simple enough to avoid prejudging, one way or another, the questions the Commission will have to settle later.<sup>40</sup> In its commentary to the principle in question, the Commission will therefore point out that it is using the term "*international responsibility*" to mean, globally and without taking a position, *all the forms of new legal relationship which may be established in international law by a State's wrongful act*—irrespective of whether they are limited to a relationship between the State which commits the wrongful act and the State directly injured, or extend to other subjects of international law as well, and irrespective of whether they are centred on the guilty State's obligation to restore the rights of the injured State and to repair the damage caused, or whether they also involve the faculty of the injured State itself, or of other subjects, of imposing on the guilty State a sanction permitted by international law.

44. With regard to the other expression the Commission will have to use in stating the basic principle on international responsibility, i.e. that denoting the type of act generating responsibility with which we are concerned, a question of terminology may arise, as the

liberation movements, *apartheid* and racial discrimination, genocide and being the first to use weapons of mass destruction (Institute of the State and Law of the Academy of Sciences of the Soviet Union, *op. cit.*, pp. 421-422).

It should be noted that in British doctrine a writer such as Lauterpacht (see L. Oppenheim, *op. cit.*, pp. 355-356) opts for a distinction which recalls that made by the Soviet and Czechoslovak writers and gives as an example of international "crimes" the massacre of aliens resident in the territory of a State and the preparation and launching of an aggressive war.

<sup>37</sup> *I.C.J. Reports* 1970, p. 32.

<sup>38</sup> *Yearbook of the International Law Commission*, 1970, vol. II, p. 177, document A/CN.4/233.

<sup>39</sup> *Ibid.*, 1969, vol. II, p. 233, document A/7610/Rev.1, para. 81.

<sup>40</sup> *Ibid.*, 1970, vol. II, p. 307, document A/8010/Rev.1, para. 73.



Special Rapporteur pointed out in the second report. In that report, he noted that the terms used in the practice and the literature of different countries were not the same and that different words were sometimes used in the same language, though all of them were qualified by the adjective "international".<sup>41</sup> Thus, writers in French sometimes speak of a "délit" and sometimes of an "acte illicite" or "fait illicite".<sup>42</sup> Similarly, Italian writers sometimes use the term "delitto", but more often "atto illecito" or "fatto illecito".<sup>43</sup> The literature in Spanish uses the terms "delito", "acto ilícito" and "hecho ilícito".<sup>44</sup> In English writers we find the terms "tort", "delict", "delinquency", "illegal conduct", "illegitimate", "illegal", "unlawful" or "wrongful" "act" and "act or omission".<sup>45</sup> German writers speak of "Unrecht", "De-

likt" and "unerlaubte Handlung".<sup>46</sup> In the works of Russian writers we find expressions such as "mezhdunarodnii delikt", "nepravomernoe deistvie" or "bezhddeistvie", "nepravomernoe povedenie".<sup>47</sup> And this list could be extended further.

45. The Commission devoted particular attention to the question of terminology at its twenty-second session. In view of the multiplicity of terms, the Commission considered it desirable to adhere in principle to the terminology employed hitherto in the report prepared by the Special Rapporteur. The French-speaking members agreed that the expression "fait illicite international" (or its equivalent "fait internationalement illicite") were usually preferable to "délit" or other similar terms, which may sometimes take on a special shade of meaning in certain systems of municipal law. They also agreed with the Special Rapporteur that the expression "fait illicite" seemed more accurate than "acte illicite", mainly for the practical reason that illicit conduct often takes the form of an omission, and this is not properly conveyed by the word "acte", the etymology of which suggests the idea of action. Furthermore, and especially from the point of view of legal theory, this preference seems even more justified, since the French term "acte" is ordinarily used in law to denote a manifestation of will intended to produce the legal consequences determined by this will, which certainly does not apply to illicit conduct.<sup>48</sup> For the same reasons the majority of the Spanish-speaking members favoured the terms "hecho ilícito internacional" and "hecho internacionalmente ilícito". Others, however, expressed a preference

<sup>41</sup> On these questions of terminology see, in particular, I. von Münch, *Das Völkerrechtliche Delikt in der Modernen Entwicklung der Völkerrechtsgemeinschaft* (Frankfurt-am-Main, Kepler, 1963), pp. 11 et seq.

<sup>42</sup> The expression "délit international" is used by G. Scelle (*Précis de droit des gens — Principes et systématique* (Paris, Sirey, 1934), part II, p. 61). It is to be found in the replies of some Governments (Switzerland, Netherlands) to the various points of the request for information sent to Governments by the Preparatory Committee for the 1930 Conference (League of Nations, *Bases of Discussion...* (op. cit.), pp. 13 and 65), and also in the French texts of foreign writers such as: K. Strupp, *Éléments...* (op. cit.), pp. 325 et seq.; R. Ago, "Le délit international", *Recueil des cours...* (op. cit.), pp. 415 et seq.; Th. C. Eustathiades, "Les sujets...", *Recueil des cours...* (op. cit.), pp. 419 et seq. The term "acto illicite" is used by H. Kelsen ("Théorie...", *Recueil des cours...* [op. cit.], pp. 16 et seq.) as the French equivalent of the German "Unrecht" and the English "delict". The term "acte illicite" is preferred by P. Guggenheim (op. cit., pp. 1 et seq.) and by P. Reuter ("Principes...", *Recueil des cours...* [op. cit.], pp. 585 and 590). The term "fait illicite" is used by J. Basdevant ("Règles générales du droit de la paix", *Recueil des cours...* 1936-IV (Paris, Sirey, 1937), t. 58, pp. 665 et seq.), by J. L'Huilier (*Éléments de droit international public* [Paris, Rousseau, 1950], pp. 354 et seq.) and by Ch. Rousseau (*Droit international public* [Paris, Sirey, 1953], p. 361).

<sup>43</sup> D. Anzilotti (*Corso...* (op. cit.), pp. 384 et seq.) speaks of "fatti illeciti internazionali". So do R. Ago ("Illecito commissivo e illecito omissivo nel diritto internazionale", *Diritto internazionale* (Milan, Istituto per gli Studi di Politica Internazionale, 1938), pp. 9 et seq.) and G. Morelli (op. cit., pp. 340 et seq.). G. Balladore Pallieri (op. cit., loc. cit.), A. P. Sereni (op. cit., pp. 1503 et seq.) and R. Quadri (*Diritto internazionale pubblico*, 5th ed. [Naples, 1968], pp. 584 et seq.) speak of "atti illeciti".

<sup>44</sup> S. Planas Suárez (*Tratado de Derecho Internacional Público* [Madrid, Hijos de Reus, 1916], t. 1, p. 167) and A. Ulloa (*Derecho internacional publico*, 4th ed. [Madrid, Ediciones Iberoamericanas, 1957], t. II, p. 258) prefer "hechos ilícitos"; J. Garde Castillo ("El acto ilícito internacional", *Revista española de derecho internacional* (Madrid, Consejo Superior de Investigaciones Científicas, 1950), vol. III, No. 1, pp. 121 et seq.) uses "acto ilícito"; Podesta Costa (*Manual de derecho internacional publico* (Buenos Aires, 1947), pp. 200 et seq.) uses "hechos lesivos"; L. M. Moreno Quintana and C. M. Bollini Shaw (*Derecho internacional publico-Sistema nacional del derecho y política internacional* (Buenos Aires, Librería del Colegio, 1950), p. 166) use "delito internacional". In the Portuguese literature, H. Accioly (*Tratado de direito internacional publico*, 2nd ed. (Rio de Janeiro, 1956), t. I, p. 275) uses the term "acto ilícito".

<sup>45</sup> For the term "tort", see G. Schwarzenberger (op. cit., pp. 562 et seq.); for "delict", see H. Kelsen (*Principles...* (op. cit.), p. 7 et seq.) and A. D. McNair (*International Law Opinions* (Cambridge, University Press, 1956), vol. II, p. 207); for "delinquency", see L. Oppenheim (op. cit., pp. 338 et seq.); for "illegal conduct", see C. Eagleton (*The Responsibility of States...* [op. cit.], p. 6); for "illegitimate act", see A. Ross, (*A Textbook of International Law* (London, Longmans, Green, 1947), p. 242); for "illegal act",

see C. C. Hyde (*International Law chiefly as Interpreted and Applied by the United States*, 2nd ed. [Boston, Little, Brown, 1947], vol. 2, p. 884) and I. Brownlie (*Principles of Public International Law* (Oxford, Clarendon Press, 1966), p. 354); for "unlawful act", see B. Cheng (op. cit., pp. 170 et seq.); for "unlawful act or omission", see E. Jiménez de Aréchaga (op. cit., p. 534); and for "wrongful act or omission", see F. V. García Amador ("State Responsibility...", *Recueil des cours...* [op. cit.], p. 377) and C. F. Amerasinghe (*State Responsibility for Injuries to Aliens* (Oxford, Clarendon Press, 1967), p. 39). However, the expression "illicit action" is also employed for example in the decision of the Italian-United States Conciliation Commission (United Nations, *Reports of International Arbitral Awards*, vol. XIV, [United Nations publication, Sales No. 65.V.4], p. 163).

<sup>46</sup> The term "Unrecht" is that used by Kelsen ("Unrecht...", *Zeitschrift...* (op. cit.), pp. 481 et seq.), Verdross (op. cit., pp. 372 et seq.) and Wengler (op. cit., pp. 489 et seq.). Strupp ("Das völkerrechtliche Delikt", *Handbuch...* (op. cit.), pp. 4 et seq.) and most of the older German writers, followed, among the most modern, by von Münch, (op. cit., pp. 11 et seq.) and G. Dahm (op. cit., pp. 177 et seq.), prefer the term "Delikt". The expression "unerlaubte Handlung" (illicit conduct) is used by F. Klein (*Die mittelbare Haftung im Völkerrecht* (Frankfurt-am-Main, Klostermann, 1941), p. 2).

<sup>47</sup> The term "délit" is used by Levin ("Ob otvetstvennosti...", *Sovetskoe...* (op. cit.), p. 339 of the French summary); the terms "nepravomernoe deistvie" and "nepravomernoe bezhddeistvie" (action et inaction illicites) by Tunkin (*Teoria...* [op. cit.], p. 431). The authors of volume V of the *Kurs...* (Institute of the State and Law of the Academy of Sciences of the Soviet Union, op. cit.) use both the term (p. 420) "delikt" and the term "nepravomernoe povedenie" (wrongful conduct).

<sup>48</sup> In this connexion, see R. Ago, "Le délit international", *Recueil des cours...* (op. cit.), pp. 438 et seq.

for the expression "acto ilícito", both in the International Law Commission<sup>49</sup> and later in the Sixth Committee of the General Assembly. The Special Rapporteur will leave the final choice to the Spanish-speaking experts, but would venture to express the belief that the reasons which militate in favour of using the term "fait" rather than "acte" in French should also be valid for the legal terminology of the other Romance languages. In English, the terms previously used as the equivalents of the French expressions "fait illicite international" and "fait internationalement illicite" were "international wrongful act" and "internationally wrongful act". The English-speaking members of the Commission said they still considered those terms the most appropriate, since the term "fait" had no real equivalent in English. For the purposes of the Russian version, the Commission decided to rely on the Russian-speaking members to select the terms which best conveyed the same idea. It is obvious, in any event—and almost goes without saying—that the choice of one particular term rather than another does not affect the determination of the conditions for, and characteristics of, an act generating international responsibility, with which most of the articles in the first part of this report will be concerned.

46. In arbitration cases and legal literature some definitions of the basic principle on international responsibility are to be found which, though the terms vary, all contain the statement that there can be no responsibility in international law without a prior wrongful act.<sup>50</sup> In submitting his second report to the Commission the Special Rapporteur drew attention to the desirability of avoiding formulations of this kind, so as not to convey the erroneous impression that, in the Commission's opinion, responsibility could arise only from a wrongful act. Although, as is mentioned in paragraph 20 of the introduction to this report, the Commission at its twenty-second session, after a lengthy discussion, confirmed its previous decision to devote itself for the time being solely to international responsibility for wrongful acts,<sup>51</sup>

it has nevertheless generally recognized the existence of cases in which States may incur international responsibility by the performance of lawful acts. This is a point which, as recalled in paragraph 20 above, was stressed by several members of the International Law Commission<sup>52</sup> and also by some members of the Sixth Committee. Hence, as has been done in the title of this section, it seems particularly necessary to adopt in the definition of the principle a formula which, though stating that an internationally wrongful act is a source of responsibility, does not lend itself to an interpretation that might automatically exclude the existence of another possible source of international responsibility.

47. In his second report, the Special Rapporteur considered it advisable to mention one more point before passing on to the proposed formulation of the basic general principle on the international responsibility of States. He pointed out that the normal situation which arises as the result of an internationally wrongful act involves the creation of international responsibility borne by the State which has committed the wrongful act. There are, however, some special cases—usually called cases of indirect responsibility, or responsibility for acts of others—which constitute an exception to the normal situation mentioned above. In these cases the responsibility arising from a particular wrongful act does not attach to the State which committed the act, because it is not free to determine its conduct in the sphere in which the wrongful act was committed. The responsibility then attaches to another State, which is in a position to control the action of the first State and to restrict its freedom. The Special Rapporteur observed that these special situations should be studied separately, at which time the Commission would decide whether they should be covered by a special rule. At that stage it was merely a question of deciding whether in the definition of the general principle on responsibility it would be necessary to adopt a formula which expressly leaves open the possibility of allowing for special cases in which international responsibility is attributed to a State other than that to which the internationally wrongful act is attributed. The Commission discussed this aspect of the subject and a large majority of its members seemed disposed to recognize the existence of such cases and the need to deal with them in the draft. In view of their exceptional nature, however, the Commission did not feel it necessary to take them into account in the initial phase of the work, and considered that they should not influence the formulation of the basic principle.

48. In conclusion, and taking into account all the comments made by the members of the Commission during the preliminary discussion, the Special Rapporteur proposes that the first draft article on State responsibility should be formulated as follows:

<sup>49</sup> Especially Mr. Alcívar (see *Yearbook of the International Law Commission*, 1970, vol. I, p. 217, 1080th meeting, paras. 22-24).

<sup>50</sup> On two occasions, for example, the Mexico/United States General Claims Commission, set up under the Convention of 8 September 1923, stated that: "Under international law, apart from any convention, in order that a State may incur responsibility it is necessary 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" (Case of *Dickson Car Wheel Company* [July 1931], United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No.: 1951.V.1.), p. 678. For a statement in similar terms, see also the case of the *International Fisheries Company* [July 1931] *ibid.*, p. 701).

In the literature, several writers support the view that international responsibility can derive only from an internationally wrongful act. L'Huillier (*op. cit.*, p. 354) is one of the most explicit, when he says that: "*La responsabilité internationale de l'Etat ne peut être mise en jeu que par un fait qui soit imputable à cet Etat et qui présente un caractère illicite au regard du droit international.*" [The international responsibility of a State can be generated only by an act imputable to that State and which is wrongful under international law.] (Translation by the United Nations Secretariat). See also Quadri (*op. cit.*, pp. 590 *et seq.*).

<sup>51</sup> See *Yearbook of the International Law Commission*, 1969, vol. II, p. 233, document A/7610/Rev.1, para 83.

<sup>52</sup> In particular Mr. Ruda, Mr. Ramangasoavina, Mr. Tammes, Mr. Albónico, Mr. Eustathiades and Mr. Castañeda at the twenty-first session of the Commission, and Mr. Sette Câmara, Mr. Ushakov, Mr. Ustor, Mr. Thiam, Mr. Bartoš, Mr. Castañeda and Mr. Elias at the twenty-second session.



**Article 1. Principle attaching responsibility to every internationally wrongful act of the State**

Every internationally wrongful act of a State involves the international responsibility of that State.

**2. CONDITIONS FOR THE EXISTENCE OF AN INTERNATIONALLY WRONGFUL ACT**

49. Having stated the basic general principle that every internationally wrongful act is a source of international responsibility for the State, the problem is to determine, in correlation with that principle, the prerequisites for establishing the existence of an internationally wrongful act. For this purpose, the following two elements are traditionally distinguished, both of which must be present:

(a) An element generally called a *subjective element*, consisting of conduct which must be attributable, not to the individual or group of individuals which has actually engaged in it, but to the State as a subject of international law;

(b) An element usually called an *objective element*: the State to which the conduct in question has been legally attributed must, by that conduct, have failed to fulfil an international obligation incumbent on it.

50. With regard to the first element, it will be noted that in judicial decisions and in practice, as well as in works on international responsibility, the term "imputability" is often used to indicate that the conduct in question must be the conduct of a State, that is, that the conduct can be attributed to the State. The term "imputation" is used to designate that attribution. Experts on international law have long stressed the fact that when these terms are used in relation to the international responsibility of States they do not have the same meaning as, for example, in municipal criminal law, where "imputability" sometimes indicates the agent's state of mind, capacity to understand and to will as the basis of responsibility<sup>53</sup> and where "imputation" may mean the inculcation of a subject by a judicial authority. Despite these explanations by the writers mentioned, the Commission was particularly anxious to avoid the ambiguities inherent in notions which can evoke very different ideas because of their meaning in certain municipal criminal law systems. It is for that reason that at the end of the discussion of the second report on State responsibility at the twenty-second session, the Commission concluded, at the suggestion of some of its members<sup>54</sup> that it would

<sup>53</sup> See D. Anzilotti, *Teoria generale*... (op. cit.), pp. 83 and 121. The same author stresses that in international law the term "imputability" does not and cannot have any meaning other than the general meaning of a term linking the wrongful action or omission with its author. Clearly, the term must be interpreted in this way when it is used in an international judicial or arbitral decision, in a statement of position by a Government or in the theories of a writer on international law. This was also the sense in which the term was used by the Special Rapporteur in his second report.

<sup>54</sup> Particularly Mr. Ushakov (see *Yearbook of the International Law Commission*, 1970, vol. I, p. 221, 1080th meeting, paras. 72-75).

be better for it to avoid using the expressions "imputability" and "imputation" and that when speaking in its own name it would be better for it to use the term "attribution" to indicate the simple fact of attaching to the State a given action or omission. That conclusion is reflected in this report.

51. With regard to the second element, the members of the International Law Commission (and several members of the Sixth Committee) were in general agreement with the Special Rapporteur that expressions such as "failure to carry out an international obligation" or "breach of an international obligation" are clearly more appropriate than the expressions "breach of a rule" or "breach of a norm of international law", which are used by some authors<sup>55</sup> and are sometimes even used simultaneously with the first-mentioned terms.<sup>56</sup> The rule is law in the objective sense. Its function is to attribute in certain conditions subjective legal situations—rights, faculties, powers and obligations—to those to whom it is addressed. It is these situations which, as their global appellation indicates, constitute law in the subjective sense; it is in relation to these situations that the subject's conduct operates. The subject freely exercises or refrains from exercising its subjective right, its faculty or power, and freely fulfils or violates its obligation, but it does not "exercise" the rule and likewise does not "violate" it. It is its *duty* which it fails to carry out and not the principle of objective law from which that duty flows. This does not mean that the obligation whose breach is the constituent element of an internationally wrongful act must necessarily flow from a rule, at least in the proper meaning of that term. The obligation in question may very well have been created and imposed upon a subject by a particular legal act, a decision of a judicial or arbitral tribunal, a decision of an international organization, and so on. The breach of an obligation of this character and origin—as will be brought out later—is just as wrongful under international law as failure to carry out an obligation established by a rule proper; and it would be totally artificial to derive the obligation in question from the rule which lays down certain particular proceedings as separate sources of international obligations.<sup>57</sup>

<sup>55</sup> See K. Strupp, "Das völkerrechtliche Delikt", *Handbuch*... (op. cit.), pp. 6, 8-9, and *Eléments*... (op. cit.), p. 327; P. Schoen, op. cit., p. 21.

<sup>56</sup> This was the case in Anzilotti's earlier works: *Teoria generale*... (op. cit.), p. 84, and *La responsabilité internationale*... (op. cit.), p. 170. The same formula is also to be found in A. Verdross ("Règles générales du droit international de la paix", *Recueil des cours*..., 1929-V [Paris, Hachette, 1931], t. 30, pp. 463 *et seq.*), G. Balladore Pallieri (*Diritto internazionale pubblico*, 8th ed. [Milan, 1962], pp. 245-246), J. Garde Castillo (op. cit., pp. 126-127), P. Guggenheim (op. cit., p. 3), W. Wengler (op. cit., p. 489), A. Schüle (op. cit., pp. 329-330), A. P. Sereni (op. cit., p. 1503), and D. B. Levin (*Otvetsstvennost gosudarstv*... (op. cit., p. 51).

<sup>57</sup> Quite apart from this, as far as the characterization of the wrongful act is concerned, the idea of the breach of a rule might also be misleading because there are cases of the invalid exercise of a faculty or power which have nothing to do with a wrongful act, but which nevertheless consist essentially in conduct which is at variance with what the rule would require to produce certain legal effects. In this connexion, see R. Ago, "Le délit international", *Recueil des cours*... (op. cit.), pp. 434 and 441-442; and G. Morelli, op. cit., p. 347.

52. Disregarding these terminological questions and more generally the degree of precision of the expressions which are sometimes used, there is no doubt that the two elements mentioned above are clearly recognizable, for example, in the passage already cited from the judgement of the Permanent Court of International Justice in the *Phosphates in Morocco Case*, in which the Court explicitly connects the creation of international responsibility with the existence of an "act being attributable to the State and described as contrary to the treaty right[s] of another State".<sup>59</sup>

They are also to be found in the arbitral award in the *Dickson Car Wheel Company Case*, delivered in July 1931 by the Mexico/United States of America General Claims Commission, where the required condition for a State to incur international responsibility is stated to be the fact "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>60</sup>

With regard to State practice, attention may be drawn to the terms in which the Austrian Government replied to point II of the request for information addressed to Governments by the Preparatory Committee of the 1930 Conference for the Codification of International Law:

There can be no question of a State's international responsibility unless it can be proved that the State has violated one of the international obligations incumbent upon States under international law.<sup>61</sup>

53. In the literature of international law, the combined facts that a certain conduct is of such a nature that it can be attributed to a State as a subject of international law and that that conduct constitutes a violation of an international obligation of that State are very widely considered to be the essential elements for recognition of the existence of a wrongful act giving rise to an international responsibility. Among the older formulations, that of Anzilotti remains a classic;<sup>62</sup> among the more recent, those by Sereni,<sup>63</sup> Levin,<sup>64</sup> Amerasinghe,<sup>65</sup>

Jiménez de Aréchaga<sup>66</sup> and that given in the *Restatement of the Law* by the American Law Institute<sup>68</sup> are the clearest. But generally speaking it may be said that most writers are substantially in agreement on this point, irrespective of the period in which they were writing.<sup>67</sup> The rare reservations expressed by some

law; (B) the violation of an international obligation manifested in that conduct] (Translation by the United Nations Secretariat).

<sup>59</sup> French summary of "*Ob otvetstvennosti...*" (*op. cit.*), [see foot-note 36 above], p. 210:

"Pour qu'il y ait responsabilité internationale, deux éléments doivent être réunis: un élément objectif, la violation d'une norme de droit international qui cause un préjudice; un élément subjectif, l'imputation de cette violation à l'Etat ou à un autre sujet du droit international."

[For international responsibility to exist, two elements must be present: an objective element, the violation of a norm of international law which causes injury; a subjective element, the imputation of that violation to a State or to another subject of international law] (Translation by the United Nations Secretariat).

<sup>60</sup> C. F. Amerasinghe, *op. cit.*, p. 37. In stating the first three of the four conditions he considers necessary for the existence of State responsibility for an injury to an alien, Amerasinghe expresses himself as follows:

"(1) There must be an act or omission of an individual or an organ consisting of a group of individuals;

"(2) This act or omission must be in breach of an obligation laid down by a norm of international law;

"(3) The act or omission must be imputable to the defendant State;"

<sup>61</sup> E. Jiménez de Aréchaga, *op. cit.*, p. 534. The first two of the three elements which this author considers essential for the establishment of international responsibility are summarized as follows:

"(i) An act or omission that violates an obligation established by a rule of international law in force between the State responsible for the act or omission and the State injured thereby.

"(ii) The unlawful act must be imputable to the State as a legal person."

<sup>62</sup> American Law Institute, *Restatement of the Law, Second, Foreign Relations Law of the United States* (Saint Paul (Minn.), American Law Institute Publishers, 1965), pp. 497 *et seq.* Part IV of this work (see above, page 193, document A/CN.4/217/Add.2), devoted to the responsibility of States for injuries to aliens, gives in section 164 as the first rule in the context of the general principles of responsibility the rule that:

"(1) A State is responsible under international law for injury to an alien caused by conduct subject to its jurisdiction, that is attributable to the State and wrongful under international law."

<sup>67</sup> See, among many other writers: Ch. de Visscher, "La responsabilité des Etats", *Bibliotheca Visseriana* (*op. cit.*), pp. 90-91; R. Ago, "Le délit international", *Recueil des cours...* (*op. cit.*), pp. 441 *et seq.*, 450 *et seq.*; J. G. Starke, "Imputability of International Delinquencies", *The British Year Book of International Law*, 1938 (London), p. 106; C. Th. Eustathiades, "Principes généraux de la responsabilité internationale des Etats", *Etudes de droit international*, 1929-1959 (Athens, Klissionis, 1959), t. 1, p. 515, and "Les sujets...", *Recueil des cours...* (*op. cit.*), p. 422; A. V. Freeman, *op. cit.*, p. 22; A. Ross, *op. cit.*, p. 242; J. L'Huillier, *op. cit.*, p. 354; J. Garde Castillo, *op. cit.*, p. 124; G. Morelli, *op. cit.*, pp. 342 *et seq.*; Ch. Rousseau, *op. cit.*, p. 361; P. Guggenheim, *op. cit.*, pp. 1-2 and 4-5; B. Cheng, *op. cit.*, p. 170; T. Meron, "International Responsibility of States for Unauthorized Acts of their Officials", *The British Year Book of International Law*, 1958 (London, 1959), pp. 86-87; G. Schwarzenberger, *A Manual of International Law*, 4th ed. (London, Stevens, 1960), vol. 1, p. 163; P. Reuter, "Principes...", *Recueil des cours...* (*op. cit.*), p. 585; C. G. Ténékidès, "Responsabilité internationale", *Répertoire de droit international* (Paris, Dalloz, 1969), vol. II, pp. 783 *et seq.*

Some of these authors and others cited previously add a further element to the two constituent elements of an internationally wrongful act suggested here. This will be discussed later. It should

(Continued on next page.)

<sup>59</sup> *Phosphates in Morocco Case* (Preliminary objections), 14 June 1938. See *P.C.I.J.*, series A/B, No. 74, p. 28. [Italics supplied by the Special Rapporteur.]

<sup>60</sup> United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No.: 1951.V.1), p. 678. [Italics supplied by the Special Rapporteur.]

<sup>61</sup> League of Nations, *Bases of Discussion...* (*op. cit.*), p. 21. [Italics supplied by the Special Rapporteur.]

<sup>62</sup> *Teoria generale...* (*op. cit.*), p. 83:

"La responsabilità nasce dall'ingiusta violazione del diritto altrui e genera l'obbligo della riparazione in quanto sia collegata con un soggetto agente, sia cioè è imputabile a questo".

[Responsibility arises from the wrongful violation of the right of another and generates the obligation to make reparation in so far as it is attributable to a subject which acts, that is, imputable to it] (Translation by the United Nations Secretariat). See also the same author's *La Responsabilité internationale...* (*op. cit.*), pp. 161-162, and *Corso...* (*op. cit.*), p. 386.

<sup>63</sup> *Diritto internazionale* (*op. cit.*), p. 1505:

"Due sono quindi gli elementi costitutivi dell'atto illecito internazionale: A) un comportamento di un soggetto di diritto internazionale; B) la violazione, che in tale comportamento si concreta, di un obbligo internazionale."

[There are, therefore, two constituent elements of the internationally wrongful act: (A) a conduct by a subject of international

writers concerning the necessity or utility of what has been called the subjective element of the internationally wrongful act are sometimes prompted by the idea, isolated and clearly contradicted by judicial decisions and practice, that the State is never responsible for "its own" acts, but only for acts of individuals—individuals who are State organs or else simply private persons. In other cases it is because of logical coherence with the premises adopted that some authors think they must eliminate the legal operation of attaching the activity of the individual-organ to the collective entity. According to one view, the only possible "legal imputation" is that of attributing to a certain entity the legal effects of a fact, and thus the attribution of a fact as such to the entity could be only a material or a psychological imputation. According to another view, it is necessary to replace the idea of legal imputation by that of recognition of a link of material causality because of the "real" character of collective entities: the State first and foremost. More often, finally, such reservations are simply the reflection of the concern caused by the usual recourse in this connexion to the terms "imputability" and "imputation", which are a source of confusion, and which the Commission specifically decided to set aside and replace by others less likely to give rise to misunderstanding.<sup>68</sup> It is therefore easy to understand why the Commission, at its twenty-second session, had no difficulty in confirming the

(Foot-note 67 continued)

also be noted that in some of the works mentioned the concept of the "wrongful act" is used to denote the objective element which must be combined with the subjective element if international responsibility is to exist. In reality, the subjective element is also a condition for the existence of an internationally wrongful act, not an extraneous condition for the creation of responsibility by a wrongful act.

<sup>68</sup> The first type of reservation is exemplified by A. Soldati (*La responsabilité des Etats dans le droit international* (Paris, Librairie de jurisprudence ancienne et moderne, 1934), pp. 75 *et seq.*). For the second view, one may quote G. Arangio-Ruiz (*Gli enti soggetti dell' ordinamento internazionale* (Milan, Giuffrè, 1951), vol. I, pp. 128 *et seq.*, 357 *et seq.*); and for the third, Quadri (*op. cit.*, pp. 587-588). The last type of reservation is exemplified by a young Soviet writer: V. N. Elynchev ("Problema vmenenia v mezhdunarodnom prave", *Pravovedenie* (Leningrad, 1970), No. 5, pp. 83 *et seq.*) seems primarily concerned with preventing the introduction, through the notion of imputability, of the erroneous idea that international responsibility would only be created following a subsequent external operation corresponding to some extent to the inculcation carried out by a judicial organ in municipal law. In that connexion, he criticizes the idea of another Soviet writer, Petrovskij, who, precisely, conceives imputation as having to be established in international law by an agreement between the offending State and the injured State. Elynchev draws attention to an undeniable fact, namely, that the responsibility is created at the time when the internationally wrongful act is committed and that it is entirely independent of a verification voluntarily undertaken by the State which committed the wrongful act. However, the idea of imputation which he thus criticizes has really nothing to do with the very simple idea of attaching the conduct of the individual-organ to the State. As explained at the beginning of this section—a point to which we shall revert later—what is called the subjective element of the internationally wrongful act expresses merely the requirement that the conduct which is recognized as constituting a failure to fulfil an international obligation should appear, at the international level, as conduct of the State and not as conduct which is alien to the State. Brownlie (*op. cit.*, p. 356), fears—although the reason is not apparent—that the notion of imputability may imply the application of the idea of vicarious responsibility to cases in which he considers it is entirely irrelevant.

agreement it had previously reached as to the need to recognize, in any internationally wrongful act, the presence of the two elements, one subjective and one objective, mentioned here: two elements whose logical distinction does not prevent them from being indissolubly linked in any specific situation.<sup>69</sup>

54. In the analysis of each of these two elements—namely, on the one hand the fact that some particular conduct is attributed to the State as a subject of international law and on the other the failure to fulfil an international obligation incumbent on the State which that conduct constitutes—various aspects stand out, for some of which specific criteria have been established in general international law. The following chapters will be devoted to a detailed examination of these aspects. They will deal, in particular, with the conditions under which international law permits some particular conduct to be considered as conduct of the State in the different cases that may occur, and the conditions for establishing, again in the different possible cases, that the violation of an international obligation has been brought about by that conduct. However, in order to define in principle the conditions for the existence of an internationally wrongful act, certain points relating to the two elements in question must first be established, precisely in order to permit a formulation of those conditions which will not be open to criticism. In the same connexion, the question must also be raised whether these are the only two elements required for the existence of a wrongful act in international law or whether others are also necessary. We must therefore pause for a moment for a preliminary examination of these questions.

55. With regard to the conduct which must be susceptible of being considered as conduct of the State, what can be said in general is that it can be either positive (action) or negative (omission). It can even be said that the cases in which the international responsibility of a State has been invoked on the basis of an omission are perhaps more numerous than those based on action taken by a State. There have been innumerable cases in which States have been held responsible for damage caused by individuals. As will be shown later, these alleged cases of State responsibility for the acts of individuals are really cases of responsibility of the State for omissions by its organs: the State is responsible for having failed to take appropriate measures to prevent or punish the individual's act.

56. Even apart from this hypothesis, moreover, there are many cases in which an internationally wrongful act consists in an omission, and whenever an international tribunal has found a wrongful omission to be a source of international responsibility, it has done so in terms just as unequivocal as those used with reference to active conduct.<sup>70</sup> Similarly, the States which

<sup>69</sup> The close connexion between the two elements was particularly stressed by Mr. Kearney (see *Yearbook of the International Law Commission*, 1970, vol. I, p. 218, 1080th meeting, paras. 38 *et seq.*).

<sup>70</sup> The international responsibility of a State for a wrongful omission was explicitly affirmed by the International Court of

replied to point V of the request for information submitted to them by the Preparatory Committee for the 1930 Conference for the Codification of International Law expressly or implicitly recognized the principle that the responsibility of the State can be involved by the omissions as well as by the actions of officials,<sup>71</sup> and this principle is confirmed in the articles adopted by the Third Committee of the Conference on first reading.<sup>72</sup> Finally it can be said that the principle has been accepted without question by writers<sup>73</sup> and explicitly or implicitly adopted in all the private codification drafts.<sup>74</sup> Thus, since this point is not disputed, and was accepted without opposition in the Commission, there is no need to dwell on it further, except perhaps to stress that it seems particularly advisable to state expressly, in the statement of conditions for the existence of an internationally wrongful act, that internationally wrongful

conduct attributed to a State can equally well be an omission as an action.

57. What is meant by stipulating that some particular conduct, in order to be qualified as an internationally wrongful act, must first and foremost be attributable to a State? This question can be answered easily by observing that what we are seeking to stress is simply that it must be possible to consider the action or omission in question as an "act of the State". And since the State, as a legal person, is not physically capable of conduct,<sup>75</sup> it is obvious that all that can be attributed to a State is the action or omission of an individual or of a group of individuals, whatever its composition may be.<sup>76</sup> It is not that the State is merely

Justice in the *Corfu Channel Case*. After specifying that "the obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them" and noting that Albania "neither notified the existence of the minefield nor warned the British warships of the danger they were approaching", the Court concluded that: "These grave omissions involve the international responsibility of Albania" [Italics supplied by the Special Rapporteur] [*Corfu Channel Case (Merits)*, Judgment of 9 April 1949, *I.C.J. Reports 1949*, pp. 22-23]. See also the arbitral award of 10 July 1924 in the *Affaire relative à l'acquisition de la nationalité polonaise*: United Nations, *Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No.: 1948.V.2), p. 425.

<sup>71</sup> League of Nations, *Bases of Discussion...* (op. cit.), pp. 70 et seq.; and *Supplement to volume III* (op. cit.), pp. 2, 3, 12 et seq.

<sup>72</sup> See *Yearbook of the International Law Commission, 1956*, vol. II, pp. 225-226 (articles 6, 7, 8), document A/CN.4/96, annex 3.

<sup>73</sup> For studies concerning the specific character of the delict of omission in international law, see: R. Ago, "Illecito commissivo...", *Diritto internazionale* (op. cit.), pp. 9 et seq.; P. A. Zannas, *La responsabilité internationale des Etats pour les actes de négligence* (Montreux, Imprimerie Ganguin et Laubscher, 1952); G. Perrin, "L'agression contre la Légation de Roumanie à Berne et le fondement de la responsabilité internationale dans les délits d'omission", *Revue générale de droit international public* (Paris), 3rd series, t. XXVIII, No. 3 (July-Sept. 1957), pp. 410 et seq.; D. Lévy, "La responsabilité pour omission et la responsabilité pour risque en droit international public", *ibid.*, t. XXXII, No. 4 (Oct.-Dec. 1961), pp. 744 et seq.

<sup>74</sup> See rule I of the draft on "international responsibility of States for injuries on their territory to the person or property of foreigners", adopted by the Institute of International Law in 1927 (*Annuaire de l'Institut de droit international, 1927 (session de Lausanne)* (Paris), t. III, p. 330; *Yearbook of the International Law Commission, 1956*, vol. II, p. 227, document A/CN.4/96, annex 8); article 1 of the draft treaty concerning the responsibility of a State for internationally illegal acts, prepared by Karl Strupp in 1927 (*ibid.*, 1969, vol. II, p. 151, document A/CN.4/217 and Add. 1, annex IX); article 1, para. 2, of the draft convention prepared by the Deutsche Gesellschaft für Völkerrecht in 1930 (*ibid.*, p. 149, annex VIII); article 1 of the draft convention on the international responsibility of States for injuries to aliens, prepared by the Harvard Law School in 1961 (*ibid.*, p. 142, annex VII); article II of the Principles of international law that govern the responsibility of the State in the opinion of Latin American countries, prepared by the Inter-American Juridical Committee in 1962 (*ibid.*, p. 153, annex XIV); point 3 of the General Rule of State responsibility formulated in section 164 of the *Restatement of the Law by the American Law Institute* (see above, p. 193, document A/CN.4/217/Add.2).

<sup>75</sup> "States can act only by and through their agents and representatives" (Advisory Opinion No. 6, of February 3rd 1923, on

certain questions relating to settlers of German origin in the territory ceded by Germany to Poland, *P.C.I.J.*, series B, No. 6, p. 22).

The expression "legal person" is not used here in its strictly technical meaning, but only as opposed to the expression "physical person", to indicate a collective entity that can act only through the actions of human beings. According to the strictly technical meaning of the expression "legal person", the State is not a "legal person" of international law, but only of national law. See, on this point—and without taking into account the description of the State as a subject of international law which is respectively made by these authors—Giuliano, *La comunità internazionale e il diritto* (Padua, 1950), pp. 241 et seq.; and especially Arangio-Ruiz, *op. cit.*, pp. 26 et seq., 95 et seq., 378 et seq.

<sup>76</sup> See M. Marinoni, *La responsabilità degli Stati per gli atti dei loro rappresentanti secondo il diritto internazionale* (Rome, Arthenaem, 1913), pp. 33 et seq.: "Gli Stati, come le così dette persone giuridiche, non possono non ricorrere all'opera di individui, la cui attività debba giuridicamente valere per gli Stati medesimi [...]. Nella realtà fisica non v'è un ente Stato [...], ma vi sono soltanto azioni, voleri di individui, che l'ordine giuridico può far valere per un soggetto di diritto diverso da quella persona fisica che li ha posti in essere" [States, like so-called legal entities, cannot but have recourse to the action of individuals, whose activities must be legally attributable to the States themselves [...]. In physical reality, there is no entity "State" [...], but only actions and expressions of will of individuals, which the legal order can attribute to a subject of law other than the physical person who is their author] (Translation by the United Nations Secretariat); K. Strupp, "Das völkerrechtliche Delikt", *Handbuch...* (op. cit.), pp. 35-36: "Denn der Staat [...] bedarf physischer Personen [...], deren Willen und Handeln in der physisch-natürlichen Welt Akte von Individuen, in der juristischen solche der Gesamtheit, d. h. des Staates, sind" [For the State [...] requires physical persons [...] whose will and conduct in the physical-natural world are acts of individuals, but in the legal world are acts of the whole community, i.e. the State.] (Translation by the United Nations Secretariat); D. Anzilotti, *Corso...* (op. cit.), p. 222: "ci sono atti e volizioni d'individui che valgono giuridicamente come atti e volizioni dello Stato, perché il diritto li imputa allo Stato, ossia ne fa il presupposto di doveri e di diritti dello Stato" [There are actions and expressions of will of individuals which are in law deemed to be actions and expressions of will of the State, because the law imputes them to the State, i.e. makes them the origin of duties and rights of the State] (Translation by the United Nations Secretariat); H. Kelsen, "Unrecht...", *Zeitschrift...* (op. cit.), pp. 496-497; *Principles...* (op. cit.), p. 117; and "Théorie...", *Recueil des cours...* (op. cit.), p. 88: "L'Etat est responsable des violations du droit international qui sont le résultat de comportements individuels pouvant être interprétés comme des comportements de l'Etat. Il faut donc que les comportements de certains individus puissent être imputés à l'Etat" [The State is responsible for violation of international law resulting from individual conduct which can be interpreted as being the conduct of the State. Accordingly, the conduct of certain individuals must be imputable to the State.] (Translation by the United Nations Secretariat); and p. 78: "Quand nous disons de

(Continued on next page.)

an abstract idea or a figment of the imagination, as certain jurists claim. In our view the State is an absolutely real entity, in municipal law as well as in international law.

58. That being so, the essential question is when and how an "act of the State" can be discerned in an action physically committed by an individual or a group of individuals. The problems which arise in this connexion consist precisely in determining what individual conduct can be attributed to the State for the purposes with which we are concerned and in what conditions such conduct must have taken place in order for that attribution to be possible. The many difficult problems involved will be analysed in detail in due course; for the time being, a general outline would seem to be sufficient. The first point to be made is that attribution to the State is necessarily, because of the very nature of the State, a legal connecting operation which as such has nothing to do with a link of natural causality or with a link of "material" or "psychological" character.<sup>77</sup> One can sometimes—but not always—speak of natural causality in reference to the relationship between the action of an individual and the result of that action,

(Foot-note 76 continued)

l'acte d'un individu déterminé qu'il est un acte de l'Etat nous imputons cet acte à une personne distincte de l'individu qui l'a accompli, à une personne qui se trouve, pour ainsi dire, derrière lui" [When we say of the act of a particular individual that it is an act of the State, we impute this act to a person other than the individual who committed it, to a person who is, so to speak, behind him.] (Translation by the United Nations Secretariat); T. Perassi, *Lezioni di diritto internazionale* (Rome, Edizioni Italiane, 1942 [reprint of the 1941 edition], Part I, p. 97: "Un ente [...] in tanto può assumere la qualità di soggetto in un ordinamento giuridico in quanto mediante l'attitudine naturale di volere ed agire di determinati uomini si ponga come unità operante, cioè come unità a cui sono riferite come proprie una volontà ed una azione". [An [...] entity may assume the character of a subject of a legal order in so far as, through the natural disposition of certain men to will and act, it becomes an operative unity, that is to say, a unity to which are attributed a will and action of its own] (translation by the United Nations Secretariat); and W. Wengler, *op. cit.*, pp. 425 and 490: "[...] die Völkerrechtsnorm eindeutig nur von einem bestimmten Menschen durch dessen eigenes Verhalten befolgt oder verletzt werden kann" [(...) in any case, a rule of international law can be complied with or infringed only by the individual behaviour of a particular person] (Translation by the United Nations Secretariat).

<sup>77</sup> D. Anzilotti (*Corso...* [op. cit.], p. 222) points out that: "L'imputazione giuridica si distingue così nettamente del rapporto di causalità; un fatto è giuridicamente proprio di un soggetto, non perchè prodotto o voluto da questo, nel senso che tali parole avrebbero nella fisiologia o nella psicologia, ma perchè la norma glielo attribuisce" [Legal imputation is thus clearly distinguishable from causal relationship; an act is legally deemed to be that of a subject of law not because it has been committed or willed by that subject in the physiological or psychological sense of those words, but because it is attributed to him by a rule of law.] (Translation by the United Nations Secretariat). See also J. G. Starke, *op. cit.*, p. 105: "The imputation is thus the result of the intellectual operation necessary to bridge the gap between the delinquency of the organ or official and the attribution of breach and liability to the State"; C. Th. Eustathiades, "Les sujets...", *Recueil des cours...* (op. cit.), p. 422: "Cette imputation est le résultat d'une opération logique effectuée par une règle de droit, donc un lien juridique" [This imputation is the result of a logical operation effected by a rule of law, and is therefore a legal relationship.] (Translation by the United Nations Secretariat). For Wengler (*op. cit.*, p. 39), the "Zurechnung" (imputation) is a normative technical process.

but not in reference to the relationship between the person of the State and the action of an individual.<sup>78</sup>

59. The second point to be made is that the State to which an individual's conduct is connected is the State as a person, a subject of law, and not the State in the sense of a legal order or system of norms.<sup>79</sup> This is true not only, and *a fortiori*, of an attribution under international law, but also of an attribution under municipal law. It is because of the failure to maintain a clear distinction between these two notions that difficulties have arisen in this connexion, even if only of a theoretical nature.<sup>80</sup> At the same time, it should be emphasized that the attribution to the State which is in question here is attribution to the State as a person under international law and not as a person under municipal law.<sup>81</sup>

<sup>78</sup> There are no activities of the State which can be called "its own" from the point of view of natural causality as distinct from that of legal attribution; it should be noted that this applies at the municipal as well as the international level, for even in municipal law the individual-organ remains a distinct entity capable of actions which are "legally" attributed not to the State, but to the individual himself.

On the other hand, what Arangio-Ruiz (*op. cit.*, *loc. cit.*), calls the "material-psychological imputation" of an act to its author is not sufficient to explain on which basis the rule of international law takes into consideration the material conduct of a certain human being in order to attribute responsibility to the State as a legal consequence of that conduct, whereas it does not operate in the same way with other conducts of the same human being. When one considers, as this author does, every activity of the individual belonging to a group as the activity of the collective entity which is the subject of international law, the problem remains, even more clearly, of determining the criteria for distinguishing the activities to which international law attaches legal consequences for the group from the activities to which no such consequences are attached. The criteria that may be suggested to solve this problem are in any case the same ones adopted by the majority of the authors in order to distinguish the acts of the State from other acts. Moreover when we speak of the legal attribution of the conduct of individuals to the State as a subject of international law, we do not maintain that the legal attribution is the specific effect of rules having this particular purpose. The fact of considering a material act of an individual as an act of the State is only one of the conditions of the operating of the rule of international law which, under certain circumstances, attributes international responsibility to the State.

<sup>79</sup> The position of normative writers on this subject is severely criticized by Elynchev (*op. cit.*, pp. 85 *et seq.*).

<sup>80</sup> It should be noted that the identification of the legal person with a legal order led writers such as M. Kelsen ("Über Staats-unrecht", *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart* [Vienna, Hölder, K.U.K. Hof- und Universitäts-Buchhändler, 1914], Bd. 40, p. 114) and W. Burckhardt (*Die völkerrechtliche Haftung der Staaten* [Berne, Haupt, Akadem. Buchhandlung vorm. Max Drechsel, 1924], pp. 10 *et seq.*) to conclude that a wrongful act cannot be imputed to the legal person which is the expression of the unity of the special legal order that constituted that person. Kelsen ("Unrecht...", *Zeitschrift für öffentliches Recht* (op. cit.), p. 500) later tried to overcome the difficulty by saying that an act of an organ of the partial legal order of the State, although necessarily lawful as regards that order, could be imputed to the State as a wrongful act by a total legal order such as the international order. All this seems both artificial and unrealistic. The internal legal order can perfectly well impute the conduct of an organ to the person of the State as a wrongful act; that person is the creation of that order and as a person has subjective legal situations like any other subject.

<sup>81</sup> For a recent reaffirmation of this important point, see Institute of the State and Law of the Academy of Sciences of the Soviet Union, *op. cit.*, p. 426.

60. The last and most important of the three preliminary points to be made at this stage is that an individual's conduct can be attributed to the State as an internationally wrongful act only under international law. It is quite unthinkable that the operation of connecting an action or omission with a subject of international law so as to produce consequences in the sphere of international legal relations should take place in a framework other than that of international law itself.<sup>82</sup> The attribution of an act to the State as a subject of international law and the attribution of an act to the State as a person under municipal law are two entirely distinct operations which are necessarily governed by two different systems of law. It is possible and even normal that in international law the situation existing in municipal law should be taken into account for such purposes, although we shall have to see in what sense and to what extent. But, this taking into account of municipal law will simply be an instrument used for an operation falling entirely within the international legal order. We shall have occasion to see that many of the specific difficulties met with in this connexion are due to an insufficiently clear grasp of this point. Its importance as a principle should be noted here and now.

61. The second condition for the existence of an internationally wrongful act was defined at the beginning of this section, namely, that the conduct attributed to the State must constitute a failure by that State to comply with an international obligation incumbent upon it. This is what is called the *objective* element of the internationally wrongful act, the specific element

which distinguishes it from the other acts of the State to which international law attaches legal consequences. The contrast between the State's actual conduct and the conduct required of it by law constitutes the essence of the wrongfulness. The wrongful act is above all a failure to fulfil a legal duty, a breach of an obligation; and it is precisely this kind of act which the legal order considers, as we saw earlier, for the purpose of attaching responsibility to it, i.e. of making it a source of new obligations and, more generally, of new legal situations whose common characteristic is that they are unfavourable to the subject to which the act in question is attributed. If we bear in mind the link between the condition and the result, between the breach of an obligation and the incurring of further obligations or of sanctions as a consequence of that breach, we shall see that, in a sense, the rules relating to State responsibility are complementary to other substantive rules of international law—to those giving rise to the legal obligations which States may be led to violate.<sup>83</sup>

62. It is widely acknowledged in judicial decisions, practice and authoritative literature that the objective element which characterizes an internationally wrongful act is represented by the violation of an international obligation incumbent upon the State. In its judgment on the jurisdiction in the *Case concerning the Factory at Chorzów*,<sup>84</sup> to which reference has already been made, the Permanent Court of International Justice used the words "breach of an engagement". It employed the same expression in its subsequent judgment on the merits of the case.<sup>85</sup> The International Court of Justice referred explicitly to the Permanent

<sup>82</sup> Anzilotti, who in his earlier works seemed to uphold the idea that, in all cases, an individual's conduct should be imputed to the State solely by municipal law, later became a firm supporter of the opposite view. See *Corso*... (*op. cit.*), p. 224.

For the same approach, see J. G. Starke, *op. cit.*, pp. 106-107; T. Perassi, *op. cit.*, p. 98; R. Ago, "Le délit international", *Recueil des cours*... (*op. cit.*), pp. 461-462; A. Ross, *op. cit.*, p. 251; C. Th. Eustathiades, "Les sujets...", *Recueil des cours*... (*op. cit.*), p. 417; K. Furgler, *Grundprobleme der völkerrechtlichen Verantwortlichkeit der Staaten unter besonderer Berücksichtigung der Haager Kodifikationskonferenz, sowie der Praxis der Vereinigten Staaten und der Schweiz* (Zürich, Polygraphischer Verlag, 1948), pp. 19-20; G. Morelli, *op. cit.*, p. 184; P. Reuter, *La responsabilité internationale* (*op. cit.*), p. 87; T. Meron, *op. cit.*, p. 87; A. P. Sereni, *op. cit.*, p. 1506; J.-P. Quéneudec, *La responsabilité internationale de l'Etat pour les fautes personnelles de ses agents* (Paris, Librairie générale de droit et de jurisprudence, 1966), p. 119.

Kelsen's particular conception of the State and legal persons in general also led him to maintain in principle ("Théorie...", *Recueil des cours*... (*op. cit.*), p. 88) that "la question de savoir si un acte accompli par un individu est un acte étatique, c'est-à-dire imputable à l'Etat, doit être examinée sur la base de l'ordre juridique national" [The question whether an act performed by an individual is an act of State, i.e. imputable to the State, must be considered on the basis of the national legal order]. (Translation by the United Nations Secretariat). The same view is expressed by Kelsen in *Principles*... (*op. cit.*), p. 117. It should be noted that in the second edition of this work, edited and revised by Tucker, foot-note 13 (pp. 197-198) contains the following statement: "It remains true, however, that international law may, and does, also determine that certain acts are to be considered as acts of state, and therefore to be imputed to the state, even though the acts in question cannot be imputed to the state on the basis of national law." It may be possible, however, that this statement reflects only the opinion of the reviser.

<sup>83</sup> This idea was clearly expressed by various members of the International Law Commission (in particular, Mr. Tammes and Mr. Eustathiades) during the discussion of the first report on State responsibility submitted by the present Special Rapporteur at the twenty-first session. It is reflected in paragraph 80 of the report on the work of the twenty-first session (*Yearbook of the International Law Commission*, 1969, vol. II, p. 233, document A/7610/Rev.1).

Among modern writers on international law, Reuter, for instance ("Principes...", *Recueil des cours*... (*op. cit.*), p. 595), has specifically remarked in this connexion that "un des traits dominants de la théorie de la responsabilité est son caractère *non autonome*" [one of the predominant features of the theory of responsibility is its *non-autonomous* character] (Translation by the United Nations Secretariat). In this context, he stressed the link between the previous obligation and the new obligation generated by the incurring of the responsibility. Another author (I. Brownlie, *op. cit.*, pp. 353-354) has clearly brought out the complementary nature of the rule of responsibility by comparison with the primary rules of international law:

"Today one can regard responsibility as a general principle of international law, a concomitant of substantive rules and of the supposition that acts and omissions may be categorized as illegal by reference to the rules establishing rights and duties. Shortly, the law of responsibility is concerned with the incidence and consequences of illegal acts..."

On the question of the need to avoid confusing a rule of law establishing an obligation the breach of which is considered an internationally wrongful act and a rule attaching responsibility to the effect of the breach, see R. Ago "Le délit international", *Recueil des cours*... (*op. cit.*), pp. 445 *et seq.*

<sup>84</sup> Case concerning the factory at Chorzów (Jurisdiction), Judgement No. 8 of 26 July 1927. *P.C.I.J.* series A, No. 9, p. 21.

<sup>85</sup> Case concerning the factory at Chorzów (Merits), Judgement No. 13 of 13 September 1928. *P.C.I.J.* series A, No. 17, p. 29.



Court's words in its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*.<sup>86</sup> In its advisory opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)* the Court held that "refusal to fulfil a treaty obligation" involved international responsibility.<sup>87</sup> In the arbitration decisions, the classic definition is the one referred to above<sup>88</sup> which was given by the Mexico/United States of America General Claims Commission in the *Dickson Car Wheel Company Case*:

Under international law, apart from any convention, in order that a State may incur responsibility, it is necessary 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>89</sup>

63. In State practice, the terms "non-execution of international obligations", "acts incompatible with international obligations", "breach of an international obligation" and "breach of an engagement" are commonly used to indicate the very essence of an internationally wrongful act, source of responsibility. These expressions recur frequently in the replies by Governments, particularly on point III, to the request for information addressed to them by the Preparatory Committee for the 1930 Conference for the Codification of International Law.<sup>90</sup> Moreover, article 1 unanimously adopted at the first reading by the Third Committee of the Conference contains these words: "any failure [...] to carry out the international obligations of the State".<sup>91</sup> Similar terminology was used in article 1 of the preliminary draft prepared by Mr. García Amador in 1957 as the Special Rapporteur on State responsibility. This speaks of "some act or omission [...] which contravenes the international obligations of the State".<sup>92</sup> Those words are also to be found in article 2 of the revised preliminary draft prepared in 1961.<sup>93</sup>

64. The same consistency of terminology is to be found in the draft codifications of State responsibility prepared by private individuals and institutions. Article 1 of the draft code prepared by the Japanese Association of

International Law in 1926 lays down that a State is responsible in the case of an act or default constituting a violation of an international duty incumbent upon the State;<sup>94</sup> article I of the resolution adopted by the Institute of International Law at Lausanne in 1927 speaks of "any action or omission" of the State contrary to its international obligations;<sup>95</sup> article 1 of the draft prepared in 1930 by the *Deutsche Gesellschaft für Völkerrecht* mentions the violation by a State of an obligation towards another State under international law;<sup>96</sup> and article 1 of the draft prepared by Strupp in 1927 refers to acts of the responsible State which conflict with its duties to the injured State.<sup>97</sup> As to the language used by the leading authors, the expression "breach of an international obligation"<sup>98</sup> or equivalents such as "violation of an obligation established by an international norm",<sup>99</sup> "failure to carry out an international obligation",<sup>100</sup> "act" or "conduct conflicting with" or "contrary to an international obligation",<sup>101</sup> and "breach of a duty" or of an "international legal duty",<sup>102</sup> are by far the most prevalent phrases used to designate what we have defined as the objective element of the internationally wrongful act. All this evidence confirms the appropriateness of the terminology chosen in that connexion by the Commission.<sup>103</sup>

65. It should be noted that in international law the idea of the breach of an obligation can be regarded as

<sup>94</sup> Draft code of international law adopted by the Kokusaiho Gakkwai (International Law Association of Japan) in co-operation with the Japanese branch of the International Law Association. See *Yearbook of the International Law Commission*, 1969, vol. II, p. 141, document A/CN.4/217 and Add. 1, annex II.

<sup>95</sup> *Ibid.*, 1956, vol. II, p. 227, document A/CN.4/96, annex 8.

<sup>96</sup> *Ibid.*, 1969, vol. II, p. 149, document A/CN.4/217 and Add. 1, annex VIII.

<sup>97</sup> *Ibid.*, p. 151, annex IX.

<sup>98</sup> See J. G. Starke, *op. cit.*, p. 106; H. Kelsen, *Principles...* (*op. cit.*), p. 196; K. Furgler, *op. cit.*, p. 16; G. Morelli, *op. cit.*, p. 347; G. Schwarzenberger, *A. Manual... op. cit.*, pp. 162-163; B. Cheng, *op. cit.*, pp. 170-171; F. V. García Amador, "State Responsibility..." *Recueil des cours...* (*op. cit.*), p. 376; A. Schüle, *op. cit.*, p. 336; P. Reuter, "Principes...", *Recueil des cours...* (*op. cit.*), p. 599; A. P. Sereni, *op. cit.*, pp. 1506 and 1512; C. F. Amerasinghe, *op. cit.*, pp. 37 *et seq.*, 41 *et seq.*; E. Jiménez de Aréchaga, *op. cit.*, p. 534. See also the working documents submitted to the Sub-Committee on State Responsibility of the International Law Commission in 1962-1963 by Mr. Tsuruoka and Mr. Ago (*Yearbook of the International Law Commission*, 1963, vol. II, pp. 247 and 251).

<sup>99</sup> See P. Guggenheim, *op. cit.*, p. 1.

<sup>100</sup> See J. Basdevant, *op. cit.*, p. 671; Ch. de Visscher, "La responsabilité des Etats", *Bibliotheca Visseriana (op. cit.)*, p. 91; Ch. Rousseau, *op. cit.*, p. 361; and the working paper submitted by Mr. Yasseen in 1962 (*Yearbook of the International Law Commission*, 1963, vol. II, p. 250).

<sup>101</sup> See R. Ago, "Le délit international", *Recueil des cours...* (*op. cit.*), pp. 441 and 445; J. L'Huillier, *op. cit.*, p. 359; R. Monaco, *Manuale di diritto internazionale pubblico* (Turin, Unione Tipografico-Editrice Torinese, 1960), p. 359.

<sup>102</sup> See D. Anzilotti, *Teoria generale...* (*op. cit.*), p. 111, and *Corso...* (*op. cit.*), pp. 385-386; C. C. Hyde, *op. cit.*, p. 882; L. Oppenheim, *op. cit.*, pp. 337-338; G. Ballardore Pallieri, *Diritto internazionale pubblico (op. cit.)*, p. 245; H. Accioly, *op. cit.*, p. 249; A. Ulloa, *op. cit.*, p. 251; G. Dahm, *op. cit.*, p. 178; S. R. Patel, *A Textbook of International Law* (London, Asia Publishing House, 1964), p. 103.

<sup>103</sup> See para. 51 above.

<sup>86</sup> *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion of 11 April 1949. *I.C.J. Reports* 1949, p. 184.

<sup>87</sup> *Interpretation of peace treaties with Bulgaria, Hungary and Romania (Second Phase)*, Advisory Opinion of 18 July 1950. *I.C.J. Reports* 1950, p. 228.

<sup>88</sup> See paras. 46 and 52 above.

<sup>89</sup> *Dickson Car Wheel Company Case* (July 1931). United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No.: 1951.V.1), p. 678 [Italics supplied by the Special Rapporteur]. See also the decision in the *Affaire relative à l'acquisition de la nationalité polonaise* (10 July 1924): *ibid.*, vol. I (United Nations publication, Sales No.: 1948.V.2), p. 425.

<sup>90</sup> League of Nations, *Bases of Discussion...* (*op. cit.*), pp. 25 *et seq.*, 30 *et seq.*; 33 *et seq.*; and *Supplement to vol. III (op. cit.)*, pp. 2, 6 *et seq.*

<sup>91</sup> See *Yearbook of the International Law Commission*, 1956, vol. II, p. 225, document A/CN.4/96, annex 3.

<sup>92</sup> *Ibid.*, 1957, vol. II, p. 128, document A/CN.4/106, annex.

<sup>93</sup> *Ibid.*, 1961, vol. II, p. 46, document A/CN.4/134 and Add. 1, addendum.

the exact equivalent of the idea of the violation of the subjective rights of others.<sup>104</sup> The Permanent Court of International Justice, which normally uses the expression "violation of an international obligation" spoke of an "act [...] contrary to the treaty right of another State" in its judgement in the *Phosphates in Morocco Case*.<sup>105</sup> The correlation between a legal obligation on the one hand and a subjective right on the other admits of no exception; as distinct from what is said to be the situation in municipal law, there are certainly no obligations incumbent on a subject which are not matched by an international subjective right of another subject or subjects, or even, for those who take a view referred to in the previous section, of the totality of the other subjects of the law of nations. This must be borne in mind in seeking a precise interpretation of the definition proposed here of the conditions for the existence of an internationally wrongful act.

66. At the suggestion of the Special Rapporteur, the Commission, during its discussion of the second report at the twenty-second session, considered whether there should not be an exception to the principle that the characteristic of the internationally wrongful act is to constitute a failure by the State to carry out an international obligation incumbent upon it. This question was prompted by the idea that in certain circumstances the abusive exercise of a right could amount to internationally wrongful conduct and thereby generate international responsibility. In other words, if, as some maintain, it is true that international law, like the municipal law of certain countries, recognizes the theory of abuse of right, would that mean that in some cases the characteristic element of an internationally wrongful act would be conduct based on a subjective right and not conduct conflicting with a legal obligation?

67. In his second report the Special Rapporteur pointed out that a really clear statement on the doctrine of abuse of right has never been made in international decisions; this is understandable in view of the dangers which both an absolute denial and a general affirmation of the principle could entail. The Permanent Court of International Justice did no more than make very guarded allusions to the theory, and in any case excluded its application to the cases contemplated and indicated in general that abuse of right could not be presumed.<sup>106</sup> The theory of abuse of rights has also been explicitly contested in certain well-known dissenting opinions.<sup>107</sup>

<sup>104</sup> The equivalence in international law between failure to carry out a legal duty and violation of a subjective right of others is noted by D. Anzilotti (*Teoria generale...* (op. cit.), pp. 83, 91 et seq., and 121); G. Balladore Pallieri ("Gli effetti...", *Rivista di Diritto Pubblico...* (op. cit.), p. 66, and *Diritto internazionale pubblico* (op. cit.), p. 245), R. Ago ("Le délit international", *Recueil des cours...* (op. cit.), p. 441), G. Morelli (op. cit., p. 347), and A. P. Sereni (op. cit., p. 1514).

<sup>105</sup> *Phosphates in Morocco Case* (Preliminary Objections), 14 June 1938, *P.C.I.J.*, series A/B, No. 74, p. 28.

<sup>106</sup> See the judgment in the Case concerning certain German interests in Polish Upper Silesia (Merits), 25 May 1926 (*P.C.I.J.*, series A, No. 7, pp. 30, 37-38), and the judgment in the Case of the Free Zones of Upper Savoy and the District of Gex, 7 June 1932 (*P.C.I.J.*, series A/B, No. 46, p. 167).

As regards the more recent decisions, Reuter's commentary contains a very apt summary of the criterion underlying them: "The decisions refer to the notion as a warning in cases in which they do not rely on it, whereas if they relied on the notion they would probably refrain from mentioning it."<sup>108</sup> The only clear formulation of the need to carry over the condemnation of abuse of right into international law is that of Judge Alvarez in some of his dissenting opinions.<sup>109</sup> In the literature, the idea of the application of the theory of abuse of right to international law has found and continues to find both firm supporters<sup>110</sup> and determined opponents.<sup>111</sup>

68. However, the Special Rapporteur observed that, as far as the present work of the International Law Commission is concerned, there seems to be no compelling reason for taking a position on this theory, on its possible justifications, and the grounds for them, on its alleged advantages for the development and progress

<sup>107</sup> See the dissenting opinion of Judge Anzilotti in the Case of the Electricity Company of Sofia and Bulgaria (Preliminary Objection), 4 April 1939 (*P.C.I.J.*, series A/B, No. 77, p. 98).

<sup>108</sup> P. Reuter, "Principes...", *Recueil des cours...* (op. cit.), p. 600. According to the author, an example of the first case is the Arbitral Tribunal's award of 16 December 1957 in the Lake Lanoux Case (for the text, see United Nations, *Reports of International Arbitral Awards*, vol. XII [United Nations publication, Sales No.: 1963.V.3], pp. 285 et seq.), and of the second, the judgment of the International Court of Justice of 12 April 1960 in the *Case concerning right of passage over Indian Territory (Portugal v. India)* [Merits] (*I.C.J. Reports* 1960, pp. 36-37). There is also an incidental reference to the subject by the International Court of Justice in its judgment of 18 December 1951 in the *Fisheries Case (United Kingdom v. Norway)* [*I.C.J. Reports* 1951, p. 142].

<sup>109</sup> *I.C.J. Reports* 1949, p. 48; *ibid.*, 1950, p. 15; *ibid.*, 1951, p. 149; *ibid.*, 1952, pp. 128 and 133.

<sup>110</sup> See in particular N. Politis, "Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux", *Recueil des cours...*, 1925-I (Paris, Hachette, 1926), t. 6, pp. 77 et seq.; S. Trifu, *La notion de l'abus de droit dans le droit international* (Paris, Domat-Montchrestien, 1940); van Bogaert, *Het Rechtsmisbruik in het Volkenrecht* (Antwerp, 1948); van der Molen, *Misbruik van Recht in het Volkenrecht—Opstellen op het gebied van Recht, Staat en Maatschappij* (Amsterdam, 1949), pp. 266 et seq.; M. Sibert, *Traité de droit international public* (Paris, Dalloz, 1951), t. II, pp. 205 and 283; A.-Ch. Kiss, *L'abus de droit en droit international* (Paris, Librairie générale de droit et de jurisprudence, 1953), especially pp. 179 et seq.; and F. V. García Amador, "State Responsibility...", *Recueil des cours...* (op. cit.), pp. 376 et seq., and fifth report on State responsibility (*Yearbook of the International Law Commission*, 1960, vol. II, pp. 57 et seq., document A/CN.4/125, paras. 66 et seq.).

<sup>111</sup> Among many others, see M. Scerni, *L'abuso di diritto nei rapporti internazionali* (Rome, Anonima Romana Editoriale, 1930); A. Cavaglieri, *Corso di diritto internazionale*, 3rd ed. (Naples, 1934), p. 508; H. J. Schlochauer, "Die Theorie des *abus de droit* im Völkerrecht", *Zeitschrift für Völkerrecht* (Breslau, Kern's Verlag, 1933), Bd. XVII, pp. 373 et seq.; and, among the more recent writers, G. Schwarzenberger, "Uses and Abuses of the 'Abuse of Rights' in International Law", *The Grotius Society: Transactions for the Year 1956: Problems of Public and Private International Law* (London, The Grotius Society, 1957), vol. 42, pp. 47 et seq.; J.-D. Roulet, *Le caractère artificiel de la théorie de l'abus de droit en droit international public* (Neuchâtel, Histoire et Société d'aujourd'hui, Baconnière, 1958); I. Brownlie, op. cit., pp. 365 et seq. For some circumscribed and extremely guarded approaches, see H. Lauterpacht, *The Development of International Law by the International Court* (London, Stevens, 1958), pp. 162 et seq.; and P. Guggenheim, "La validité et la nullité des actes juridiques internationaux", *Recueil des cours...* 1949-I (Paris, Sirey, 1950), t. 74, pp. 250 et seq.



of international law, or on the dangers it would entail for the security of international law. The Special Rapporteur considers that in actual fact, the problem of abuse of right has no direct influence on the determination of the premises of international responsibility. The question is one of substance, concerning the existence or non-existence of a "primary" rule of international law—the rule whose effect is apparently to limit the exercise by the State of its rights, or, as others would maintain, its capacities, and to prohibit their abusive exercise. Clearly, therefore, if it was recognized that existing international law should accept such a limitation and prohibition, the abusive exercise of a right by a State would inevitably constitute a violation of the obligation not to exceed certain limits in exercising that right, and not to exercise it with the sole intention of harming others or of unduly encroaching upon their sphere of competence. If the existence of an internationally wrongful act was recognized in such circumstances, the constituent element would still be represented by the violation of an obligation and not by the exercise of a right.<sup>112</sup> The Special Rapporteur consequently concluded that a reference to the failure to carry out an international legal obligation as an objective element of an internationally wrongful act should be quite sufficient for the purpose of defining in principle the conditions for the existence of an act of that nature. That reference would certainly also cover the case of a breach of the contemplated obligation, if its existence was established: it would therefore be unnecessary to provide expressly for an alleged exception. Furthermore, the Special Rapporteur was very doubtful whether it was necessary to provide for the insertion of an article concerning a question which does not relate specifically to responsibility in a draft on the international responsibility of States.<sup>113</sup>

69. The Commission devoted particular attention to this problem; many of its members expressed interest in the notion of abuse of right. The trend which emerged during the discussion in the Commission—which was to some extent echoed in the Sixth Committee—was to agree to allow some time for reflection on the substance of the problem. Later, when it examines in detail the various questions which arise in connexion with the objective element of an internationally wrongful act, the Commission will decide whether or not abuse of right should be given a place in the draft. However, with regard to defining in prin-

<sup>112</sup> Even early on (in *Teoria generale...* (*op. cit.*), p. 89) Anzilotti had noted that responsibility does not flow from an excess in the exercise of the right but from the fact of acting in contravention of that right. For developments along these lines see R. Ago, "Le délit international", *Recueil des cours...* (*op. cit.*), pp. 443-444; B. Cheng, *op. cit.*, pp. 129 *et seq.*; E. Jiménez de Aréchaga, *op. cit.*, p. 540.

<sup>113</sup> In the revised preliminary draft which he prepared in 1961, Mr. García Amador introduced a provision in article 2, paragraph 3, to the effect that "the expression 'international obligations of the State' also includes the prohibition of the 'abuse of rights', which shall be construed to mean any action contravening the rules of international law, whether conventional or general, which govern the exercise of the rights and competence of the State". See *Yearbook of the International Law Commission, 1961*, vol. II, p. 46, document A/CN.4/134 and Add. 1, addendum.

ciple the conditions for the existence of an internationally wrongful act, the Commission agreed with the Special Rapporteur that the reference to failure to fulfil an obligation would also cover the case where the obligation in question was specifically an obligation not to exercise certain of the State's own rights in an abusive or unreasonable manner.

70. It might also be questioned whether another aspect mentioned by the Special Rapporteur in his second report should be taken into consideration in defining the conditions for the existence of an internationally wrongful act. He observed that an act of this kind consists in essence of conduct connected to a State and constituting a failure by that State to carry out an international obligation. Two separate cases can, however, arise. On some occasions, the conduct as such may in itself suffice to constitute a failure to carry out an international obligation incumbent upon the State: a refusal by the State's legislative organs to pass an act which the State, by treaty, has specifically undertaken to adopt; an attack by one country's armed forces upon the territory of another country with which the former maintains peaceful relations; a refusal by a coastal State to allow the vessels of another country friendly passage through its territorial waters in peacetime; an inspection of a foreign country's diplomatic bag by a Customs official; an unauthorized entry by police into the premises of a foreign embassy; a denial of justice to an alien by judicial organs—all these are examples of the case envisaged.

71. There are nevertheless cases in which the situation is different. If an aircraft on a war mission drops bombs without taking the necessary precautions to ensure that they do not damage a hospital or a historic monument, the obligation to respect the enemy's health services and cultural property will not be breached unless the hospital or monument in question is hit. Similarly, for a State to be chargeable with having failed in its duty to provide effective protection for the premises of a foreign embassy or to safeguard the safety of aliens present in its territory during disturbances, it is insufficient to show that the State was negligent in the matter in that it did not provide adequate police protection; some prejudicial event must also have taken place as a result of that negligence: for instance, a hostile demonstration, an attack on the embassy premises by private individuals or the killing of aliens by a mob. In circumstances of this kind—which are manifestly due primarily to negligence on the part of organs of the State—the conduct of the State does not seem to constitute a breach of an international obligation unless the conduct as such is combined with a supplementary element: an external event—one of those events which the State should seek to prevent—must actually have occurred.<sup>114</sup>

72. The Special Rapporteur indicated that it would be necessary to revert to the distinction mentioned in the

<sup>114</sup> The Special Rapporteur therefore considers that wrongful acts consisting in conduct alone and wrongful acts requiring, in addition, an external event can be distinguished in international as well as in municipal law. See R. Ago, "Le délit international", *Recueil des cours...* (*op. cit.*), pp. 447 *et seq.*; G. Morelli, *op. cit.*, p. 349.

two preceding paragraphs when it came to defining the rules relating to the different cases of failure to carry out an international obligation. However, he had touched on the question primarily in order to put to the Commission the question whether, in its view, that distinction should be mentioned in the definition of principle of the conditions for the existence of an internationally wrongful act. During the discussion which took place at the twenty-second session, several members replied to the question in the affirmative. Others, however, preferred to reserve their position on that point for the time being, while recognizing that it deserved more thorough study at a later stage.<sup>115</sup> Since the distinction will probably have to be referred to specifically in the formulation of the individual rules which will appear later in the draft, the Special Rapporteur feels that there is no harm in refraining from mentioning it in the general principle which is about to be defined. It will suffice to use a formula which is flexible enough to cover all the various cases. The Special Rapporteur applied these criteria in formulating the draft article which is given at the end of this section.

73. One last point should be mentioned before concluding. In his second report, the Special Rapporteur noted that in addition to the two elements, the subjective and the objective, described above, reference is sometimes also made to the existence of an ulterior constitutive element of an internationally wrongful act, and that this alleged third element was usually termed "damage".<sup>116</sup> However, the Special Rapporteur also showed that there was some ambiguity in such references. In some instances, those who stress the requirement that damage should exist are in fact thinking of the requirement that an external event should have occurred; as noted in the preceding paragraphs, such an event must in some cases be present in addition to the actual conduct of the State if that conduct is to constitute a failure to carry out an international obligation. It may indeed happen that when the obligation in question is one of those duties of the State—so common in international law—to protect or safeguard certain persons or property, the event in question may be an action prejudicial to certain persons committed by third parties. However, when certain writers refer to "damage" they often have in mind not an injury caused to a State at the international level but rather an injury caused to an individual at the municipal level.<sup>117</sup> The importance accorded to the element of damage is thus a consequence of having considered only cases of State responsibility for injuries to aliens, and of having combined the consideration of the rules relating to responsibility with that of the substantive rules relating to the treatment of aliens. The essence of a State's obligations with respect to the status of aliens is that it must not wrong-

fully injure them or allow them to be injured. And it is clear that if the obligation itself is so defined, there can be no breach of this obligation where the individual alien has not in fact suffered any injury. But the injury to an individual, which is precisely what the international obligation is designed to prevent, has nothing in common with the damage at the strictly international level which some consider must occur in addition to the breach of the obligation for an internationally wrongful act to exist. Such damage can only be damage suffered by a State.

74. Most of the members of the Commission agreed with the Special Rapporteur regarding the preceding considerations; in particular, they recognized that the economic element of damage referred to by certain writers was not inherent in the definition of an internationally wrongful act as a source of responsibility, but might be part of the rule which lays upon States the obligation not to cause certain injuries to aliens. Furthermore, with regard to the determination of the conditions essential for the existence of an internationally wrongful act, the Commission also recognized that under international law an injury, material or moral, is necessarily inherent in every violation of an international subjective right of a State.<sup>118</sup> Hence the notion of failure to fulfil an international legal obligation to another State seemed to the Commission fully sufficient to cover this aspect, without the addition of anything further. The economic injury, if any, sustained by the injured State may be taken into consideration, *inter alia*, for the purpose of determining the amount of reparation, but is not a prerequisite for the determination that an internationally wrongful act has been committed. The discussion thus confirmed the Special Rapporteur's belief that there is no need to take account of the so-called "damage" element in defining in principle the conditions for the existence of an internationally wrongful act.

75. In view of the foregoing exposition and comments, the Special Rapporteur believes that the following formulation of the article defining the conditions for the existence of an internationally wrongful act can be proposed to the Commission:

**Article 2. Conditions for the existence of an internationally wrongful act**

An internationally wrongful act exists when:

(a) Conduct consisting of an action or omission is attributed to the State in virtue of international law; and

<sup>115</sup> In particular, Sir Humphrey Waldock (see *Yearbook of the International Law Commission*, 1970, vol. I, pp. 189-190, 1076th meeting, paras. 29 *et seq.*).

<sup>116</sup> See in particular A. V. Freeman, *op. cit.*, p. 22; A. Ross, *op. cit.*, pp. 242 and 255; K. Furgler, *op. cit.*, p. 16; P. Guggenheim, *Traité...* (*op. cit.*), p. 1; A. Schüle, *op. cit.*, p. 336; E. Jiménez de Aréchaga, *op. cit.*, p. 534.

<sup>117</sup> This is clear in, for example, Amerasinghe, *op. cit.*, p. 55.

<sup>118</sup> D. Anzilotti (*Teoria generale...* (*op. cit.*), p. 89, and especially *Corso...* (*op. cit.*), p. 425) indicates that *international responsibility derives its raison d'être purely from the violation of a right of another State and every violation of a right is a damage* [Special Rapporteur's underlining]. The author brings out the importance in international law of the honour and dignity of States, which are often given more weight than their economic interests, so that injury is equated in international law with the breach of an obligation. For similar views expressed by more recent writers, see G. Schwarzenberger, *A Manual...* (*op. cit.*), p. 164; A. P. Sereni, *op. cit.*, pp. 1522-1523. Even Jiménez de Aréchaga (*op. cit.*, p. 534) states that "in inter-State relations the concept of damage does not, however, have an essentially material or patrimonial character."

(b) That conduct constitutes a failure to comply with an international obligation of the State.

### 3. SUBJECTS WHICH MAY COMMIT INTERNATIONALLY WRONGFUL ACTS

76. Chapter I, section III, of the second report was entitled "Capacity to commit internationally wrongful acts". This title reflected current usage. Many writers on international law agree that, in principle, any State which is a subject of international law has what they term "international delictual capacity" or "capacity to commit internationally wrongful acts". It is impossible to visualize a State possessing international personality but not having international obligations; and if it has such obligations, it may logically violate them as well as carry them out.

77. The Special Rapporteur nevertheless wished from the outset to draw the Commission's attention to the need to take care not to be misled by the use of the word "capacity", because its employment might lead us to see an analogy between the principle that in international law every State possesses the capacity to commit wrongful acts and the rule in article 6 of the Vienna Convention on the Law of Treaties, which provides that "every State possesses capacity to conclude treaties".<sup>119</sup> Capacity to conclude treaties and capacity to commit internationally wrongful acts are, however, two entirely separate notions. Capacity to conclude treaties, which is the international equivalent of capacity to contract, is the most prominent aspect of a subjective legal situation, namely, the situation which, to continue using municipal law terminology, is definable as the State's "capacity to act" in international law: i.e., the legal power of the State to perform "legal acts" and to produce legal effects by manifesting its will.

78. The term "delictual capacity", on the other hand, obviously denotes neither a legal power nor yet another subjective legal situation. In fact, if we reflect carefully, we shall realize the absurdity of the idea that a legal order can endow its subjects with "capacity", in the proper sense of the term, to conduct themselves in contravention of their legal obligations. It therefore seems impossible to support the view, apparently cherished by German jurists, that delictual capacity (*Deliktsfähigkeit*) is a sub-category of the "capacity to act" (*Handlungsfähigkeit*).<sup>120</sup> The terms "delictual capacity" and "capacity to commit wrongful acts" cannot be anything more than convenient labels for denoting that a subject may, in fact, engage in conduct contrary to an international obligation which is incumbent upon it and thereby fulfil the conditions necessary to be considered the author of an internationally wrongful act.<sup>121</sup>

<sup>119</sup> 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. 290.

<sup>120</sup> K. Strupp, "Das völkerrechtliche Delikt", *Handbuch...* (op. cit.), pp. 21-22; F. Klein, op. cit., pp. 34-35; A. Schüle, op. cit., p. 330; I. von Münch, op. cit., p. 130.

<sup>121</sup> This is what some writers refer to as the "active subject" of the wrongful act (see Monaco, op. cit., p. 362; and Vitta, "Res-

ponsabilità degli Stati", *Novissimo Digesto Italiano* (Turin, 1968), vol. XV, p. 733) or of responsibility (see first report by García Amador on State responsibility, in *Yearbook of the International Law Commission, 1956*, vol. II, pp. 184 et seq., document A/CN.4/96, chap. IV); and what the Soviet writers term the "subject of an international delict" (Institute of the State and Law of the Academy of Sciences of the Soviet Union, op. cit., p. 426).

79. On the basis of this explanation the Commission, during its discussion of the second report, acknowledged the soundness of the principle which the aforementioned writers mean to express by using the terms referred to above. This principle must be included in the draft in one form or another, for it would be dangerous to take the idea which it embodies for granted. To give only one example, a very new State might be tempted to invoke for certain purposes the immaturity or inadequacies of its structure, claiming that for that reason it was incapable of fulfilling its international obligations, or at least some of them, and, hence, that it could not be considered to have committed an internationally wrongful act by violating those obligations. Such a position would, however, be indefensible. There can be no possible comparison between the status of a newly-formed State in international law and that of a minor or any person lacking delictual capacity in municipal law. States come of age as soon as they attain independent and sovereign existence and become full members of the international community. The obverse of sovereignty is the possibility of asserting one's rights, but the reverse is the duty to fulfil one's obligations.<sup>122</sup> The principle that no State can escape the possibility of being considered as the author of an internationally wrongful act if, by its conduct, it fails to fulfil an international obligation, must therefore be clearly stated for all members of the international community.

80. Some members of the Commission, while agreeing with the substance of the principle, questioned the advisability of using the term "capacity" to describe the physical ability of a State to commit a wrongful act. The reasons they gave were similar to those used by the Special Rapporteur to bring out the clear distinction between the meaning which the word "capacity" may have in relation to wrongful acts and its meanings in other spheres of law. At the close of the debate on that point at the twenty-second session, the Special Rapporteur agreed to explore the possibility of finding other terms that would express the same principle without giving rise to misunderstanding.

81. The first solution which might come to mind would be that of simply replacing the term "capacity", which has a marked legal character, by a term indicating directly a physical ability or possibility. After reflecting further on the question, however, the Special Rapporteur became convinced that the real sense of the principle to be defined would perhaps be clearer if, in connexion with wrongfulness, stress was placed on a passive situation of the State rather than an active

ponsabilità degli Stati", *Novissimo Digesto Italiano* (Turin, 1968), vol. XV, p. 733) or of responsibility (see first report by García Amador on State responsibility, in *Yearbook of the International Law Commission, 1956*, vol. II, pp. 184 et seq., document A/CN.4/96, chap. IV); and what the Soviet writers term the "subject of an international delict" (Institute of the State and Law of the Academy of Sciences of the Soviet Union, op. cit., p. 426).

<sup>122</sup> In this connexion, see the comments made by Mr. Thiam at the twenty-second session of the International Law Commission (*Yearbook of the International Law Commission, 1970*, vol. I, p. 214, 1079th meeting, paras. 36-38).

situation. In other words, it seems preferable to say that the State may be considered the author of an internationally wrongful act rather than to describe it as having the "capacity" or "ability" to commit such an act.<sup>123</sup> In fact, what we are seeking to express here is primarily the idea that every State is on an equal footing with others with regard to the possibility of having its conduct characterized as internationally wrongful, and that no State can hope to prevent its own actions or omissions from appearing as actions or omissions which are regarded as reprehensible by international law, if all the conditions for the existence of an internationally wrongful act are present.

82. At its twenty-second session, the Commission was able to give only very rapid consideration to the question of the possible limitations to which this principle, described by some writers as that of the "delictual capacity" of all States, might be subject in specific cases. The Special Rapporteur, reviewing those cases in his second report, indicated that he felt it unnecessary to pay attention, from that point of view, to the situation of a State member of a federal union. The cases in which federated States still possess some international personality—because they have retained, even in a very limited form, capacity to make certain agreements with States outside the federation—are becoming increasingly rare. Furthermore, it is not absolutely certain that if the federated State, by its action or omission, should fail to fulfil an international obligation contracted directly by it, that act would not be attributed, at the international level, to the federal State rather than the federated State. Consequently, the Special Rapporteur still feels that there is no point in taking these marginal cases into account, especially in view of the evidence at the Vienna Conference on the Law of Treaties that federal States as a whole are firmly opposed to any mention of a separate international personality for federated States.<sup>124</sup>

<sup>123</sup> If the course proposed here is adopted, care must be taken not to confuse the designation of a subject as author of a wrongful act with the designation of that subject as "responsible" as a result of that act. Considering a subject as being the author of an internationally wrongful act and calling upon it to assume a responsibility flowing from that act are two operations which are logically separate and consecutive. Furthermore, they do not always necessarily follow each other. There may be cases—to which we have already referred, indicating that it would be necessary to revert to them in due course—where because of one State's situation in relation to another State, the latter may be called upon to answer in place of the former for an internationally wrongful act which the former has committed. Consequently, in cases of this kind, the former State is considered to be the subject which is the author of the internationally wrongful act, even if it is the responsibility of another State which is involved as a result of that act.

There is quite often confusion regarding this point. Anzilotti, for example (*La Responsabilité internationale*... (op. cit.), p. 180), translates the German term "Deliktsfähigkeit" (i.e. capacity to commit a delict) by the expression "capacité de répondre des actes contraires au droit" [capacity to answer for acts contrary to law] (Translation by the United Nations Secretariat). There seems to be a similar confusion in Strupp ("Das völkerrechtliche Delikt", *Handbuch*... (op. cit.), pp. 21-22), and Dahm (op. cit., p. 179).

<sup>124</sup> In article 5 ("Capacity of States to conclude treaties") of its draft the International Law Commission proposed the inclusion of a paragraph 2 providing that "States members of a federal union may possess a capacity to conclude treaties if such capacity is

83. On the other hand, the Special Rapporteur felt it his duty to draw the Commission's attention to the situation which may arise when in the territory of a given State another subject or subjects of international law are acting in its place.<sup>125</sup> The other subject or subjects concerned may sometimes entrust certain activities, normally exercised by organs of the territorial State and within the framework of its legal system, to elements of their own organization, either for purposes of their own or sometimes because of the need to fill gaps in the organization of the territorial State. The organs of the territorial State, through which it normally discharges some of its international obligations, are then prevented from performing some of their functions.<sup>126</sup> In other words, the territorial State is deprived of part of its organization, a part which previously gave it the physical ability to discharge and violate certain international obligations. It is therefore no longer able to commit an internationally wrongful act in the sphere affected by that deprivation, and if the breach of an international obligation should occur it cannot be attributed to that State: it must be attributed to the other subject or subjects who have replaced the organs of the territorial State by their own.<sup>127</sup> It is therefore understandable that, when confronted with such cases, those who accept the notion of an "inter-

admitted by the federal constitution and within the limits there laid down." (*Yearbook of the International Law Commission*, 1966, vol. II, p. 191, document A/6309/Rev.1). After a long discussion, the Committee of the Whole adopted this paragraph in 1968, but in 1969, at the plenary meetings of the Conference itself, certain federal States resumed their attack on this paragraph with renewed vigour and it was finally rejected, so that it does not appear in article 6 of the Vienna Convention on the Law of Treaties (see foot-note 119 above).

<sup>125</sup> The other subject or subjects concerned may also be States. But they may also be subjects of a different nature, such as an insurrectional movement or even, to take an extreme case, an international organization.

<sup>126</sup> This situation may arise in cases of the survival of one of those legal relationships of dependence which have often furnished the textbooks with classic examples of the situation described here but which are, fortunately, now disappearing (see R. Ago, "La responsabilità indiretta nel diritto internazionale", *Archivio di diritto pubblico*, January-April 1936-XIV (Padua, CEDAM, 1936), vol. 1, fasc. 1, pp. 27 et seq.; and "Le délit international", *Recueil des cours*... (op. cit.), p. 455 et seq.). It may also arise in other cases, for example, that of a military occupation, whether in time of war or time of peace, whether partial or total, temporary or permanent, in brief, regardless of the title, reason and character of the occupation. Nor is there any need, for the purposes with which we are concerned here, to draw any distinction based on whether the occupation is regarded as legitimate or illegitimate by international law. Even apart from the case of military occupation, there are other situations where elements of the organization of a State or of an international institution act in the territory of another State, replacing the action of the latter's organization. The organs whose activity is thus replaced are sometimes judicial organs and sometimes administrative organs, such as the police and so on.

<sup>127</sup> In this case we are concerned with direct responsibility arising from an act by the subject concerned. This case should not be confused with that in which a State might incur indirect responsibility, i.e., as a result of an act by others and not by its own act. It is hardly necessary to add that, since the organs of one State are acting here in place of those of another State and within the framework of the latter's legal order, they are obliged, in their action, to respect the international obligations incumbent upon the organs of the territorial State which they are replacing.

national delictual capacity" of States are obliged to recognize that the latter may be subject to some restrictions. In referring to that recognition in his second report, the Special Rapporteur felt obliged to refer both to the question of the significance of this alleged "capacity" and that of possible limitations of that capacity. He merely wished to stress the need to remove any doubts concerning the determination of the author of an internationally wrongful act in a situation such as that described above. One must be careful not to attribute an internationally wrongful act to a State whose organs were in fact unable to commit any act<sup>128</sup> and at the same time to grant a sort of impunity to the State whose organs actually committed the act concerned.

84. However, this requirement probably does not make it necessary to insert a special provision in the definition of the general principle to which this section is devoted, especially if it is decided to set aside the formula acknowledging that every State has the "capacity to commit internationally wrongful acts" and to replace it by a form of wording stating that each State may be considered the author of an internationally wrongful act. On the basis of a definition of this kind, it becomes clear that a State cannot be regarded as the author of an internationally wrongful act unless, in that particular case, the conditions for the existence of such an act have been fulfilled. Now in cases such as those where part of the organization of the State has been replaced by the organs of another State, one essential condition is lacking, namely, that which requires that the conduct constituting the breach of an international obligation should be attributable to the State having suffered the deprivation mentioned. The adoption of new wording thus seems to have the additional advantage of preventing the text of the article from raising the question of the limitations of the alleged "delictual capacity". It will suffice to deal with it in the commentary to the article.

85. In view of all the preceding considerations, the following wording is proposed for the formulation of the general principle in question :

<sup>128</sup> In the case envisaged here, the fact that the State may not be considered the author of an internationally wrongful act in a given sphere is the consequence of a restriction occurring at a given time in an organization which was previously complete. The same impossibility may also be the effect of a structure which, by its very nature, is essentially partial. This is the case for certain subjects of international law other than States, even if they are often treated as States in drafts for the codification of international law. Insurrectional movements, for example, are not States in the proper sense of the term and are not States even when they have affirmed their authority over a given territory and their international personality is no longer in doubt. However, it may precisely be questioned whether, in a given sphere, an insurrectional movement may or may not be considered the author of an internationally wrongful act which would be a source of international responsibility for the movement itself. It seems clear that an affirmative answer to this question can only be given if the sphere in question is one of those in which a subject of that nature may, by its very structure, be the subject of international obligations. Where this essential condition is not fulfilled, the subject in question is clearly deprived of the physical ability to fulfil or violate an international obligation.

*Article 3. Subjects which may commit internationally wrongful acts*

Every State may be considered the author of an internationally wrongful act.

4. IRRELEVANCE OF MUNICIPAL LAW TO THE CHARACTERIZATION OF AN ACT AS INTERNATIONALLY WRONGFUL

86. The independence of the characterization of a given act as wrongful in international law with regard to any characterization of that act, whether similar or not, by the municipal law of the State, may certainly be regarded as a general principle of international responsibility.

87. This independence is evident from several points of view. We have already had occasion to observe<sup>129</sup> that the attribution of a given action or omission to the State as a subject of international law can only take place under international law. At the same time, it was pointed out that this attribution is completely distinct from the attribution of an act to the State as a person under municipal law, effected on the basis of the latter law. It was also briefly indicated—pending further discussion of the subject in chapter II—that international law may take into account certain situations existing in municipal law as a factual premise for the attribution which takes place within the sphere of international law. We hastened to point out, however, that that in no way detracted from the full autonomy of the legal operation of attributing an act to the State which takes place under international law. In other words, the existence of an "act of the State" at the international level does not depend on the existence of an "act of the State" at the national level.

88. However, the irrelevance in international law of the conclusions which may be reached on the basis of municipal law is revealed primarily by other aspects, and it is above all in connexion with those aspects that it is necessary to stress the independence of the conclusions of international law and municipal law regarding the characterization of a given act or situation. The wrongfulness of some particular conduct attributed to the State at the international level can be defined only by reference to an international legal obligation incumbent on that State; the conclusion in that connexion is in no way influenced by the fact that, in municipal law, the conduct in question may also seem to constitute the breach of an obligation or, on the contrary, perfectly lawful conduct or even the performance of a duty. This is the principle which we intend to stress in the present section.

89. An internationally wrongful act cannot be said to exist when there is no breach of an international obligation but only a failure by the State to fulfil an obligation established by its own legal system: there seems to be no need for a lengthy demonstration of

<sup>129</sup> See para. 60 above.

the soundness of this proposition. The principle which it embodies constitutes the foundation of judicial decisions and international practice and has often been expressly confirmed.

90. The clearest expression of this principle in a judicial decision is found in the advisory opinion (4 February 1932) of the Permanent Court of International Justice concerning the "Treatment of Polish nationals and other persons of Polish origin or speech in the Danzig Territory".<sup>130</sup> The problem before the Court was to determine whether the Polish Government possessed the right to submit to the organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the constitution of the Free City of Danzig. In its advisory opinion, the Court sought first and foremost to show that the special character of the Danzig Constitution concerned only the relations between the Free City and the League of Nations, and that with regard to Poland the Danzig Constitution was and remained the constitution of a foreign State. That being so, the Court stated that the Polish Government did not have the right which it invoked, for :

[...] according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law [...].

The application of the Danzig Constitution may however result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law, [...] However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City".

91. With regard to State practice, there is certainly no need to refer here to the numerous cases in which States wrongfully accused of bearing international responsibility for what was in fact nothing more than a failure to observe a provision of municipal law have successfully opposed on that basis the unfounded claims advanced against them. More generally, it will be remembered that the request for information submitted to States by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930) drew a distinction between the international responsibility of the State flowing from the breach of an international obligation, and the purely internal responsibility flowing from the breach of an obligation established by the constitution or laws of that State. The Governments which replied to the request for information were in agreement on that point.<sup>131</sup> At the Hague Conference, article 1 of the draft

convention on State responsibility, which was approved unanimously at the first reading, implicitly confirmed the same conclusion.<sup>132</sup> We do not feel it necessary to dwell on the conclusions relating to this subject which may be drawn from international judicial decisions and State practice by citing the views of writers on international law. It is enough to say that the principle in question is generally accepted and in fact is uncontested.<sup>133</sup>

92. The essential importance of the principle relating to this aspect of the relationship between international law and municipal law is, however, revealed in the proposition which inverts the one given in paragraph 89 above : the fact that some particular conduct conforms to the provisions of national law or is even expressly prescribed by those provisions does not make it possible to deny its internationally wrongful character when it constitutes a breach of an obligation established by international law. As has been clearly stated,

The principle that a State cannot plead the provisions (or deficiencies) of its constitution as a ground for the non-observance of its international obligations [...] is indeed one of the great principles of international law, informing the whole system and applying to every branch of it [...].<sup>134</sup>

Judicial decisions, State practice and the works of writers on international law leave not the slightest doubt on that subject.

93. It has even been said that the Permanent Court of International Justice "affirmed this rule and elaborated it into one of the corner stones of its jurisprudence."<sup>135</sup> The Court expressly recognized the principle in its first Judgment, of 28 June 1923, in the *Case of the S.S. "Wimbledon"*. The German Government was seeking to justify having prohibited—contrary to the provisions of Article 380 of the Treaty of Peace of Versailles<sup>136</sup>—the *Wimbledon* from passing through the Kiel Canal during the war between the Soviet Union and Poland, arguing, *inter alia*, that the passage of the ship through the Canal would have constituted a violation of the German neutrality orders. The Court rejected that argument, observing that

international law has been broken. If this condition is not fulfilled when a law is infringed to the detriment of a foreigner, there can never be any question of a request put forward under international law by a foreign State; the injured party alone would be entitled to seek a remedy under internal law." (League of Nations, *Bases of Discussion* ... (op. cit.), p. 16).

<sup>132</sup> For the text of the article, see *Yearbook of the International Law Commission*, 1956, vol. II, p. 225, document A/CN.4/96, annex 3.

<sup>133</sup> The principle is set out very clearly in the commentary to section 167 of the *Restatement of the Law of the American Law Institute* (American Law Institute, op. cit., p. 509):

"[...] just as compliance with state law does not preclude violation of international law, [...] violation of state law does not necessarily involve violation of international law [...]."

<sup>134</sup> G. G. Fitzmaurice, "The general principles of international law considered from the standpoint of the rule of law", *Recueil des cours* ..., 1957-II (Leyden, Sijthoff, 1958), t. 92, p. 85.

<sup>135</sup> G. Schwarzenberger, *International Law* (op. cit.), p. 69.

<sup>136</sup> G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Weicher, 1923), 3rd series, t. XI, p. 636.

<sup>130</sup> P.C.I.J., series A/B, No. 44, pp. 24-25. In this connexion, see also the opinion expressed by the Court in its judgment of 7 September 1927 in the *Lotus Case* (P.C.I.J., series A, No. 10, p. 24).

<sup>131</sup> League of Nations, *Bases of Discussion* ... (op. cit.), p. 16 *et seq.*; and *Supplement to vol. III*, (op. cit.), pp. 2, 4 *et seq.* The principle in question was clearly set out in the reply of the German Government. After stressing the distinction between obligations incumbent on the State under international law and obligations of the State under its own laws, the German Government added:

"International responsibility—the sole form of responsibility under consideration—can only become involved when a rule of



"[...] a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace.

"[...] under Article 380 of the Treaty of Versailles, it was her [Germany's] definite duty to allow it [the passage of the *Wimbledon* through the Kiel Canal]. She could not advance her neutrality orders against the obligations which she had accepted under this Article".<sup>137</sup>

The principle thus formulated was subsequently reaffirmed by the Court on several occasions. The most explicit formulations include the following:

"[...] it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."<sup>138</sup>

"[...] it is certain that France cannot rely on her own legislation to limit the scope of her international obligations";<sup>139</sup>

"[...] a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."<sup>140</sup>

The same principle, viewed from a different angle, is also affirmed in the Advisory Opinions of 21 February 1925 on the *Exchange of Greek and Turkish Populations*<sup>141</sup> and of 3 March 1928 on the *Jurisdiction of the Courts of Danzig*.<sup>142</sup> Finally, in the same connexion, we may recall the observations by Lord Finlay on the Advisory Opinion of 15 September 1923 on the question concerning the *Acquisition of Polish Nationality*. These observations are particularly interesting because they refer to a case in which the actual absence of provisions of municipal law is shown not to be an excuse for the non-fulfilment of international obligations.<sup>143</sup>

94. The existence of a principle of international law according to which a State cannot evade the observance of its international obligations by pleading its municipal law is confirmed by an examination of the decisions of the International Court of Justice. Although the decisions of this Court do not provide affirmations of this

principle which are as explicit as those to be found in the decisions of the Permanent Court, it is nevertheless true that the principle in question was recognized expressly in the Advisory Opinion concerning *Reparation for injuries suffered in the service of the United Nations*<sup>144</sup> and implicitly in several other judgements. It is interesting to note that numerous judges of the Court have seen fit to set forth explicitly, in their separate or dissenting opinions on these same judgements, the principle which the majority of members of the Court had implied. In this context, reference should be made to the Judgement of 18 December 1951 in the *Fisheries Case*,<sup>145</sup> with the individual opinion of Judge Alvarez<sup>146</sup> and the dissenting opinion of Judge McNair;<sup>147</sup> the Judgement of 18 November 1953 in the *Nottebohm Case* (Preliminary Objection)<sup>148</sup> with the declaration of Judge Klaestad;<sup>149</sup> and above all the Judgement of 28 November 1958 in the *Case concerning the application of the Convention of 1902 Governing the Guardianship of Infants*,<sup>150</sup> with the separate opinions of Judge Badawi,<sup>151</sup> Judge Lauterpacht<sup>152</sup> and Judge Spender,<sup>153</sup> and the dissenting opinions of Judge Winiarski<sup>154</sup> and Judge Córdova.<sup>155</sup>

95. Similarly, there are no doubt on this subject in arbitral decisions. As early as 1872, in the decision in the famous *Alabama Case* (Great Britain v. the United

<sup>144</sup> *I.C.J. Reports 1949*, p. 180: "As the claim is based on the breach of an international obligation on the part of the Member held responsible by the Organization, the Member cannot contend that this obligation is governed by municipal law..."

<sup>145</sup> *I.C.J. Reports 1951*, p. 132.

<sup>146</sup> *Ibid.*, p. 152: "International law takes precedence over municipal law. Acts committed by a State which violate international law involve the responsibility of that State."

<sup>147</sup> *Ibid.*, p. 181: "It is a well-established rule that a State can never plead a provision of, or lack of a provision in, its internal law or an act or omission of its executive power as a defence to a charge that it has violated international law."

<sup>148</sup> *I.C.J. Reports 1953*, p. 123.

<sup>149</sup> *Ibid.*, p. 125: "With regard to the allegations of the Government of Guatemala that provisions of its national law prevent that Government and its officials from appearing before the Court, it suffices to say that such national provisions cannot be invoked against rules of international law."

<sup>150</sup> *I.C.J. Reports, 1958*, p. 67.

<sup>151</sup> *Ibid.*, p. 74: "... it has been established by many judicial decisions that a State cannot evade the obligations imposed by an international convention by invoking its own law, or indeed even its own constitution."

<sup>152</sup> *Ibid.*, p. 83: "A State is not entitled to cut down its treaty obligations in relation to one institution by enacting in the sphere of another institution provisions whose effect is such as to frustrate the operation of a crucial aspect of the treaty."

<sup>153</sup> *Ibid.*, especially pp. 125-126, and 128-129: "Treaty and convention obligations, whatever they are, must be faithfully observed. The provisions of municipal law cannot prevail over those of a treaty or convention."

<sup>154</sup> *Ibid.*, pp. 137 and 138. In this connexion, Judge Winiarski recalls the positions taken by the Permanent Court and expressed support for them.

<sup>155</sup> *Ibid.*, p. 140: "In my opinion there is no national law, whatever its classification might be, either common or public or with different aim and scope, which in the face of a treaty dealing with the same subject-matter can juridically claim priority in its application."

<sup>137</sup> Case of the S.S. *Wimbledon* (*P.C.I.J.*, series A, No. 1, pp. 29-30).

<sup>138</sup> Case of the Greco-Bulgarian "Communities", Advisory Opinion of 31 July 1930, (*P.C.I.J.*, series B, No. 17, p. 32).

<sup>139</sup> Case of the Free Zones of Upper Savoy and the District of Gex (second phase), Order of 6 December 1930 (*P.C.I.J.*, series A, No. 24, p. 12) and *idem*, Judgment of 7 June 1932 (*P.C.I.J.*, series A/B, No. 46, p. 167).

<sup>140</sup> Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion of 4 February 1932 (*P.C.I.J.*, series A/B, No. 44, p. 24).

<sup>141</sup> *P.C.I.J.*, series B, No. 10, p. 20: "a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken."

<sup>142</sup> *P.C.I.J.*, series B, No. 15, p. 27: "Poland could not avail herself of an objection [based on Polish national law] which [...] would amount to relying upon the non-fulfilment of an obligation imposed upon her by an international engagement."

<sup>143</sup> *P.C.I.J.*, series B, No. 7, p. 26: "By the express words of Article 4 [of the treaty] they are *ipso facto* Polish nationals. If Polish law requires registration or any other formality for the effective exercise of their rights as Polish citizens, the Polish Government is bound to provide for this; and most certainly the Polish Government could not set up any wrongful refusal of theirs as justifying their contention that these persons are not Polish citizens."

States of America), the Arbitral Tribunal, endorsing the arguments advanced by the United States,<sup>156</sup> stated :

"[...] the government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed".<sup>157</sup>

During the period between the First and Second World Wars, there were many decisions along the same lines, of which we shall recall the most important. In the arbitral award of 1922 concerning the *Norwegian Shipowners' Claims*, we read :

The Tribunal cannot agree [...] with the contention of the United States that it should be governed by American Statutes whenever the United States claim jurisdiction.

This Tribunal is at liberty to examine if these Statutes are consistent with the equality of the two Contracting Parties, with Treaties passed by the United States, or with well established principles of international law, including the customary law and the practice of judges in other international courts.<sup>158</sup>

In 1923, the arbitrator William H. Taft, in the award concerning the *Aguilar-Amory and Royal Bank of Canada Claims* [Tinoco Case] (Great Britain v. Costa Rica), concluded :

In an international tribunal [...] the unilateral repeal of a treaty by a statute would not affect the rights arising under it and its judgement would necessarily give effect to the treaty and hold the statute repealing it of no effect.<sup>159</sup>

An even clearer affirmation of the same principle is to be found in the award concerning the *Shufeldt Claim*, rendered in 1930 by an Arbitral Tribunal established by the United States of America and Guatemala :

The Guatemala Government contend further that the decree of the 22nd May 1928 was the constitutional act of a sovereign State exercised by the National Assembly in due form according to the Constitution of the Republic and that such decree has the form and power of law and is not subject to review by any judicial authority. This may be quite true from a national point of view but not from an international point of view, for "it is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter's subject."<sup>160</sup>

Lastly, with regard to more recent years, mention must be made of the decisions of the Italian-United

States of America Conciliation Commission, established under article 83 of the 1947 Treaty of Peace,<sup>161</sup> and particularly the decision in the *Wollemborg Case*, rendered on 24 September 1956. The Commission stated :

... one thing is certain : the Italian Government cannot avail itself, before an international court, of its domestic law to avoid fulfilling an accepted international obligation. Judicial decisions of the Permanent Court of International Justice are all identical on this point.<sup>162</sup>

96. The principle that a State cannot invoke its municipal law to show that it has not violated an international obligation is affirmed as frequently in State practice as in international decisions. We shall confine ourselves to recalling here the most important positions taken during the past fifty years.<sup>163</sup> In this context we shall examine the attitude of States to the disputes discussed in the League of Nations or submitted to the Permanent Court of the International Court of Justice, as well as the work on the codification of international law undertaken under the auspices of the League of Nations and the United Nations.

97. In the aforementioned disputes, the plaintiff States firmly supported the principle that conformity to municipal law does not exclude international responsibility. It should be noted, moreover, that the defendant States too generally agreed with that view. In the Memorandum submitted to the League of Nations regarding the dispute between the Swiss Confederation and other States concerning *Reparation for damage suffered by Swiss citizens as a result of events during the war*, the Swiss Federal Council stated that :

Municipal law cannot relieve a State from the necessity of fulfilling its international obligations. It is obvious, indeed, that any State is free to give itself such laws as it may choose ; but these laws engage its international responsibility if they infringe the principles of international law or if they are defective to the point of preventing an international obligation of the State in question from becoming effective.<sup>164</sup>

<sup>161</sup> United Nations, *Treaty Series*, vol. 49, p. 126.

<sup>163</sup> United Nations, *Reports of International Arbitral Awards*, vol. XIV (United Nations publication, Sales No. 65.V.4), p. 289. See also in the same connexion the decision in the *Flegenheimer Case* of 20 September 1958, rendered by the same Commission (*ibid.*, especially p. 360).

<sup>162</sup> It might also be advisable to recall the very clear affirmation of the principle contained in a memorandum sent by the United States Department of State to the Legation of Cuba in 1913 (reproduced in G. H. Hackworth, *Digest of International Law* (Washington, U.S. Government Printing Office, 1940), vol. I, pp. 28-29), as well as those contained in the statement by the Netherlands Minister of Justice to the Second Chamber in 1916 (quoted in League of Nations, *Bases of Discussion...* (*op. cit.*), p. 219), although these affirmations date back to a somewhat earlier era than the one with which we are concerned.

<sup>164</sup> League of Nations, *Official Journal*, 15th year, No. 11 (November 1934), p. 1486. The same position was adopted in the legal statement drawn up by Mr. Sauser-Hall annexed to the memorandum (*ibid.*, pp. 1494-1495) and in the statements of the Swiss representative, Mr. Motta, to the League of Nations (*ibid.*, p. 1438). It should be noted that the other parties to the dispute in question did not question the soundness of the affirmation. The same principle had been energetically affirmed by the Hungarian Government in the dispute concerning the Expropriation by the Roumanian Government of the immovable property of Hungarian optants (*ibid.*, 4th year, No. 7 [July 1923], p. 729; *ibid.*, No. 8 [August 1923],

<sup>156</sup> For the United States position, see the note dated 25 September 1869 from Mr. Fish to Mr. Motley, in *Fontes Juris Gentium*, Series B, Sectio I, Tomus I, Pars 1 (Berlin, Heymanns 1932), No. 2038, p. 899.

<sup>157</sup> J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, U.S. Government Printing Office, 1898), vol. I, p. 656.

<sup>158</sup> Award rendered on 13 October 1922 by the Arbitral Tribunal established under the agreement of 30 June 1921 between Norway and the United States of America (United Nations, *Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No. 1948.V.2), p. 331).

<sup>159</sup> Award of 18 October 1923, rendered by the Arbitral Tribunal established under the Convention of 12 January 1922 (*ibid.*, p. 386). See also the award rendered on 19 October 1928 by the French-Mexican Claims Commission (Convention of 25 September 1924) in the *Georges Pinson Case* (*ibid.*, vol. V (United Nations publication, Sales No. 1952.V.3), pp. 393-394).

<sup>160</sup> Award of 24 July 1930 rendered by the Tribunal established by the Agreement of 2 November 1929 (*ibid.*, vol. II (United Nations publication, Sales No. 1949.V.1), p. 1098).



During the discussion in the Permanent Court of International Justice on the question of the *Jurisdiction of the Danzig Courts*, Mr. Gidel, representing the Danzig Government, stated :

It is a universally accepted principle that the provisions or deficiencies of municipal law cannot be invoked by a State to avoid fulfilling international obligations or to evade the responsibilities flowing from the non-fulfilment of those obligations.

The sole task of international courts is to determine what obligations are incumbent upon the Parties to the dispute; the inadequacy or non-existence of the laws of a State do not suffice to exonerate that State from its international responsibility.<sup>165</sup> [Translation from the French.]

Mr. Limborg, representing the Polish Government, replied :

My adversary, the eminent Professor, is quite right : generally speaking, a State can never plead in an international court that its laws are inadequate.<sup>166</sup> [Translation from the French.]

In the *Case of the Free Zones of Upper Savoy and the District of Gex*, the Swiss Government stated :

There is no doubt [...] that the French Government cannot avail itself of the *de facto* situation or the consequences of the *de facto* situation which it created *contrary to the law*, in 1923, by installing its customs cordon at the political frontier of the small zones of Savoy and Gex on its own authority.<sup>167</sup> [Translation from the French.]

In its reply, it repeated :

The Swiss Government, for its part, considers first that *international commitments take precedence over national law and that consequently all French legislation—and not only the customs legislation—must be applied in such a way that the de jure situation created by the provisions of 1815 and 1816 is respected.*<sup>168</sup> [Translation from the French.]

The French Government did not deny the soundness of this argument. In his reply, Mr. Paul-Boncour, Counsel for the French Government, stated :

We were also told : you have no right to avail yourselves of the results obtained since 1923, when you transferred the customs cordon to your political frontier ; you have no right to avail yourselves of the results which are the consequences of your violation of the law [...].

But we are not adducing a legal argument, we are invoking factual arguments, we are citing statistics.<sup>169</sup> [Translation from the French.]

In its *Contre-Mémoire* on the *Losinger and Co. Case*, the Yugoslav Government acknowledged that

[...] It is true that international law does not permit a State to invoke its laws and the decisions of its courts in order to evade its international commitments [...].<sup>170</sup> [Translation from the French.]

The validity of the principle in question was reaffirmed once again by the parties to the *Phosphates in Morocco* case. The Italian Government having stated that :

It is an elementary principle of international law, which is constantly followed in practice, that the State cannot avail itself of the provisions of its municipal law to evade the fulfilment of its international obligations.<sup>171</sup> [Translation from the French.]

The French Government replied :

[The Italian Government has contended] that the State cannot avail itself of its freedom of judicial organization to evade its international obligations and to refuse to treat aliens in accordance with international conventions. The Government of the Republic agrees on that point.<sup>172</sup> [Translation from the French.]

Lastly, reference must be made to the *Nottebohm Case*, in connexion with which the Government of Liechtenstein energetically supported the principle,

[...] Which is so clear as to require the minimum citation of authority, [...] that no State may rely upon the provisions of its own law as a sufficient excuse for failure to comply with its obligations under international law.<sup>173</sup>

98. Above all, it is in the work on the codification of State responsibility undertaken under the auspices of the League of Nations and the subsequent work on the codification of the rights and duties of States and the law of treaties undertaken under the auspices of the United Nations that we find the most formal affirmation of the rule that any objection based on the fact that a State's conduct conforms to its own municipal legislation is invalid at the international level. In point I of the request for information sent to States by the Preparatory Committee of the 1930 Conference for the

pp. 886-887; *ibid.*, 9th year, No. 4 [April 1928], pp. 562-563 and 570). The Romanian Government did not contest the soundness of the Hungarian position on that point (*ibid.*, 4th year, No. 8 [August 1923], p. 895).

<sup>165</sup> *P.C.I.J.*, series C, No. 14-I, p. 44. See also the Note from the Senate of Danzig to the President of the Council of the League of Nations (*ibid.*, pp. 302-303) and the Memorandum of the Senate of Danzig (*ibid.*, p. 333).

<sup>166</sup> *Ibid.*, p. 59.

<sup>167</sup> Observations of the Swiss Government (*P.C.I.J.*, series C, No. 19, vol. III, p. 1222).

<sup>168</sup> Reply of the Swiss Government (*P.C.I.J.*, series C, No. 19, vol. IV, pp. 1912-1913). See also the statement by Mr. Logoz, agent of the Swiss Government (*ibid.*, series C, No. 19, vol. I, especially pp. 210-211).

Some of the clearest statements of the principle under consideration were made by the Swiss Government. In a recent statement, on December 10th, 1968, Mr. Spühler, Chief of the Federal Political Department, answering a question in Parliament, declared :

"If Swiss municipal law is not in accordance with our international obligations, we must modify our law in order to make it conform to public international law. No State can evade its obligations under international law by invoking the contrary provisions of its constitution or of its municipal law. On the contrary, in such an event the State must create a legal situation which conforms to public international law, and repair the injuries done." (*Société suisse de droit international, Annuaire suisse de droit international, 1969-1970* (Zürich, 1971), vol. XXVI, p. 97).

<sup>169</sup> *P.C.I.J.*, series C, No. 19, vol. I, p. 344. See also the reply of the French Government (*ibid.*, No. 19, vol. IV, pp. 1636-1637).

<sup>170</sup> *P.C.I.J.*, series C, No. 78, p. 181.

<sup>171</sup> Memorandum of the Italian Government (*P.C.I.J.*, series C, No. 84, p. 70). The same affirmation was repeated in the observations and conclusions (*ibid.*, p. 455) and in the additional observations (*ibid.*, p. 826) of the Italian Government and in the statement of its agent, Mr. Montagna (*ibid.*, series C, No. 85, p. 1172).

<sup>172</sup> Reply of the French Government (*P.C.I.J.*, series C, No. 84, p. 712).

<sup>173</sup> Statement of the Government of the Principality of Liechtenstein on 11 May 1953. See *Nottebohm Case* (Liechtenstein v. Guatemala), *I.C.J. Pleadings*, vol. I, p. 181 and generally pp. 180-182. See also the oral argument of Mr. Sauser-Hall, Counsel for Liechtenstein, at the public hearing of 10 November 1953 (*ibid.*, vol. II, pp. 27-28).

Codification of International Law a distinction was drawn between the responsibility incumbent on a State under international law and the responsibility which may be incumbent on it under its municipal law, and it was stated :

In particular, a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law.

In their replies, seventeen States expressly stated their agreement with this idea, while six others implicitly agreed with it. One State replied somewhat ambiguously.<sup>174</sup> Consequently, the Preparatory Committee formulated the following basis of discussion [Basis of discussion No. 1] for the Conference :

A State cannot escape its responsibility under international law by invoking the provisions of its municipal law.<sup>175</sup>

During the debate at the Conference, States expressed general approval of the idea embodied in Basis No. 1,<sup>176</sup> and the only subjects of discussion were the advisability of inserting a rule expressing that idea in the convention<sup>177</sup> and the choice of the most appropriate wording. At the end of the debate, the Third Committee of the Conference adopted in first reading the following article (article 5) :

A State cannot avoid international responsibility by invoking the state of its municipal law.<sup>178</sup>

99. The International Law Commission of the United Nations, at its first session (1949), adopted a draft Declaration on Rights and Duties of States. Article 13 of the draft, the contents of which were approved by all the members of the Commission, reads as follows :

Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.<sup>179</sup>

<sup>174</sup> League of Nations, *Bases of Discussion* ... (op. cit.), pp. 16 et seq.

<sup>175</sup> See *Yearbook of the International Law Commission*, 1956, vol. II, p. 223, document A/CN.4/96, annex 2. The same principle, although worded somewhat differently, was included in point 3 of the conclusions in the report of the Sub-Committee of Experts on Responsibility of States (*ibid.*, p. 222, annex 1).

<sup>176</sup> Only two States requested that exceptions to the principle be mentioned. In their view, the principle would not be valid in the case of certain matters covered by the capitulatory system and those falling within the reserved domain. However, following statements by other delegates to the Conference, who pointed out that those cases did not constitute real exceptions to the envisaged principle, the two States withdrew their proposed amendments. The existence of exceptions to the principle was also mentioned by another delegate (see League of Nations, *Acts of the Conference for the Codification of International Law* [The Hague, 13 March-12 April 1930], volume IV, *Minutes of the Third Committee* [document C.351 (c)M.145(c).1930.V], pp. 120 et seq.).

<sup>177</sup> Some delegates considered that the principle expressed in Basis No. 1 was already clearly brought out in the text of the articles which stated that a State may be held responsible for the conduct of its legislative and judicial organs. This argument, which is not very sound, was not accepted by the Conference.

<sup>178</sup> See *Yearbook of the International Law Commission*, 1956, vol. II, p. 225, document A/CN.4/96, annex 3.

<sup>179</sup> See *Official Records of the General Assembly, Fourth Session, Supplement No. 10* (A/925). The English text is also reproduced in *Yearbook of the International Law Commission*, 1949, p. 288. For the debate in the Commission, see *ibid.*, pp. 104-105 (14th meeting,

100. With regard to the early work of the International Law Commission on State responsibility, it should be noted that the wording of the clause included in article 1, paragraph 3, of the preliminary draft prepared in 1957 by the Special Rapporteur, Mr. García Amador, was very similar to that of the article on that subject adopted at the 1930 Codification Conference :

The State may not plead any provisions of its municipal law for the purpose of repudiating the responsibility which arises out of the breach or non-observance of an international obligation.<sup>180</sup>

This clause was incorporated unchanged in article 2, paragraph 4, of the preliminary draft prepared by Mr. García Amador in 1961.<sup>181</sup>

101. At the first session of the United Nations Conference on the Law of Treaties (1968), the delegation of Pakistan proposed in the Committee of the Whole that a clause specifying that no party to a treaty could invoke the provisions of its municipal law to justify the non-observance of a treaty should be inserted in the draft convention. Ten delegations spoke on that point and they all accepted the principle in question. Although some of them expressed misgivings, they did so only in connexion with the need to insert the provision in the Convention on the Law of Treaties. At the end of the discussion, the clause was adopted in first reading by 55 votes to none, with 30 abstentions, and was referred to the Drafting Committee.<sup>182</sup> In second reading, the Committee of the Whole approved the article submitted by the Drafting Committee without a formal vote.<sup>183</sup> At the second session of the Conference (1969),

paras. 1-16), 147 (20th meeting paras. 78-80), 171 (24th meeting, paras. 4-8). The text of the article adopted by the Commission reproduces, without substantive modifications, article 12 of the draft declaration on rights and duties of States submitted to the General Assembly by the Government of Panama and used by the Commission as a basis of discussion (A/285). The text of the draft also appears in the *Preparatory study concerning a draft Declaration on the Rights and Duties of States* (memorandum by the Secretary-General of the United Nations) [United Nations publication, Sales No. 1949.V.4], p. 35. The soundness of the principle set out in those articles was stressed by several Governments in their comments on the Panamanian draft (*ibid.*, pp. 80, 84-85), on the draft of the International Law Commission (*Official Records of the General Assembly, Sixth Session, Annexes*, agenda item 48, documents A/1338 and Add.1 and A/1850), and in the debate in the General Assembly on the Commission's report (*ibid.*, *Fourth Session, Sixth Committee*, 168th-173rd and 175th-183rd meetings; and *ibid.*, *Plenary Meetings*, 270th meeting).

<sup>180</sup> *Yearbook of the International Law Commission*, 1957, vol. II, p. 128, document A/CN.4/106, annex.

<sup>181</sup> *Ibid.*, 1961, vol. II, p. 46, document A/CN.4/134 and Add.1.

<sup>182</sup> The States which spoke in favour of the principle in the debate included the Byelorussian Soviet Socialist Republic, Chile, France, Israel, Italy, the USSR, the United Kingdom, the United States of America and Turkey. The United States delegation indicated that, in its view the principle would be more appropriately placed in a convention on State responsibility. See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), pp. 150 et seq., 28th meeting of the Committee of the Whole, paras. 49-70, and 29th meeting.

<sup>183</sup> The text of the clause was approved at the 72nd meeting of the Committee of the Whole (*ibid.*, pp. 427-428, 72nd meeting of the Committee of the Whole, paras. 29-48). The amendment

(Continued on next page.)

some delegations thought they saw a contradiction between this rule and the principle laid down in paragraph 1 of draft article 43 (article 46 of the final Convention), according to which :

A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

In order to allay that concern, it was pointed out that there was no contradiction between the two provisions, since the one concerned treaties already in force and the other competence to conclude treaties. Following upon that brief discussion, the Conference, at its thirteenth plenary meeting, finally adopted (by 73 votes to 2, with 24 abstentions) the following provision, which became article 27 of the Convention :

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.<sup>184</sup>

102. The principle thus sanctioned by international judicial decisions and State practice is also expressly confirmed by writers belonging to different legal systems.<sup>185</sup> It is also included in most of the draft codifications of State responsibility prepared by individuals or private institutions. We may cite article 5 of the draft code prepared by the Japanese Association of International Law in 1926 ;<sup>186</sup> rule I, second paragraph, of the draft adopted by the Institute of International

(Foot-note 183 continued)

proposed by the delegation of Pakistan used the terms "constitution" and "laws". The Drafting Committee replaced those words by the term "internal law" which is thus used in the text approved by the Committee of the Whole. The Drafting Committee also added the phrase indicating that this rule is without prejudice to the article concerning the provisions of internal law regarding competence to conclude a treaty. When the new form of the clause was introduced, the representative of Venezuela expressed some reservations about the formulation of the principle.

<sup>184</sup> See *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), pp. 53-54, 13th meeting, paras. 30-40.

Concerning article 27 of the Vienna Convention on the Law of Treaties, see E. De La Guardia and M. Delpech, *El derecho de los tratados y la Convención de Viena* (Buenos Aires, La Ley, 1970), pp. 286 *et seq.*; S. Rosenne, *The Law of Treaties, A Guide to the Legislative History of the Vienna Convention* (Leyden, Sijthoff, 1970), pp. 200-201.

<sup>185</sup> See, besides the course by Fitzmaurice cited above (see foot-note 134 above), C. Eagleton, *The Responsibility of States...* (*op. cit.*), pp. 63 *et seq.*; A. Verdross, *Völkerrecht* (*op. cit.*), p. 114; H. W. Briggs, *The Law of Nations*, 2nd ed. (London, Stevens, 1953), pp. 62-63; Vitta, *La responsabilità degli Stati per fatti di organi legislativi* (Milan, 1953), pp. 29 *et seq.*; M. Sørensen, "Principes de droit international public", *Recueil des cours...* 1960-III, (Leyden, Sijthoff, 1961), vol. 101, pp. 110-111; H. Waldock, "General course on public international law", *Recueil des cours...* 1962-II, (Leyden, Sijthoff, 1963), vol. 106, pp. 125 *et seq.*; I. Brownlie, *op. cit.*, pp. 32-33; L. Cavaré, *Le droit international public positif*, 3rd ed. brought up to date by J.-P. Quéneudec (Paris, Pédone, 1967), t. I, pp. 177 *et seq.*; and Institute of the State and of Law of the Academy of Sciences of the Soviet Union, *op. cit.*, p. 428.

<sup>186</sup> "A State cannot evade the responsibility established by the present rules for reasons of its own constitutional law or practice." (*Yearbook of the International Law Commission*, 1969, vol. II, p. 141, document A/CN.4/217 and Add. 1, annex II).

Law at Lausanne in 1927 ;<sup>187</sup> article 2 of the draft prepared by the Harvard Law School in 1929<sup>188</sup> and article 2, paragraph 2, of the draft prepared by the same institute in 1961 ;<sup>189</sup> article 7 of the draft prepared by the Deutsche Gesellschaft für Völkerrecht in 1930 ;<sup>190</sup> article 4, third paragraph, of the draft prepared by Professor Strupp in 1927 ;<sup>191</sup> and article 4 of the draft prepared by Professor Roth in 1932.<sup>192</sup>

103. There is no exception to the principle that municipal law has no effect on the characterization of an act of the State as internationally wrongful. One cannot cite as an exception the cases where certain rules of international law—such as those dealing with the treatment of aliens—prescribe that the State should have some particular kind of conduct when that conduct is also required by municipal law. It is true that in such cases there can be no internationally wrongful act when the conduct of the State conforms to municipal law, but even then it is not the conformity of the conduct to national legal rules which precludes international wrongfulness, but the fact that conduct conforming to municipal law constitutes, by the very fact of that conformity, the performance of the international obligation.

104. The search for appropriate wording to define the principle dealt with in this section does not seem to entail any major difficulties. At the Conference for the Codification of International Law (The Hague, 1930), States indicated certain requirements they wished to see respected in the "technical" formulation of the article on that subject. The wording adopted should be such that a State could not evade its international obligations by invoking constitutional or other provisions or legislative provisions or by seeking to plead the non-existence or existence in its national legal order of the provisions or means of implementation necessary for the execution of a given international obligation. In fact, it is primarily a question of ensuring that the definition adopted expresses precisely the idea that the identification of an act as an internationally wrongful act of the State is totally independent of the way in which that same act is regarded by the internal legal order of that State. It is also necessary to ensure that the definition encompasses all the different aspects of that independence. In view of those requirements, a brief, comprehensive reference to municipal law seems

<sup>187</sup> *Annuaire de l'Institut de droit international, 1927 (session de Lausanne)* (Paris), t. III, p. 330; *Yearbook of the International Law Commission*, 1956, vol. II, p. 227, document A/CN.4/96, annex 8.

<sup>188</sup> "The responsibility of a state is determined by international law or treaty, anything in its national law, in the decisions of its national courts, or in its agreements with aliens, to the contrary notwithstanding." (*Yearbook of the International Law Commission*, 1956, vol. II, p. 229; document A/CN.4/96, annex 9).

<sup>189</sup> "A State cannot avoid international responsibility by invoking its municipal law." (*ibid.*, 1969, vol. II, p. 143, document A/CN.4/217 and Add.1, annex VII).

<sup>190</sup> *Ibid.*, p. 150, annex VIII.

<sup>191</sup> "Defective legislation, and particularly in federal States constitutional limitations upon the legislative power of the central government, can neither release nor diminish the responsibility of a State." (*ibid.*, p. 151, annex IX).

<sup>192</sup> *Ibid.*, p. 152, annex X.

to be the most appropriate, since it is both the simplest and most general:<sup>193</sup> besides constitutional and legislative provisions, it encompasses provisions emanating from any other source provided for in the internal legal order and in particular the decisions of courts.

105. In view of the preceding considerations, we feel we can propose, for the definition in question, the following text:

**Article 4. Irrelevance of municipal law to the characterization of an act as internationally wrongful**

**The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law.**

## CHAPTER II

### The "act of the State" according to international law

#### 1. PRELIMINARY CONSIDERATIONS

106. At the beginning of chapter I, section 2, it was stated that in international law the first prerequisite for establishing that an internationally wrongful act has been committed is what has been called the subjective element of the wrongful act. It was also pointed out that this subjective element consisted of conduct by human beings which, by reason of its characteristics, must be attributable, not to the human being or group of human beings which actually engaged in it, but to the State as a subject of international law. It was then shown that the conduct in question could consist of either an action or an omission. Lastly, as a preliminary step, the following three comments were made concerning the general features of the problem:

(a) The attribution to the State of the conduct actually engaged in by physical persons is necessarily based on juridical data and not on the recognition of a link of natural causality.

(b) The attribution to the State of the action or omission of an individual or group of individuals as an internationally wrongful act which is a source of international responsibility concerns the State as a "person under international law". The notion of the State with which we are concerned here has therefore nothing to do with the notion of the State as a legal order; furthermore, it should not be confused with the notion of the State as a person under municipal law.

(c) The attribution to the State as a subject of international law can take place only on the basis of interna-

tional law itself. Such attribution is thus completely distinct from and independent of the attribution of the same act to the State as a subject of municipal law which may, possibly but not necessarily, take place under the latter law (without prejudice to the possibility that international law may take the situation existing in municipal law into account for its own purposes).

107. Our task now is to develop this basic notion of the "act of the State" according to international law, that is, the attribution to the State of the conduct of an individual for the purpose of attaching legal consequences to that conduct at the international level. In particular, we shall have to determine when, in what circumstances and in what conditions such attribution takes place. The problems to be solved have one common denominator: the basic task is to establish what conduct engaged in by individuals can be considered, for the purposes with which we are concerned, as conduct of the State, and in what conditions such conduct must have been engaged in, in order to be attachable to the State as a subject of international law. In this connexion, we must first of all point out that from a theoretical standpoint there is nothing to prevent the conduct of physical persons or groups of physical persons whose link with the State might even have no relation to the latter's organization from being attached to the State as a subject of international law: for example, the actions or omissions of a State's nationals or of individuals residing in its territory could be considered acts of the State. In practice, however, we find that what is, as a general rule, attributed to the State at the international level are the acts of persons or groups of persons who form part of its "organization", in other words, the acts of its "organs" or "agents". As indicated in paragraphs 25-28 of the introduction, we shall see in the following sections of this chapter how this basic principle is defined and completed, and determine its scope and the limitations and derogations to which it is subject. We shall examine the question whether the activities of certain categories of agents and organs should be considered as acts of the State as a subject of international law. We shall also have to consider whether, in addition to the conduct of persons who form part, properly speaking, of the machinery of the State, the conduct of other persons is also attributed to the State at the international level: the conduct of persons who are organs of institutions other than the State itself or who engage in what are in fact public activities although they are not, in the proper sense of the term, "organs", or, in any case, organs of that particular State. We shall then examine the question whether one should consider as acts of the State under international law certain conduct which persons whose activities are in principle attributed to the State adopt in conditions which could, in the specific case in question, cast doubt on the legitimacy of that attribution. Lastly, we shall complete the picture by examining the treatment accorded by international law to the conduct of private individuals acting solely in that capacity and the conduct of groups whose activities are directed against the State.

108. In this complicated, multifaceted analysis we shall, of course, be guided by the criteria which have been

<sup>193</sup> The Third Committee of the 1930 Conference for the Codification of International Law preferred the expression "municipal law" to the wording "provisions of its municipal law" used by the Preparatory Committee in the bases of discussion.<sup>a</sup> At the United Nations Conference on the Law of Treaties, the Drafting Committee—as has already been noted (see above para. 101)—generally preferred to use the term "internal law" rather than "constitution" and "laws".

<sup>a</sup> For the text of the bases of discussion, see *Yearbook of the International Law Commission, 1956*, vol. II, p. 223, document A/CN.4/96, annex 2.

applied throughout the preparation of this report, in other words, we shall use an essentially inductive method, proceeding from the examination of the practical application of principles in judicial decisions and State practice to the theoretical formulation of those principles. It must be acknowledged, however, that certain theoretical points have long influenced these problems and obscured the approach to them. In order to be able to understand the substance of the problem of the attribution of the acts of its "organs" to the State as a subject of international law, and in order to be able to overcome the difficulties which arise in that connexion, it therefore seems useful to clear away in advance the influence of certain premises which are, in our view, erroneous, and of certain confusions which constitute an obstacle at every stage of the course we must follow.

109. The first point to be stressed is the need to avoid identifying the situations with which we are concerned too closely with others which are basically different despite certain common general features. As is well known, international law takes the machinery or "organization" of the State into consideration for purposes which greatly exceed those of the attribution to the State of an internationally wrongful act. All activities of the State at the international level are activities exercised by persons who, as a rule, form part of its "organization": in the first place, the completely lawful activities which consist of performing acts or producing manifestations of will with a view to attaining certain legal consequences. It may even be said that it is in this connexion that the problem of defining the "act of the State" for international purposes has been studied most thoroughly. However, the solutions proposed by the various schools of thought with regard to the specific aspects with which we are concerned often consist only of the application of a position adopted with regard to a more general and sometimes different aspect of the problem. For it is wrong to believe that the questions arise in the same way and call for an identical solution in every sphere. Attaching to the State a manifestation of will which is valid, for example, in order to establish its participation in a treaty, and attributing some particular conduct to the State in order to impose international responsibility upon it are not operations which are comparable in every respect, calling for the application of exactly the same criteria.<sup>194</sup> In any case, our present task is simply to determine the conditions in which an internationally wrongful act is attributed to the State in international law; we are not required to do anything more.

110. The aforementioned differences of opinion may also originate in terminological misunderstandings, that is to say, they may be caused by the fact that a different sense is attributed to certain basic notions. As we have said, however, the origin of these differences and difficulties is more frequently to be found in a confusion not only between different notions but between different realities. For example, this may be seen in the case of two operations which, in our view, are quite separate: the

operation of establishing the "organization" of the State (that is to say, determining which are the individual and collective "organs" which, taken as a whole, make up the State machinery) and on the other hand the operation of attributing to the State, for some purpose or other, the conduct adopted in certain conditions by persons belonging to the State organization. In this case, the original confusion is combined with the additional confusion—which is perhaps even more serious—between the definition of the act of a given person as an "act of the State" in municipal law and the corresponding definition in international law.

111. This double confusion is largely to blame for the difficulties encountered by one school of thought which has had and still has many supporters and which takes as its basic premise the statement—in itself irrefutable—that the term "organization" does not and cannot mean anything but the organization which the State autonomously gives itself. According to the writers belonging to this school of thought, the "organs" of the State can therefore only be those which the State considers as such within its own legal system and whose action it regulates for its own purposes. The same writers, however, also feel obliged to deduct from this premise a consequence which is in no way a logical corollary to it. In their view, it would not be admissible in international law or municipal law to consider a manifestation of will or an action as being a manifestation of will or action of the State unless (a) the will was manifested or the action performed by a person whose status as an organ of the State is incontestable according to that State's municipal law, and (b) that person's conduct was in conformity with the rules of municipal law which define his functions and the scope of his competence. In other words, persons who in the internal legal order do not possess the status of "organs of the State" in the proper sense of the term, even when they perform, in one way or another, public functions which are clearly separate from their private activities, should be considered merely as private individuals. The same attitude should be adopted towards persons who, although organs of the State in the strict sense of the term and acting in that capacity, do not comply with the criteria established to regulate their activities. In both cases it would be inconceivable, both in international law and in municipal law, to consider an action or omission committed in such circumstances as an act of State ("acte étatique", "Hoheitsakt").

112. The advocates of this line of reasoning are then obliged to resort to artificial or contradictory solutions if they do not wish to arrive quite simply at the conclusion—which is, as we shall see, clearly contradicted by State practice—that the State is not responsible for acts committed by persons whom that State's system of municipal law does not consider as part of the State machinery or for acts committed by organs of the State in violation of the rules to which their action is subject.<sup>195</sup> In

<sup>194</sup> See, in this connexion, C. Eagleton, *The Responsibility of States* . . . (op. cit.), pp. 54-55; A. Ross, op. cit., pp. 251-252.

<sup>195</sup> The older writers completely excluded any international responsibility of the State in such cases, or, at most, admitted it by basing it on the fact that the superior organs of the State had not prevented or at least disavowed the reproachable acts in question. See, for example, P. Fiore, *Trattato de diritto internazionale pubblico*,

such cases the writers sometimes have recourse to the idea of international responsibility for an act committed by others, which, according to some of these writers, would be comparable to the responsibility which, in their view, the State would also assume for the acts of private individuals, although it would perhaps be stricter.<sup>196</sup> On the other hand, they sometimes affirm that international practice—disregarding truth and logic or applying purely opportunist criteria—regards as acts of State, for the determination of international responsibility, acts which should not really be characterized as such, since in law such characterization can take place only under municipal law.<sup>197</sup> In this connexion, these writers often refer to the

3rd ed. (Milan, 1887), vol. I, pp. 426-427; Ch. Calvo, *Le droit international théorique et pratique*, 5th ed. (Paris, Guillaumin), t. 3, pp. 135-136; F. Despagne, *Cours de droit international public*, 3rd ed. (Paris, 1905), p. 564. This idea was also supported in the report prepared by J. G. Guerrero for the Commission of Experts of the League of Nations. See also, by the same author, *La codification du droit international* (Paris, Pédone, 1930), pp. 111-112. Levin (*Orverstevnmost gosudarstv . . .* [op. cit.], pp. 72 et seq.) now maintains an analogous position.

<sup>196</sup> This is the idea advanced in the first edition of his work by Oppenheim, who uses the term "vicarious responsibility", as opposed to "original responsibility", to designate the responsibility of States for certain actions or omissions other than their own, including certain wrongful acts committed by their agents without authorization. See L. Oppenheim, *op. cit.*, pp. 337-338 and 362. According to A. Jess (*Politische Handlungen Privater gegen das Ausland und das Völkerrecht* [Breslau, Marcus, 1923], pp. 103 et seq.), the responsibility of States for acts committed outside the acknowledged competence of their author is in fact responsibility for the acts of individuals. See also in this connexion E. M. Borchard, *op. cit.*, p. 180; and A. V. Freeman, *op. cit.*, pp. 25-26.

<sup>197</sup> This theory was developed primarily in connexion with acts committed by officials which did not conform to the provisions of the law to which those officials were subject. H. Triepel (*Völkerrecht und Landesrecht* [Leipzig, Mohr (Siebeck), 1899], p. 349) observes that the State should also be responsible for the acts of its organs when they exceed the limits of their competence, despite the fact that "strictly speaking these acts, from the legal standpoint, are not acts of State" ("diese Akte sind zwar rechtlich genommen keine Staatsakte").

Anzilotti, too, in his earlier works (*Teoria generale . . .* [op. cit.], p. 132, and also *Il diritto internazionale nei giudizi interni* (Bologna, Zanichelli, 1905), reprinted in *Scritti di diritto internazionale pubblico* (Padua, CEDAM, 1956), vol. II, t. 1, pp. 429 et seq.) took as his basic premise the statement that municipal law alone determined the respective competence of the various organs of the State, and went on to deduce the corollary that the conduct adopted by an organ in violation of municipal law or in excess of its competence was not an act of State but purely the act of an individual, from whatever point of view it was examined. He nevertheless observed that in such cases international law provided that the State was responsible for wrongful acts by its officials: that responsibility was created immediately by the conduct of the official and not (as in the case of acts of private individuals) by the attitude to that conduct adopted by the State. According to Anzilotti, wrongful acts committed by officials who abuse their position, although not acts of the State, possess the external characteristics of such acts, and the State must therefore answer for the prejudicial consequences of those acts. Strupp ("Das völkerrechtliche Delikt", *Handbuch . . .* [op. cit.], pp. 37 et seq.) developed his ideas along similar lines. Concerning the theories of those who regard any organ which acts in violation of its competence as a private individual and consider the responsibility of the State following such an action as a case of responsibility for the acts of a private individual, Strupp remarks: "Diese, der Rechtslogik konforme Auffassung steht jedoch in schroffem Widerspruch zu der Rechtsauffassung der Staaten, soweit eine Kompetenzüberschreitung in Betracht kommt." (*ibid.*, p. 39) ("This view, which is in conformity with legal logic, is nevertheless in clear contradiction with the legal concept of States, inasmuch as it concerns an act in excess of

security of international relations as a condition which would in fact make it necessary to assume that all the actions and omissions of an organ are in conformity with the law and the organ's competence so long as they have the external appearance, if not the intrinsic reality, of conformity.<sup>198</sup> Now this assumption may have the effect of reconciling the conclusions with State practice, but it nevertheless remains in clear contradiction with the premises adopted by the jurists mentioned above.

113. In other schools of thought we find the negative consequences of the lack of a distinction between the determination of the organization of the State and the definition of the conditions in which the actions or omissions of persons forming part of that organization can be attributed to the State as a subject of international law. In particular, these consequences may be noted in the case of the advocates of a concept which is very different from and indeed almost diametrically opposed to the concept adopted by the writers mentioned above. The starting-point is still the idea that the two operations in question are inseparable. However, the writers belonging to the second school quite rightly wish to restore to international law the task of determining the conditions in which some particular conduct or manifestation of will can be recognized as being conduct or will of the State at the international level. They conclude that everything should be attributed to international law, that is to say, they also assign to it the task of determining the organization of the State as a subject of international law. Of course, such a conclusion is inconceivable unless one adopts a notion of "organization" which is highly distorted in comparison with the usual meaning of this term. According to the view which is expressed clearly by some writers in this group, the "organization" of an entity,

competence"). [Translation by the United Nations Secretariat.] Strupp (*ibid.*, p. 42) goes on to observe that according to the legal concept of States, the State answers for the acts of its organs, even when they have acted in excess of their competence, provided that they remained within the general framework of their functions and thus appeared to be acting as organs.

Dahm (*op. cit.*, pp. 181-182), considers that the organization of the State is established by the norms of its municipal law, which determine which persons act for the State and define their competence. According to Dahm, that very fact establishes the limits of responsibility in international law; in that respect, the international legal order follows municipal law. However, for reasons pertaining to justice and security it is essential that the conduct of organs of the State which act in excess of their competence while appearing to perform their functions should be considered as conduct of the State.

Among modern Italian writers, Monaco (*op. cit.*, p. 368) adopts as a general criterion the consideration that "if the organ, in exercising the powers of its function, violates international law, it is not illogical for the injured State to interpret broadly the sphere of attributions of the organ and to seek to attribute the responsibility for that act to the State to which the organ belongs."

<sup>198</sup> See Triepel, *op. cit.*, loc. cit.: Anzilotti, *Teoria generale . . .* (*op. cit.*), p. 132; Jess, *op. cit.*, p. 104 (this jurist, however, criticizes the view that organs which act in excess of their competence should be considered, in practice, if not theoretically, as real organs); Strupp, "Das völkerrechtliche Delikt", *Handbuch . . .* (*op. cit.*), p. 43; Dahm, *op. cit.*, p. 182. Subsequently, when we examine in greater detail the question of the international responsibility of the State for acts committed by its organs in excess of their competence, we shall see the influence which the various opinions outlined here have had in practice on the official positions of certain governments.



considered as a subject by a given legal order, should be taken to mean the set of rules which establish the conditions under which that legal order may attribute to the entity concerned a declaration of will, an action or an omission by certain individuals. Of course, if one were to agree that the term "organization" should be given such a meaning it would be easy and even necessary to deduce that the organization of the State as a subject of the law of nations would be established by the same law.<sup>199</sup> But it seems certain that in the end such a definition of the organization of the State bears no relation to the phenomenon it is supposed to define. The "organization" of the State cannot be described as a set of "rules relating to attachment"; it is a complex of real structures, the machinery by which the State reveals its existence and works to achieve its purposes. And it is the State itself which "organizes" itself, which gives itself this machinery and provides for its functioning according to its own criteria and prescriptions. It is not the task of international law to "organize" the State, even if only for international purposes.<sup>200</sup> In order to make the contrary statement more acceptable the advocates of this theory are careful to add that in establishing its own organization of the State, international law uses, at least in principle, the rules of law established by the internal organization of the State<sup>201</sup> or refers to the internal *de facto* organization of the State.<sup>202</sup> The idea in itself is nevertheless unacceptable.

<sup>199</sup> Perassi (*op. cit.*, p. 98) reaches this conclusion precisely on the basis of the premise mentioned above. Balladore Pallieri (*Diritto internazionale pubblico* [*op. cit.*], pp. 123-124) also conceives of the organization of a subject-legal person as the process by which the will or action of private individuals are taken into consideration by law as being the will or action of the subject-legal person; from that, he deduces that the organization of States as subjects of international law is determined by international legal rules. Similarly, Morelli (*op. cit.*, pp. 185-186) considers that the imputation of actions or manifestations of will by individuals to subjects of a given legal order may be identified with the organization of those subjects and, hence, that the rules providing for the organization of subjects of international law cannot be other than the rules of international law. Sereni (*op. cit.*, 1958, t. II, pp. 456-457) considers that it is for international law to indicate which individuals or groups of individuals possess the status of organs of its subjects and to define their competence.

It should be noted that if the concept referred to here were developed to its most extreme consequences, it would be necessary to admit that in cases where it was acknowledged, if only on an exceptional basis, that the State was responsible for the acts of private individuals or other persons having no link with the organization of the State, these persons would automatically be elevated to the rank of organs of the State from the standpoint of international law.

<sup>200</sup> In criticizing the theory referred to here, G. Biscottini ("Volontà ed attività dello Stato nell'ordinamento internazionale", *Revista di diritto internazionale*, Padua, XXXIVth year, series IV, vol. XXI (1942), p. 14) rightly observes that international legal rules have nothing to do with the determination of the organization of the State for the purposes of international law.

<sup>201</sup> In determining the organization of the State-subject of international law, international law would therefore endorse the content of the rules which establish the organization of the State-subject of municipal law. See Perassi, *op. cit.*, p. 99; Sereni, *op. cit.*, t. II, p. 457.

<sup>202</sup> Morelli (*op. cit.*, p. 187) considers that for the purposes of the referral effected by international law, the *de facto* organization of the subject should prevail over its legal organization. See also V. Bellini, "Il principio generale dell'effettività nell'ordinamento internazionale", *Annuario di diritto comparato e di studi legislativi*, Rome, 3rd series (special), vol. XXVII, fasc. 3, 1951, pp. 293 *et seq.*

114. Still other writers adopt a starting-point similar to those of the schools of thought examined thus far, a choice which is facilitated by their strictly monistic concept of the relationship between international law and municipal law. This concept leads them to speak of the power of the State to determine its own organization as a concession or delegation by international law. When confronted by some of the problems mentioned above, they are thus obliged to argue that international law does not always leave it to municipal law to determine the organization of the State. According to these writers, there are exceptional cases in which international law intervenes directly in this sphere in order to determine whether a given person should be considered as an organ of the State.<sup>203</sup> The difficulties encountered by the jurists belonging to the aforementioned schools of thought would thus seem to have been overcome, but only on condition that one is satisfied with a construction which, on reflection, seems to be even more artificial and unrelated to reality than that of the jurists who assign to international law the task of determining the organization of the State as a subject of international law. In fact, according to their reasoning, international law would not merely establish directly a part of the State organization; even the remaining "normal" part of this organization would be established by the State only by virtue of an alleged "faculty" granted by the international legal order. The existence of the organization of the State, even at the purely internal level, would thus depend, in the final analysis, on international law.

115. The preceding examination of some of the best-known trends in legal literature and the impasse to which they lead, in one way or another, merely confirms the belief which was expressed at the beginning of these preliminary considerations: only a clear and clean-cut definition of the distinctions which we have mentioned will enable us to find a satisfactory solution to the problems which arise in this connexion and, above all, to eliminate those which, in the final analysis, are nothing more than artificial problems and hence, in fact, non-existent.

<sup>203</sup> A. Verdross ("Règles générales...", *Recueil des cours*... [*op. cit.*], pp. 335-336, and *Völkerrecht*, [*op. cit.*], p. 380) states that the rule according to which the organs of a State must be persons declared competent by its municipal law is valid only for *normal* cases. In exceptional cases, international law itself may "establish which individuals should be considered as organs of the State". The two cases in which that occurs are the case of a population of a non-occupied territory which, when the enemy approaches, spontaneously takes up arms to combat the invader, and the case of organs which do not possess competence under municipal law. Verdross nevertheless feels obliged to justify these exceptions by the principle of efficacy. For ideas which are in part similar, see Guggenheim, *Traité*... (*op. cit.*), pp. 5-7.

Kelsen, who in his early works whole-heartedly defended the principle that it is for national law to determine whether an act performed by an individual is or is not an act of State, that is to say, imputable to the State, has more recently contended that international law, too, may in exceptional cases determine which persons are competent to act as organs of the State and thus to perform acts of State. In his view, this is the only way of explaining why even an act performed by an individual who is neither authorized nor compelled by national law to perform it is considered as an act of State (see Kelsen, "Théorie...", *Recueil des cours*... [*op. cit.*], pp. 88-89; and *Principles*... [*op. cit.*], pp. 117-118).

116. The first misconception which must be eliminated is precisely the idea that the determination of the criteria according to which the conduct of certain persons can be attributed to the State is the same as the determination of what constitutes the organization of the State. We have already pointed out, in passing, that the term "organization" of the State must be taken to mean the machinery of the State, the complex of concrete structures through which it manifests its existence and performs its actions. Of course, the formation of these structures and provision for this action are the subject of legal regulation, which can be established only by the State itself. Logically, this regulation is a prerequisite for the operation which consists of attributing to the subject-State the conduct of a person forming part of those structures. This is necessarily true even if the question is raised only within the framework of the internal order, that is to say, if the conduct in question is considered only as an act of the State as a subject of national law. When one attributes to the State a certain action or omission of a person or group of persons, one does not thereby give them the status of organs of the State; one simply establishes a consequence of the fact that these persons are organs and have the legal capacity to act on behalf of the State. In other words, the status of organs possessed by the person whose conduct is being examined is the premise or condition and not the effect of considering that conduct as an act of the State.

117. This statement is even more valid when the conduct of a person or group of persons is attributed to the State as a subject of international law and not as a subject of municipal law. For the national legal order, the organization of the State—structures and functioning of which are determined wholly by legal norms pertaining to that order—has a legal character. On the other hand, the formation and regulation of the same organization are entirely alien to the legal provisions of the international order; for the latter system, the internal organization of the State is, as a whole, merely a fact,<sup>204</sup> just as the municipal law criteria which govern the action of the State are merely facts. This is nothing but an application of the general principle recognized by the Permanent Court of International Justice in its Judgment No. 7 of 25 May 1926 and confirmed by the Court in subsequent decisions, according to which "from the standpoint of international law [...] municipal laws are merely facts".<sup>205</sup> Thus, although it is true that the fact that an individual or group

of individuals forms part of the organization of the State should be considered only as a possible premise for the attribution of conduct engaged in by that individual or group to the State as a subject of international law, it should nevertheless be stressed that from the standpoint of international law this premise is a *de facto* premise and not a *de jure* premise. The State machinery is always a fact for the international legal system; its structures are not "received" into that system and do not acquire the character of legal structures in it, even if international law takes them into consideration for its own purposes. One must not be misled by the use of the term "referral" ("renvoi") which is sometimes used to describe this phenomenon.<sup>206</sup> International law merely presupposes the organization which the State has adopted within the framework of its internal law; it takes account of its existence in the national legal order as a fact on which it bases some of its findings.<sup>207</sup>

118. On the basis of the preceding considerations it would seem useful to sum up the essential conclusions which emerge from the line of reasoning developed thus far.

119. The first conclusion concerns the meaning which should be attributed, if one wishes to be exact, to the frequently repeated statement that in international law the conduct of the agents or organs of the State subject of that law is attributed to the State in order to impose responsibility upon it, if appropriate. This does not mean that the persons concerned possess or acquire by virtue of that attribution the legal status of an organ of the State in international law. Correctly interpreted, the aforementioned proposition simply means that in international law the conduct of persons or groups of persons to whom the legal status of organ of the State is attributed in the internal order, and solely in that order, is in principle considered as an act of the State. It should also be noted that this statement is not valid solely in the usual case, in which the State determines its organization in complete freedom. From this point of view the situation remains the

<sup>204</sup> This idea is stated clearly by Marinoni (*op. cit.*, pp. 115 *et seq.*). This writer observes that "The State exists and manifests itself through the organization of agents and officials; if the State exists internationally, it pre-exists in and through this organization [...]. This organization of State officials exists also for international law, as an expression of the existence of the State, [...] but in a different way than for municipal law, from which that organization emanates immediately and exclusively. For municipal law that organization has a legal character, for it depends directly on that law; for international law it is a fact, precisely because it is alien to that law and is merely presupposed." (*ibid.*, pp. 117-118) [Translation by the United Nations Secretariat].

For a cogent criticism of the idea that the organization of the State as a subject of international law is an organization established by international law, see Arangio-Ruiz, *Gli enti soggetti* . . . , *op. cit.*, pp. 343 *et seq.*

<sup>205</sup> Case concerning certain German interests in Polish Upper Silesia (Merits), 25 May 1926, *P.C.I.J.*, series A, No. 7, p. 19.

<sup>206</sup> This is certainly not the form of referral by which the norms of international law would take over and endorse the content of the norms of municipal law, as some have argued (for example, Perassi, *op. cit.*, p. 99; and Monaco, *op. cit.*, p. 320). Anzilotti (*Corso* . . . , *op. cit.*, p. 387), while referring in this connexion to "referral" to municipal norms by international norms, stresses that international law, by imputing the action of an individual to the State, merely makes the relationship between the individual and the State, which is recognizable on the basis of municipal law, a prerequisite ("*presupposto*") for that imputation.

<sup>207</sup> See Ago, "Le délit international", *Recueil des cours* (*op. cit.*), pp. 464-465:

"The internal organization of the State and the status of organ possessed by certain persons within that organization have no legal value for international law. They are merely facts, the material premises which the law of nations uses as guide-marks for the legal judgements which it seeks to formulate. [...] recourse [to the internal organization] does not imply the attribution of any legal value to that organization in the system which has recourse to it. In short, the organ of the State has the legal status of an organ only within the internal legal order; from the standpoint of the international order, the status of organ is regarded only as a factual condition necessary in order to examine the conduct of that organ and evaluate it as legal conduct of the State." (Translation by the United Nations Secretariat).

J.-P. Quéneudec (*op. cit.*, pp. 29-30) agrees with these views.



same in the exceptional cases in which international law limits the freedom of the State to establish its organization as it wishes. In such cases, international law does not itself establish directly the machinery of the State or part of that machinery; it merely imposes on the State an obligation which the State respects in choosing to adopt one type of organization rather than another. However, the organs established in conformity with such an obligation are not organs of international law. Like the other organs which are freely chosen, they are organs of municipal law and the international legal order may regard the provisions of municipal law concerning both types of organ as a factual condition for the attribution of their actions or omissions to the State subject of international law.

120. The second conclusion is that international law is completely free when it takes into consideration the situation existing in the internal legal order. The attribution of an act to a State in international law is clearly wholly independent of the attribution of that act in national law.<sup>208</sup> In the context of the national legal system, it may be logical to attribute to the State (for example, for the purpose of imposing an administrative responsibility upon it) only the acts performed by persons having the *de jure* status of organs and to preclude such attribution when those organs act outside the limits fixed by the rules of that system. However, these limitations have no *raison d'être* in the context of international law. As we have already pointed out, international law is perfectly free to make or not to make the attribution of some particular conduct to the State subject of international law dependent on the fact that the individual who engaged in that conduct is or is not regarded as an organ of the State by national law. The consideration of certain acts as acts of the State in international law may be based on criteria which are both wider and more limited than the corresponding consideration in municipal law. Indeed, we shall see that in international practice the conduct of persons who are organs of public institutions other than the State

and the conduct engaged in by organs of the State or other entities outside the limits of the competence attributed to them by municipal law is treated as an act of the State subject of international law. This is not surprising and does not call for exceptional justification through recourse to any explanation or excuse. At the same time, however, it does not indicate any intention on the part of international law to insert into that State machinery "organs" which the State itself has not designated as such or to make any change in the organization of the State from the outside.

121. The third and last conclusion flows automatically from the freedom which we have acknowledged international law possesses with regard to the determination of the conditions in which it admits that some particular conduct should be considered as an act of the State at the international level, and from the independence of that determination with regard to any determination that may be made by national law. As we have said from the outset, the purpose of the lengthy arguments developed in these preliminary considerations and of our detailed examination of the various approaches to the subject is to clear the way for the specific consideration of the questions which form the subject of this chapter. We can now be certain that in our work we can completely disregard the theoretical considerations on which so many jurists have focused their attention. Our work must be based solely on what actually happens in the life of international society and the findings which result from an examination of State practice and the decisions of international tribunals. We must concentrate on determining what conduct international law really attributes to the State which is the subject of that law, and not the conduct which international law should attribute to that State according to a given abstract concept.

## 2. ATTRIBUTION TO THE STATE, SUBJECT OF INTERNATIONAL LAW, OF THE ACTS OF ITS ORGANS

122. In the preceding preliminary considerations<sup>209</sup> it was pointed out that observation of what actually happens in international life makes it possible to formulate an initial indisputable statement: the acts of persons or groups of persons who form part of the internal machinery of the State, in other words the conduct of those who, in the legal order of the State, are properly designated as "organs" or "agents" of the State, are, as a general rule at least, considered as "acts of the State" from the standpoint of international law. We have also seen that many writers have sought to construct theoretical speculations on this basis, by transforming what should have remained a simple description of facts into a sort of absolute principle of logic, flowing from such and such an abstract premise, a procedure which has given rise to many difficulties. In the light of the conclusions drawn at the end of that analysis, we can now see that the statement mentioned above should be regarded strictly as a statement, that is to say, as the objective result of an

<sup>208</sup> The distinction between the two attributions and their independence of one another is clear to many writers. We have seen above (para. 113) that the desire to emphasize the autonomy of international law in determining in what conditions conduct may be attributed to the State at the international level has even led certain jurists, particularly Italian jurists, to put forward the idea that international law itself determines the organization of the State as a subject of international law. Other writers, such as J. G. Starke (*op. cit.*, p. 110), without going so far, also state that international law is fully autonomous in this respect. A. Ross (*op. cit.*, p. 251) says:

It is the latter [international law] which determines whose actions can be ascribed to a State in the sense that they constitute the normal basis of the international responsibility of that State. [Italics supplied by the Special Rapporteur.]

For Meron (*op. cit.*, p. 88), "imputability is an independent process of international, not of domestic, law". Reuter "Principles . . .", *Recueil des cours* . . . [op. cit.], p. 603, and especially *La responsabilité internationale* [op. cit.], p. 87) states effectively that "imputation under municipal law is not necessarily the same as imputation carried out under international law, and it is, of course, the latter which is determinant in the case of international responsibility" [Translation by the United Nations Secretariat].

See also C. F. Amerasinghe, "Imputability in the law of State responsibility for injuries to aliens", *Revue égyptienne de droit international* (Cairo), vol. 22, 1966, pp. 96 and 104.

<sup>209</sup> See para. 107 above.

examination of what actually happens in inter-State relations. We are also in a position to affirm that this statement in itself is not necessarily absolute and, above all, that it is not exclusive. In other words, we see that in the sphere of international legal relations the conduct of those who are regarded as organs of the State in the internal legal order is attributed to the State as a subject of international law. However, this should not lead us automatically to draw far-fetched conclusions. It is not implied *a priori* that the actions or omissions of any person regarded as an organ of the State should be considered without more ado as acts of the State at the international level; only further careful analysis of the facts will enable us, if appropriate, to make this further point. Above all, there is no implication that, in acknowledging that the conduct of organs of the State according to the internal legal order is attributed to the State as a subject of international Law, one has exhausted the list of types of conduct which may be considered "acts of the State" for the purposes of attaching international responsibility to those acts. The analysis of the facts will likewise show that the conduct of other persons who are not in such a situation in relation to the State is also attributed to the State in international law and may thus be the source of international responsibility for the State. It must therefore be clearly borne in mind that what we are saying here is merely a starting-point which will subsequently be completed by a series of other points resulting from the additional findings derived from the examination of international life.

123. That being so, our first task is precisely to verify that the point to which we have referred does actually correspond to the facts of international relations. There is no doubt that the principle that the State is responsible for offences committed by its agents has long been recognized in international judicial decisions. We must, however, point out that in most cases this principle is simply presupposed or taken for granted. It is implicitly reaffirmed in innumerable cases and underlies the decisions taken in almost all the cases that we shall examine, for other purposes and from other aspects, in the following sections of this chapter. We shall therefore confine ourselves to mentioning here the cases in which the principle in question has been expressed in a particularly clear and explicit manner.

124. In the *Moses case*, for example, settled on 14 April 1871 by the Mixed Claims Commission Mexico/United States of America, constituted under the Convention of 4 July 1868, the umpire Lieber, affirming that Mexico was responsible for the act of a Mexican officer, commented:

An officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority.<sup>210</sup>

An even clearer assertion is given in seven arbitral awards in the *Affaire des réclamations des sujets italiens résidant au Pérou* (concerning the damage suffered by Italian subjects during the Peruvian civil war of 1894-1895) rendered at Lima on 30 September 1901. Each of these awards reiterates that:

[...] a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by its agents" [Translation from French].<sup>211</sup>

The criterion of attributing to the State, for the purposes of international responsibility, the acts of its "leaders", "agents" and "organs" is also confirmed in several other arbitral awards; for example, the award rendered on 8 May 1902 by the arbitral tribunal established by the Protocol of 19 December 1901 between the United States of America and El Salvador in connexion with the claim of the *Salvador Commercial Company*,<sup>212</sup> the undated decision of the Mixed Claims Commission Italy/Venezuela constituted under the Protocols of 13 February and 7 May 1903 in the *Sambiaggio case*,<sup>213</sup> the undated award of the Mixed Claims Commission Netherlands/Venezuela constituted under the Protocol of 28 February 1903 in the *J. N. Henriquez Case*,<sup>214</sup> the award rendered on 9 May 1934 by the arbitrator Algot Bagge in the *Finnish Ship-owners Case* (Great Britain v. Finland),<sup>215</sup> and so on.

125. In State practice, we should note the positions adopted in connexion with specific disputes and, more particularly, the replies by Governments to points III, IV and V of the request for information addressed to them by the Preparatory Committee for the Conference for the Codification of International Law (The Hague, 1930).<sup>216</sup> The replies unanimously express, explicitly or implicitly, the juridical conviction that the actions or omissions of *organs* of the State which give rise to a failure to fulfil an international obligation must be attributed to the State as internationally wrongful acts of the State. At the Conference itself, on 18 March 1930, the French delegate submitted to the members of the Third Committee a proposal designed precisely to establish the responsibility of the State for any failure "on the part of its organs".<sup>217</sup> The Third Committee of the Conference subsequently adopted in first reading, by the unanimous vote of the thirty-five countries represented, article 1—to which we have already referred on more than one occasion—the text of which also provides that international responsibility shall be incurred by a State as a consequence of "any failure on the part of its organs to carry out the international obligations of the State".<sup>218</sup>

126. All the draft codes on international responsibility prepared by public institutions or learned societies for-

<sup>211</sup> United Nations, *Reports of International Arbitral Awards*, 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); p. 411 (Miglia claim).

<sup>212</sup> *Ibid.*, p. 477.

<sup>213</sup> *Ibid.*, vol. X (Sales No. 60.V.4), p. 512.

<sup>214</sup> *Ibid.*, pp. 714-715.

<sup>215</sup> *Ibid.*, vol. III (Sales No. 1949.V.2), p. 1501.

<sup>216</sup> League of Nations, *Basis of Discussion...* (*op. cit.*), pp. 25 *et seq.*, 41 *et seq.*, 52 *et seq.*; *Supplement to volume III* (*op. cit.*), pp. 2-3, 6 *et seq.* The three points of the request for information refer respectively to acts of the legislative organ, acts relating to the operation of the tribunals and acts of the executive organ.

<sup>217</sup> See A. Ch. Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris, C.N.R.S., 1965), vol. III, No. 898, pp. 524.

<sup>218</sup> See *Yearbook of the International Law Commission, 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.

<sup>210</sup> J. B. Moore, *op. cit.*, vol. III, p. 3129.

multate in similar terms the principle that the conduct of the organs of the State is attached to the State for the purpose of determining international responsibility.

Article 1 of the draft code of International Law prepared in 1926 by the Kokusaiho Gakkwai, provides for the attribution to the State as a source of responsibility of any

wilful act, default or negligence of the official authorities in the discharge of their official functions.<sup>219</sup>

Rule I of the draft on "International responsibility of States for injuries on their territory to the person or property of foreigners", prepared by the Institute of International Law in 1927, refers in this connexion to

any action or omission [. . .] whatever be the authority of the State whence it proceeds: constitutional, legislative, governmental, administrative or judicial.<sup>220</sup>

Article 7 (a) and (b) of the draft convention on "Responsibility of States for damage done in their territory to the person or property of foreigners", prepared in 1929 by the Harvard Law School, refers to the wrongful act or omission of "higher authorities" or "subordinate officers or employees" within the scope of their office or function.<sup>221</sup> Article 15 of the draft convention on the international responsibility of States for injuries to aliens, prepared by the Harvard Law School in 1961, provides for the attribution to the State, as a wrongful action or omission, of

the act or omission of any organ, agency, official or employee of the State acting within the scope of the actual or apparent authority or within the scope of the function of such organ, agency, official or employee."<sup>222</sup>

Article 1 of the draft prepared in 1930 by the Deutsche Gesellschaft für Völkerrecht refers in paragraph 3 to the

"[. . .] acts or omissions of the constituent or legislative power, of the Government, of the administrative authorities, of the courts or of the corporations and agencies which perform public functions in its [the State's] territory." ("Akte oder Unterlassungen der verfassungsgesetzgebenden oder gesetzgebenden Gewalt, der Regierung, der Verwaltungsbehörden, der Gerichte oder der Korporationen und Anstalten [. . .] die auf seinem Gebiete öffentliche Aufgaben erfüllen.")<sup>223</sup>

Article V of the Principles of international law that govern the responsibility of the State in the opinion of Latin American countries, prepared in 1962 by the Inter-American Juridical Committee, provides for State responsibility only in the case of "the fault of duly constituted authorities";<sup>224</sup> articles II, III and IV of the Principles of international law that govern the responsibility of the State in the opinion of the United States of America, prepared in 1965 by the Inter-American Juridical Committee, provide successively for State responsibility for acts and omissions of the legislative organ, of tribunals

and of executive officials.<sup>225</sup> The "General rule as to attribution" (of conduct to the State) given in section 169 of the *Restatement of the Law of the American Law Institute* reads as follows:

Conduct of any organ or other agency of a State, or of any official, employee, or other individual agent of the State or of such agency, that causes injury to an alien, is attributable to the State [. . .] if it is within the actual or apparent authority, or within the scope of the functions, of such agency or individual agent.<sup>226</sup>

The draft codes prepared by individual jurists contain clauses couched in similar terms.<sup>227</sup> We may also recall here that in his "Bases of discussion", prepared in 1956, Mr. García Amador, Special Rapporteur of the International Law Commission, indicated in Basis No. II that the active subjects of international responsibility included "States, in respect of acts or omissions of State organs".<sup>228</sup> The same author devoted chapter II of his preliminary draft of 1957<sup>229</sup> and article 12 of his revised preliminary draft of 1961<sup>230</sup> to "Acts and omissions of organs and officials of the State".

127. Finally, it may be said that the attribution of the acts of its organs to the State for purposes of determining its international responsibility is accepted by writers on international law, who are practically unanimous on this point, despite the differences of opinion which, as we have seen, separate them on the issue whether all the actions or omissions of the "organs" or "agents" of the State, and they alone, may or may not be attributed to it as internationally wrongful acts.<sup>231</sup> Consequently,

<sup>219</sup> *Ibid.*, p. 153, document A/CN.4/217 and Add.1, annex XV.

<sup>220</sup> See above, p. 193, document A/CN.4/217/Add.2.

<sup>221</sup> Article 1 of the Draft Treaty concerning the responsibility of a State for internationally illegal acts, prepared in 1927 by Karl Strupp, establishes the responsibility of the State "for the acts of persons or groups whom it employs for the accomplishment of its purposes (its 'organs')". (*Yearbook of the International Law Commission*, 1969, vol. II, p. 151, document A/CN.4/217 and Add.1, annex IX). Article 1 of the Draft convention on the responsibility of States for international wrongful acts, prepared by Professor Roth in 1932, provides that a State is responsible for the acts contrary to international law of "any individuals whom or corporations which it entrusts with the performance of public functions" ("natürlichen und juristischen Personen, die er mit der Erfüllung öffentlichen Aufgaben betraut") (*ibid.*, annex X).

<sup>222</sup> *Ibid.*, 1956, vol. II, p. 220, document A/CN.4/96, chap. X.

<sup>223</sup> *Ibid.*, 1957, vol. II, p. 128, document A/CN.4/106, annex.

<sup>224</sup> *Ibid.*, 1961, vol. II, p. 52, document A/CN.4/134 and Add.1, addendum.

<sup>225</sup> For the general principle according to which the actions or omissions committed in violation of an international obligation of a State by one of its "organs" or "agents" are attributed to that State, see Triepel, *op. cit.*, pp. 349 *et seq.*; Anzilotti, *Teoria generale . . .*, (*op. cit.*), pp. 130 *et seq.*, *La responsabilità internazionale . . .* (*op. cit.*), p. 164, and Corso . . . (*op. cit.*), pp. 387 *et seq.*; Marinoni, *op. cit.*, pp. 44 *et seq.*; Borchard, *op. cit.*, p. 189; Schoen, *op. cit.*, p. 43; Strupp, "Das völkerrechtliche Delikt", *Handbuch . . . op. cit.*, pp. 35 *et seq.*; Ch. de Visscher, "La responsabilité des États", *Bibliotheca Visseriana (op. cit.)*, p. 91; A. Decencière-Ferrandière, *La responsabilité internationale des États à raison des dommages subis par des étrangers* (Paris, Rousseau, 1925), pp. 64 *et seq.*; Eagleton, *The Responsibility of States . . . (op. cit.)*, p. 44; Hyde, *op. cit.*, 882; J. Dumas, *De la responsabilité internationale des États* (Paris, Sirey, 1930), p. 243; O. Hoiler, *La responsabilité internationale des États* (Paris, Editions internationales, 1930), pp. 7 *et seq.*; Kelsen, "Unrecht . . .", *Zeitschrift für öffentliches Recht (op. cit.)*, pp. 504 *et seq.*, "Théorie . . .", *Recueil des cours . . . (op. cit.)*, p. 88 *et seq.*,

<sup>219</sup> *Ibid.*, 1969, vol. II, p. 141, document A/CN.4/217 and Add.1, annex II.

<sup>220</sup> *Ibid.*, 1956, vol. II, p. 227, document A/CN.4/96, annex 8.

<sup>221</sup> *Ibid.*, p. 229, document A/CN.4/96, annex 9.

<sup>222</sup> *Ibid.*, 1969, vol. II, p. 142, document A/CN.4/217 and Add.1, annex VII.

<sup>223</sup> *Ibid.*, p. 149, document A/CN.4/217 and Add.1, annex VIII.

<sup>224</sup> *Ibid.*, p. 153, document A/CN.4/217 and Add.1, annex XIV.

there does not seem to be any need to provide further proof that the rule as such forms part of current international law.

128. Our task in this section is therefore to determine the most appropriate formula to express the principle which emerges from our analysis. In this connexion, it should be stressed that the purpose of such a formula is to define the rule which is, so to speak, the initial rule, the basic rule with respect to the possibility of considering as "acts of the State", at the international level, certain conduct engaged in by specific persons, and this, not for general purposes, but for the specific purpose of this draft, namely, that of considering those acts as internationally wrongful. The rule must express the essential idea that the actions or omissions committed by persons or groups of persons possessing the status of organs of the State according to the latter's legal system can, from the standpoint of international law, be taken into consideration as acts of the State for the aforementioned purpose. At the same time, the formula must contain nothing which implies that the rule is absolute or exclusive; the door must be left wide open for the subsequent formulation of other principles which might limit and above all complete the definition of the scope of the first rule.<sup>232</sup>

and *Principles* ... (op. cit.), p. 117 (in the case of this writer, however, the special aspects of his ideas should be set aside); Eustathiades, "Principes généraux...", *Etudes de droit international* ... (op. cit.), p. 514, and "Les sujets...", *Recueil des cours* ... (op. cit.), pp. 416 et seq.; Ago, "Le délit international", *Recueil des cours* ... (op. cit.), pp. 462 et seq.; Starke, op. cit., p. 106; Ross, op. cit., p. 252; Verdross, *Völkerrecht* (op. cit.), p. 379; Oppenheim, op. cit., pp. 340 et seq.; Morelli, op. cit., p. 343; Rousseau, op. cit., p. 361; Guggenheim, *Traité* ... (op. cit.), p. 4; Cheng, op. cit., pp. 192 et seq.; Schwarzenberger, *A Manual* ... (op. cit.), p. 166; Reuter, *La responsabilité internationale* (op. cit.), p. 86; H. Accioly, op. cit., pp. 276 and 279, and "Principes généraux de la responsabilité internationale d'après la doctrine et la jurisprudence", *Recueil des cours* ... 1959-I (Leyden, Sijthoff, 1960), t. 96, especially p. 371; Ulloa, op. cit., p. 256; Schüle, op. cit., p. 331; Dahm, op. cit., p. 161; Sereni, op. cit., 1962, t. III, p. 1507; Sørensen, op. cit., p. 224; Carlebach, op. cit., p. 23; Münch, op. cit., p. 170; Patel, op. cit., p. 103; O'Connell, op. cit., pp. 1042 et seq.; Brownlie, op. cit., p. 367; Tunkin, *Droit international* ... (op. cit.), p. 192, et *Teoria* ... (op. cit.), p. 431; Amerasinghe, "Imputability...", *Revue égyptienne* ... (op. cit.), p. 95, and *State Responsibility* ... (op. cit.), p. 38; Levin, *Otvetstvennost gosudarstv* ... (op. cit.), pp. 69 et seq.; Jiménez de Aréchaga, op. cit., p. 544; Institute of the State and Law of the Academy of Sciences of the Soviet Union (op. cit.), p. 426; Elynychev, op. cit., p. 87.

<sup>232</sup> Efforts are sometimes made to express in a comprehensive, brief formula all the acts which in international law are attributed to the State for the purposes indicated; some writers speak in this connexion of the conduct of persons belonging to the "effective" or "de facto" organization of the State (see, for example, Morelli, op. cit., p. 343; Sereni, op. cit., t. III, p. 1507). However, we can only reiterate our lack of enthusiasm for such formulas. No doubt international law usually conforms to a criterion of effectiveness and no doubt this criterion also forms the basis for the findings of international law with regard to the attribution of conduct to the State. As has already been pointed out, however, this attribution has no effect on the "organization" of the State and in no way implies the existence of an "effective" organization parallel to the "legal" organization. It should be added that from the normative standpoint with which we are concerned, it would be pointless to use the term "effective organization", for it would still be necessary to determine specifically what was meant by effective organization and in what way that organization differed from the organization existing by virtue of rules of law.

129. Furthermore, there is another point relating to the formula to be adopted which should be made quite clear, even though some might consider that it could be taken for granted. There is a fundamental distinction which must always be drawn when referring to the conduct of persons to whom the State, in setting up its machinery, assigns the task of being its organs. It may be right to say, for example, that the individuals and groups who form the State are wholly integrated into the State's personality and hence completely lose their individuality. However, care must be taken not to draw from this statement conclusions which may go beyond our present purpose.<sup>233</sup> The indubitable element of truth which exists in the idea of identifying the individual-organ with the State should not make us forget that the physical person possessing the status of organ of the State loses his separate individuality only when it is acting as an organ. He is obviously still capable of acting on his own account. In each specific case, it must therefore be verified whether on that occasion the person concerned acted as an organ of the State, under cover of his status as an organ, or as a physical person separate from the person of the State. The practical difficulties which may sometimes arise in connexion with this verification in no way detract from the clarity of the distinction from the standpoint of principles. The dividing line to be established is precisely that which separates on the one hand, the actions or omissions committed by certain persons under cover of their functions as organs of the State and on the other those committed by the same persons in a private capacity. In the latter case the conduct of these persons can be considered only as the conduct of private individuals.

130. This conclusion, with the corollary which in principle precludes attribution to the State, as acts which may give rise to responsibility, of actions or omissions committed by individual-organs in a purely private capacity, is unanimously recognized in international practice and international judicial decisions. It will therefore suffice to recall here just a few examples of that recognition. For instance, Governments took a very clear position on the point at the 1930 Codification Conference. Point V, No. 2, (d), of the request for information submitted by the Preparatory Committee of the Conference concerned the question whether the State becomes responsible for "acts or omissions of officials unconnected with their official duties". The twenty Governments which dealt with that point in their replies all considered that the State was not responsible in such a case.<sup>234</sup> This criterion was subsequently accepted by all the State representatives at the Conference and was implicitly recognized in the text of article 8 of the draft adopted in first reading by the Third Committee of the Conference.<sup>235</sup>

<sup>233</sup> See, for example, Quadri (op. cit., pp. 394-395), who follows up this statement with the assertion that such individuals and groups would thereby completely lose their individuality, so that their actions could never be considered as individual acts.

<sup>234</sup> League of Nations, *Bases of Discussion* ... (op. cit.), pp. 82 et seq.; and *Supplement to Volume III* (op. cit.), pp. 3, 17.

<sup>235</sup> *Yearbook of the International Law Commission, 1956*, vol. II, p. 226, document A/CN.4/96, annex 3.

131. The same idea has been explicitly expressed on more than one occasion in arbitral awards. One of the most frequently quoted is that concerning *Bensley's Case*, rendered on 20 February 1850 by the Commission established under the Act of Congress of the United States of America of 3 March 1849. The following reason was given for the rejection of the reparations claim submitted for the detention of a young United States boy in the house of a Mexican governor:

The detention of the boy appears to have been a wanton trespass committed by the governor, under no color of official proceedings, and without any connection with his official duties.<sup>236</sup>

More recently, the French/Mexico Claims Commission (established under the Convention of 25 September 1924), in its decision of 7 June 1929 concerning the *Caire Case* stated that the State is not responsible

only in the case in which the act had no connexion with the official function and was, in fact, merely the act of a private individual.<sup>237</sup> [Translated from French.]

It should be added that in many other cases the criterion to which we are referring is not stated so explicitly but nevertheless appears to have been implicitly accepted. This is so, for example, in the *Putnam Case*<sup>238</sup> and the *Morton case*<sup>239</sup> decided by the United States of America/Mexico General Claims Commission established by the convention of 8 September 1923. These cases refer to the killing of United States subjects by Mexican policemen when off duty and for purely personal reasons; the private character of the act was obvious and the claimants themselves acknowledged that such acts could not be attributed to the Mexican State.

132. In order to complete the picture, we may recall that generally speaking the various draft codes, whether public or private in origin, set forth the principle of attribution to the State-subject of international law of the acts of its organs,<sup>240</sup> taking care to specify at the same time that these acts must be committed by the persons concerned in the performance of their functions; this is done precisely to exclude attribution to the State of conduct engaged in by the same persons in a purely private capacity. Some of these drafts even incorporate this exclusion in a separate provision.<sup>241</sup> In the case of theoretical works, almost all writers mention the need for such exclusion and some of them even lay particular stress on it.<sup>242</sup>

<sup>236</sup> See J. B. Moore, *op. cit.*, vol. III, p. 3018. See also the decision in the Case of the Castelains, handed down by the Mixed Commission France-United States established under the convention of 15 January 1880 (*ibid.*, pp. 2999-3000).

<sup>237</sup> United Nations, *Reports of International Arbitral Awards*, vol. V (United Nations publication, Sales No. 1952.V.3), p. 531.

<sup>238</sup> *Ibid.*, vol. IV (Sales No. 1951.V.1), pp. 151 *et seq.*

<sup>239</sup> *Ibid.*, pp. 428 *et seq.*

<sup>240</sup> See para. 126 above.

<sup>241</sup> This is the case in the second paragraph of article 2 of the draft of the Kokusaiho Gakkwai (*Yearbook of the International Law Commission*, 1969, vol. II, p. 141, document A/CN.4/217 and Add.1, annex II) and in the draft prepared by the Deutsche Gesellschaft für Völkerrecht (article 1, para. 4, second sentence) (*ibid.*, p. 149, document A/CN.4/217 and Add.1, annex VIII).

<sup>242</sup> See Eagleton, *The Responsibility of States . . .* (*op. cit.*), pp. 58-59; Cheng, *op. cit.*, pp. 197 *et seq.*; A. V. Freeman, "Responsibility of States for Unlawful Acts of their Armed Forces", *Recueil des*

133. In this connexion, it should perhaps be pointed out that the case of an organ of the State acting in a private capacity should not be confused with the quite different case (which we have already mentioned several times and with which we shall subsequently deal specifically) of an organ acting as an organ although in excess of its competence or, more generally, in violation of municipal law. In this case, the person concerned is not acting as a private individual; he may act in violation of the rules to which his official actions are subject, but he is nevertheless acting in the name of the State. Here and elsewhere, international law is free to deal with such actions as it sees fit and to define their consequences as it wishes; whatever the solution adopted, however, these are acts of organs and not acts of private individuals. This distinction has been clearly drawn in international arbitral decisions, for example, the award in the *Mallén Case*, rendered on 27 April 1927 by the United States of America/Mexico General Claims Commission. In this decision, two separate events were successively taken into consideration. The first involved the action of an official acting in a private capacity and the second another action committed by the same person acting in his official capacity, although in an abusive way.<sup>243</sup> In other cases, the application of the distinction has not been so easy and the tribunals have had to analyse the factual circumstances thoroughly before being able to take a decision regarding the act.<sup>244</sup> It

*cours . . . 1955-II* (Leyden, Sijthoff, 1956), t. 88, pp. 291-292; García Amador, first report to the International Law Commission (*Yearbook of the International Law Commission*, 1956, vol. II, document A/CN.4/96), para. 71, and second report to the Commission (*ibid.*, 1957, vol. II, document A/CN.4/106), chap. II, para. 11; Schwarzenberger, *International Law* (*op. cit.*), pp. 615 *et seq.*; Sereni, *op. cit.*, t. III, pp. 1509-1510; O'Connell, *op. cit.*, p. 1045; Quéneudec, *op. cit.*, pp. 82 *et seq.*

<sup>243</sup> United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No. 1951.V.1), pp. 173 *et seq.* The Mexican consul at El Paso (Texas), Mallén, was the victim of two successive assaults by an American police officer, Franco, who had a personal grievance against the consul. In the first case the Commission acknowledged that it was concerned with "a malevolent and unlawful act of a private individual who happened to be an official" and that consequently that action could not be attributed to the United States Government. In fact, this was admitted by the Mexican Government itself. In the second case, however, Franco mistreated and arrested the consul, accusing him of illegally carrying a gun, when according to the law of Texas Mallén was authorized to carry such a weapon. With regard to the second incident, the Commission Stated

It is also essential to note that both Governments consider Franco's acts as the acts of an official on duty, [ . . . ] and that the evidence establishes his showing his badge to assert his official capacity. Franco could not have taken Mallén to jail if he had not been acting as a police officer. Though his act would seem to have been a private act of revenge which was disguised, once the first thirst of revenge had been satisfied, as an official act of arrest, the act as a whole can only be considered as the act of an official. (*Ibid.*, p. 177.)

<sup>244</sup> In the Corrie case, for example, which was decided on 5 March 1929 by the United States-Mexico General Claims Commission (*ibid.*, pp. 416-417), the solution was not very clear. Disorder broke out in the streets of a Mexican town as the result of the behaviour of some United States seamen, and the local Chief of Police intervened. He wore no uniform, although some of the sailors knew he was an official. A struggle broke out between the police officer and the seamen, during which the officer drew his revolver and shot two of the seamen dead. The Commission considered the police officer's action to be an act performed in a private capacity and decided that

should be noted, however, that the principle of the distinction has never been questioned.

134. That being so, we must once again draw attention to the fact that questions may also arise in connexion with actions or omissions which, though having been committed by persons forming part of the State machinery, can be considered only as private conduct. In the more general context of the consideration of the treatment accorded in international law to the conduct of private individuals we shall, among other things, have to determine whether an action or omission by a private individual can, in certain circumstances, be attributed to the State-subject of international law; naturally, in so doing, we shall also have to refer to the specific case referred to above. We shall also have to determine whether the conduct adopted by other organs with regard to an action or omission committed by an individual-organ in a private capacity should be taken into consideration for the purpose of possible attribution to the State of an internationally wrongful act. At this initial stage, however, for the purpose of formulating the rule we are seeking to define, the only point of importance is to ensure that the demarcation line which we have mentioned is indicated with the necessary clarity. To that end, we feel it is sufficient to indicate simply that the conduct of the person-organ who, in the case in question, is acting as an organ, is attributed to the State.

135. Bearing in mind these requirements, we feel we can propose the following wording for the first of the rules established in international juridical life regarding the attribution of an act to the State for the purpose of characterizing that act as internationally wrongful:

**Article 5. Attribution to the State, subject of international law, of the acts of its organs**

For the purposes of these articles, the conduct of a person or group of persons who, according to the internal legal order of a State, possess the status of organs of that State and are acting in that capacity in the case in question, is considered as an act of the State from the standpoint of international law.

it could not be attributed to the Mexican State. In the Gordon case, settled on 8 October 1930 (*ibid.*, pp. 586-593), an officer of the Mexican army was engaged in target practice with another officer and accidentally wounded a United States citizen. The Commission, rejecting the arguments of the United States, which were based on the fact that the person who committed the action in question was a military man, based its decision on the fact that the officer had just bought the pistol in a private capacity and was trying it out. The conclusion contains the following passage:

Everything then leads to the belief that the act in question was outside the line of service and the performance of the duty of a military officer and was a private act, and under those conditions the Mexican Government is not directly responsible for the injury suffered by Gordon.

One sphere in which the application of the distinction to which we have referred has sometimes given rise to difficulties is that of looting and destruction committed by soldiers who were not acting under the command of officers. In the case concerning D. Earnshaw and others (The Zafiro case), settled on 30 November 1925 by a Great Britain-United States arbitral tribunal (*ibid.*, vol. VI (Sales No. 1955.V.3), pp. 160-165), the action of the men concerned was regarded as a private act. The decisions in other cases are less definite. See on this point A. V. Freeman, "Responsibility of States . . .", *Recueil des cours* . . . (*op. cit.*), pp. 325 *et seq.*

**3. IRRELEVANCE OF THE POSITION OF AN ORGAN OF THE STATE IN THE DISTRIBUTION OF POWERS AND IN THE INTERNAL HIERARCHY**

136. Section 2 of the present chapter was devoted to an examination of international jurisprudence, the practice of States and the opinions of writers, which enabled us to bring out the basic principle that may be said to dominate our subject. This is the principle that the conduct of persons who, under the internal legal system of the State, have the character of organs of the State, is regarded as an "act of the State" at the international level, for the purposes of possibly qualifying these acts as internationally wrongful. From the outset, however, it has been stressed that this principle is not necessarily absolute and not necessarily exclusive, and that further verification is required.<sup>245</sup> Such verification, which again must be based on an examination of the facts of international life, should enable us, first, to determine whether or not the acts or omissions of *all* persons having the character of organs of the State within the national legal framework can be regarded as acts of the State at the international level. This is the task to which we must address ourselves in the present section.

137. The question just stated in general terms can be broken down into three separate points. First, it must be asked whether only the conduct of a State organ responsible for "external" relations can constitute a wrongful act of the State under international law, or whether, on the contrary, the conduct of an organ engaged in "internal" activities may also enter into consideration in this regard. Secondly, it must be asked, still in the same context, whether it is only the conduct of a "governmental" or "executive" organ of the State which can give rise to an internationally wrongful act, or whether no distinction should be made in this respect between an act or omission of such an organ and an act or omission of a constituent, legislative, judicial or any other organ. And thirdly, there is the question whether a distinction should or should not be made in the present context between the conduct of a "higher" and that of a "lower" or "subordinate" organ.

138. The first point can be quickly disposed of. It is merely an old and obsolete theory that only an act or omission of an organ responsible for conducting the external relations of the State (Head of State, Minister for Foreign Affairs, diplomatic agent, consul) can constitute an internationally wrongful act of the State.<sup>246</sup> On this view, the State would be called upon to answer for the conduct of its "internal" organs (administrative officials, for example, or judges) only "indirectly", as it is for the action of private persons; it would be responsible only if one of its external relations organs had endorsed the act or omission of the internal organ. This view obviously resulted from the confusion we have already denounced<sup>247</sup> between the consideration of certain conduct as an internationally wrongful act of the State and the

<sup>245</sup> See para. 122 above.

<sup>246</sup> See in particular F. Liszt, *Das Völkerrecht*, 12th ed. (Berlin, Springer, 1925), pp. 281-282.

<sup>247</sup> See para. 109 above.



attribution to the State of a manifestation of will which may constitute a valid international legal act or establish participation in such an act. Without dwelling any further on this point, let us say simply that a glance at the international jurisprudence and practice is enough to show that there is no justification for the view referred to. For a long time now writers, too, have mentioned this view only to reject it.<sup>248</sup>

139. The second point may seem more complex. As already explained, the problem is to determine whether an organ whose conduct may give rise to an internationally wrongful act of the State can belong to any sector of the machinery of State or whether certain sectors must be excluded.

140. The study of possible cases of internationally wrongful acts by particular organs has often been taken up separately for the different main traditional branches of the State organization: the legislature (and constituent power), the executive and the judiciary. This procedure made it easier to analyse certain particular aspects. The study of the possible international repercussions of certain conduct on the part of legislative organs has thus been the occasion for detailed analysis of various points. One of the questions examined, for example, has been in what cases an act and, especially, an omission on the part of such an organ can in itself constitute the commission of an internationally wrongful act, and in what cases such a result is produced only when the act or omission of the legislature is directly followed by an act or omission on the part of an executive or judicial organ. Another question examined has been that of determining the moment at which the specific breach of an international obligation by an act of the legislature can be said to have been committed, when such an act involves the successive intervention of different individual or collective organs. The study of this subject has also included attempts to show that the conduct of legislative organs may enter into consideration for the purposes of attributing an internationally wrongful act to the State, either as the conduct of these organs taken as a whole, or, in certain cases, as the conduct of one of them taken separately; and sometimes it has been held that even the conduct of an individual member of a collective organ may give rise to an internationally wrongful act of the State.<sup>249</sup> The study of the

possible conduct of the various categories of executive and administrative organs has been the context in which a series of familiar questions has most frequently been raised. These have ranged from the distinction between externally acting and internally acting organs, to the distinctions between higher and subordinate organs, civil and military organs, organs acting on national territory and those acting on foreign territory, *de jure* and *de facto* organs, organs of the State administration and those of other public institutions or other collective entities, etc.; all of this, of course, from the point of view of the possible consequences at the international level of an act or omission of these different types of organ.<sup>250</sup> As to judicial organs, studies dealing specially with problems of international responsibility connected with their activities have been the occasion not only for distinguishing between the various possible cases of breach of an international obligation through the act or omission of a judge, but also for examining a number of other questions. It is in this connexion that attention has been drawn to the implications, for our problems, of the subordination of the judiciary to the legislature, to the difference (again from the point of view of possible international consequences) between a decision of first instance and a decision of last instance, to the exhaustion of local remedies, especially in connexion with that difference, and, once again, to the problem of the moment at which the commission of an internationally wrongful act can be said to have been completed. Finally, it is largely within this same framework that attempts have been made to find a definition of "denial of justice", and that attention has been drawn to certain consequences of the principle of independence of the judiciary for compensation procedures, etc.<sup>251</sup>

*degli Stati per fatti degli organi legislativi* (Rome, 1939); M. Sibert, "Contribution à l'étude des réparations pour les dommages causés aux étrangers en conséquence d'une législation contraire au droit des gens", *Revue générale de droit international public* (Paris), t. XV, vol. I, 1941-1945, pp. 5 et seq.; A. S. Bilge, *La responsabilità internazionale degli Stati e son applicazione in materia d'actes législatifs* (thesis No. 471) (Istanbul, Tsitouris, 1950); Vitta, *La responsabilità degli Stati per fatti di organi legislativi* (op. cit.).

Among the general works which contain a separate and very detailed analysis of the acts and omissions of the organs of the different "powers" and, especially, of legislative organs, see, in particular Strupp, "Das völkerrechtliche Delikt", *Handbuch...* (op. cit.), pp. 63 et seq.; Furgler, op. cit., pp. 28 et seq.; and Münch, op. cit., pp. 183 et seq.

<sup>250</sup> For a detailed study of these questions and, in general, of the responsibility of the State for acts of administrative organs, see Strupp, "Das völkerrechtliche Delikt" *Handbuch...* (op. cit.), pp. 85 et seq.; Hoijer, *La responsabilità internazionale degli Stati* (op. cit.), pp. 75 et seq.; Furgler, op. cit., pp. 28 et seq.; Münch, op. cit., pp. 195 et seq. On the specific question of the responsibility for the acts of armed forces, see Freeman, "Responsibility of States...", *Recueil des cours...* (op. cit.), pp. 267 et seq.

<sup>251</sup> On the international responsibility of States for the acts or omissions of their judicial organs, see Strupp, "Das völkerrechtliche Delikt", *Handbuch...* (op. cit.), pp. 70 et seq.; O. Hoijer, "Responsabilità internazionale degli Stati in materia d'actes judiciaires", *Revue de droit international* (Paris, t. V, 1930), pp. 115 et seq. and *La responsabilità internazionale degli Stati* (op. cit.), pp. 39 et seq.; C. Th. Eustathiades, *La responsabilità internazionale de l'Etat pour les actes des organes judiciaires et le problème du déni de justice en droit international* (Paris, 1936); Pau, "Responsabilità internazionale dello Stato per atti di giurisdizione", Istituto di scienze giuridiche, economiche e politiche della Università di Cagliari, *Studi economico-giuridici*, Padua, vol. XXXIII, 1949-50, pp. 197 et seq.; Furgler,

<sup>248</sup> See Ch. de Visscher, "La responsabilité des Etats", *Bibliotheca Visseriana* (op. cit.), p. 94; Ross, op. cit., p. 253; Balladore Pallieri, *Diritto internazionale pubblico* (op. cit.), pp. 126-127; Reuter, *La responsabilità internazionale* (op. cit.), pp. 86-87; Vitta, *La responsabilità degli Stati per fatti di organi legislativi* (op. cit.), p. 24; Münch, op. cit., p. 170; Quéneudec, op. cit., pp. 41 et seq.; Jiménez de Aréchaga, op. cit., p. 544. The authors of volume V of the *Kurs...* (Institute of the State and Law of the Academy of Sciences of the Soviet Union, op. cit.) indicate, however (p. 427), that in their view the responsibility of the State is greater in the case of acts or omissions of organs having authority to represent it internationally.

<sup>249</sup> Various writers have devoted special monographs or articles to international responsibility resulting from the acts of legislative organs. See O. Hoijer, "La responsabilità internazionale degli Stati in materia d'actes législatifs", *Revue de droit international* (Paris, t. IV, 1929), p. 577 et seq., and *La responsabilità internazionale degli Stati* (op. cit.), pp. 7 et seq.; L. Kopelmanas, "Du conflit entre le traité international et la loi interne", *Revue de droit international et de législation comparée*, (Bruxelles, 1937), No. 1, pp. 88 et seq., and No. 2, pp. 310 et seq.; Musacchia, *La responsabilità internazionale*

141. On reflection, however, one look at the list of these questions is enough to show that, by examining them, writers have gone far beyond the limits of the problem we are concerned with here, which is merely to establish whether or not it is permissible to consider as an "act of the State", for the purposes of qualifying that act as internationally wrongful, the conduct of all State organs, whatever their position in a classification of State powers. True, most of the questions mentioned come within the general framework of determining conditions for the existence of an internationally wrongful act, but this produces different effects from those we have to consider at the present stage. In most cases, the questions amount to asking not whether the conduct of a given person should or should not be attributed to the State as a subject of international law, but whether the conduct does or does not constitute, objectively, a breach of an international obligation. The answer does not depend on the position the organ occupies in the machinery of State; it depends on the type and nature of the obligation violated by the conduct of the organ. For instance, when we ask whether failure to adopt a certain law represents, as such, an internationally wrongful act by the State, we are not questioning the possibility of attributing to the State an omission by a legislative organ; we are, rather, raising a problem that relates to the distinction to be made between

the breach of an international obligation which directly requires the adoption of a legislative instrument, and failure to fulfil an obligation whose general object is only to produce a result that can also be achieved, if need be, by action other than legislation. The determination of the moment at which the commission of an internationally wrongful act can be regarded as completed is linked to the same distinction, and is part of the problem of determining the aspects of the offence, not of determining the acts attributable to the State.

142. A separate and isolated study of the international responsibility arising from acts or omissions of legislative, executive or judicial organs sometimes has the disadvantage of creating difficulties which have no real *raison d'être*. To mention only one of them, it is well known that the separation of powers is by no means as clear cut in practice as it would seem to be from the textbooks, and that it is very differently conceived in the different legal and political systems. Hence, the discussions as to whether a given act or omission is attributable to one power rather than to another <sup>252</sup> discussions which in the last resort are pointless since, whatever conclusion is reached on the delimitation of powers, the act or omission in question will still be attributed to the State under international law, will be defined as an internationally wrongful act and will generate responsibility of the State.

*op. cit.*, pp. 44 *et seq.*; H. Urbanek, "Das völkerrechtsverletzende nationale Urteil", *Österreichische Zeitschrift für öffentliches Recht*, vol. IX, 1958-1959, fasc. 2, pp. 213 *et seq.*; Münch, *op. cit.*, pp. 209 *et seq.*

On the specific notion of the denial of justice, see, in addition, A. S. Hershey, "Denial of Justice", *Proceedings of the American Society of International Law (at its twenty-first annual meeting, Washington, D.C., April 28-30, 1927)* (Washington, 1927), vol. I, pp. 27 *et seq.*; C. Eagleton, "Denial of Justice in International Law", *American Journal of International Law* (Washington, vol. 22, July 1928), pp. 538 *et seq.*; J. Dumas, "Du déni de justice considéré comme condition de la responsabilité internationale des Etats en matière criminelle", *Revue de droit international et de législation comparée* (Brussels, 3rd series), t. X, 1929, p. 277 *et seq.*; J. W. Garner, "International Responsibility of States for Judgments of Courts and Verdicts of Juries amounting to Denial of Justice", *The British Year Book of International Law*, 1929 (London), pp. 181 *et seq.*; Ch. Durand, "La responsabilité internationale des Etats pour déni de justice", *Revue générale de droit international public* (Paris, 3rd series, t. V, 1931), pp. 694 *et seq.*; G. G. Fitzmaurice, "The Meaning of the Term Denial of Justice", *The British Year Book of International Law*, 1932 (London) pp. 93 *et seq.*; Rabasa, *Responsabilidad internacional del Estado con referencia especial a la responsabilidad por denegación de justicia* (Mexico, 1933); A. Moussa, "L'étranger et la justice nationale", *Revue générale de droit international public* (Paris, 3rd series, t. VIII, No. 4 (July-August 1934), pp. 441 *et seq.*; Ch. de Visscher, "Le déni de justice en droit international", *Recueil des cours . . . 1935-II* (Paris, Sirey, 1936), t. 52, pp. 369 *et seq.*; O. J. Lissitzyn, "The Meaning of the Term Denial of Justice in International Law", *American Journal of International Law* (Washington), vol. 30, No. 4, October 1936, pp. 632 *et seq.*; Freeman, *The International Responsibility of States . . .* (*op. cit.*); H. W. Spiegel, "Origin and Development of Denial of Justice", *American Journal of International Law* (Washington), vol. 32, No. 1, January 1938, pp. 63 *et seq.*; C. G. Ténékidès, "Les jugements nationaux 'manifestement injustes' envisagés comme source de la responsabilité internationale des Etats", *Revue générale de droit international public*, Paris, 3rd series, t. XIII, No. 4 (July-August 1939), pp. 373 *et seq.*; J. Irizarry y Puente, "The Concept of 'Denial of Justice' in Latin America", *Michigan Law Review*, Ann Arbor (Mich.), vol. 43, No. 2, October 1944, pp. 383 *et seq.*; Gutierrez Castro, *La denegación de justicia como causa de reclamaciones internacionales* (Mexico, 1965).

143. Lastly, it should be mentioned that some of the specialized studies referred to here have been the occasion for research deliberately going beyond the sphere of the international wrong and responsibility. Some writers, though they may perhaps have started out with the idea of determining whether and in what forms also the organs of a certain branch of the State power are able to commit internationally wrongful acts, have lost sight of this objective in the course of their analysis and have indirectly engaged in a different enquiry to determine the international obligations relating to a specific sector of inter-State relations. To give some examples, when, in a study on responsibility for acts and omissions of legislative organs, a writer attempts to establish whether a law ordering expropriation without compensation constitutes a breach of an international obligation, what he is asking is not whether the legislative organs of the State can commit a wrongful act from the standpoint of international law, but whether or not the State has an international obligation not to expropriate aliens without adequate compensation. When some writers speak of aggravated responsibility of the State for the acts of military organs, what they are really trying to do is to determine the specific content of the international obligations the State is required to fulfil in its military activities. When, in a study of acts or omissions of the judiciary, writers refer to the denial of justice and its various aspects, what they are asking, albeit indirectly, is not whether judicial organs can commit breaches of international obligations, but what are the international obligations of the State in regard to the administration of justice. In other words, instead of studying the various rights and duties of States

<sup>252</sup> See, in this connexion, the ideas developed by Münch, *op. cit.*, pp. 186 *et seq.*

directly, in the different sectors of the law of nations, they study these rights and duties from the point of view of their breach—an approach which can ultimately reduce the whole of international law to the notion of responsibility. This is what produces the tangle of rules of responsibility and “primary” rules of international law which, as has been noted on several occasions,<sup>253</sup> makes it extremely difficult to isolate and define the rules relating to international responsibility proper.

144. To revert, after this preliminary clarification, to the only task we have to undertake at the present stage, it may be affirmed that there is no need to resort to ideas of progressive development of international law in order to conclude that the acts or omissions of all State organs—whether of the constituent or legislative power, the executive or the judiciary—can be attributed to the State as internationally wrongful acts. No-one now supports the old theories which purported to establish an exception in the case of legislative organs on the basis of the “sovereign” character of parliament, or in the case of jurisdictional organs by virtue of the principle of independence of the courts or the *res judicata* authority of their decisions. The cases in which certain States have resorted to arguments based on principles of this kind, and have found arbitral tribunals willing to accept them, belong to the distant past.<sup>254</sup> Today, the belief that the respective positions of the different powers of the State have significance only for constitutional law and none for international law (which sees the State only in its entity) is firmly rooted in international jurisprudence, the practice of States and the doctrine of international law.

145. In fact, for nearly a century there has not been a single international judicial or arbitral decision which has stated, or even implicitly accepted, the principle of the non-responsibility of the State for the acts of its legislative or judicial organs. On the other hand, the opposite principle has been expressly confirmed in more than one decision and adopted implicitly in many others. We may mention in detail here some examples from different periods. In the award of 8 May 1902 in the *Salvador Commercial Company Case*, the United States of Amer-

ica/San Salvador arbitration tribunal, established under the Protocol of 19 December 1901, endorsed the opinion of Halleck that:

[. . .] a State is responsible for the acts of its rulers, whether they belong to the legislative, executive or judicial department of the Government, so far as the acts are done in their official capacity.<sup>255</sup>

Twenty-four years later, in its Judgment No. 7 of 25 May 1926 in the *Case concerning certain German interests in Polish Upper Silesia* (Merits), the Permanent Court of International Justice affirmed the responsibility of Poland for the act of adopting and applying a law and, in so doing, stated the principle which has now become classical, that:

From the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.<sup>256</sup>

At about the same time, in the award of 23 July 1927 in the *Chattin Case*, the United States of America/Mexico General Claims Commission, set up under the Convention of 8 September 1923, affirmed the direct responsibility of the State for acts of its “officials”, and in this context completely identified wrongful acts committed by the courts with those committed by executive organs.<sup>257</sup> More recently, the Franco-Italian Conciliation Commission, set up under article 83 of the Peace Treaty of 10 February 1947, expressed the following opinion in its decision of 7 December 1955:

Although in some arbitral awards of the XIXth century the opinion is expressed that the independence of the courts, in accordance with the principle of the separation of powers generally recognized in civilized countries, excludes the international responsibility of the State for acts of the judiciary contrary to law, this theory now seems to be universally and rightly rejected by international doctrine and jurisprudence. The judgment given by a judicial authority emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive. The non-observance of an international rule by a court generates international responsibility of the community of which the court is an organ [. . .]. Either the French courts ordered the liquidations in accordance with French internal law but in breach of the Treaty, and France is responsible for the legislative act violating its international obligations; or the French courts ordered the liquidations contrary to French internal Law and to the Treaty, and France is responsible for the judicial act violating its international obligations.<sup>258</sup> [Translation from French by the Secretariat.]

It must also be said, in support of the observations made here, that there have been very many international awards in which the examination of the case included examination of the question whether a State should be held responsible for acts committed by its legislative<sup>259</sup> or

<sup>253</sup> This aspect was stressed in paragraphs 55 and 89 of the first report by the present Special Rapporteur (*Yearbook of the International Law Commission*, 1969, vol. II, pp. 134 and 138, document A/CN.4/217 and Add.1) and in paragraph 7 of the second report (*ibid.*, 1970, vol. II, p. 178, document A/CN.4/233).

<sup>254</sup> The theory of the independence of the judiciary was advanced by Portugal to avoid recognizing its international responsibility in the Croft (1856) and Yuille, Shortridge and Co. (1861) cases. The Senate of Hamburg appointed as arbitrator between Great Britain and Portugal by virtue of the Agreements of 14 May 1855 and 8 March 1861, decided that the Portuguese Government could not be held responsible for the act of its courts, because they were independent (A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux* (Paris, Pédone, 1923), t. II, 22, 23 *et seq.*, 101 *et seq.*, and 103). For an analysis of these cases, see A. Otken, “De la responsabilité internationale des Etats en raison de décisions de leurs autorités judiciaires”, *Revue de droit international, de sciences diplomatiques, politiques et sociales* (Geneva, 4th tome, January-March 1926), pp. 33 *et seq.* The theory of the *res judicata* authority of an internal judgment was advanced, for the same purpose, by Nicaragua in the *Lighthouse Case* (1880) (H. La Fontaine, *Pasicrisie internationale — Histoire documentaire des arbitrages internationaux* (Bern, Stämpfli, 1902), pp. 225-227).

<sup>255</sup> United Nations, *Reports of International Arbitral Awards*, vol. XV (United Nations publication, Sales No. 66.V.3), p. 477.

<sup>256</sup> P.C.I.J., series A, No. 7, p. 19.

<sup>257</sup> United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No. 1951.V.1), p. 286.

<sup>258</sup> *Ibid.*, vol. XIII (Sales No. 64.V.3), p. 438.

<sup>259</sup> See, in this connexion, the judgments and advisory opinions of the Permanent Court of International Justice in the cases concerning settlers of German origin in the territory ceded by Germany to Poland (P.C.I.J., series B, No. 6, 1923), particularly pp. 35 *et seq.*, the treatment of Polish nationals in the Danzig Territory (*idem.*, series A/B, No. 44, 1932, particularly pp. 24-25), and Phosphates in Morocco (*idem.*, series A/B, No. 74, 1938, particularly pp. 25-26);

judicial<sup>260</sup> organs. And in all these awards, whether it was held that the State was responsible or not, the possibility of attributing the acts in question to the State was accepted.

146. With regard to the practice of States, it certainly seems that the doctrine of the impossibility of invoking international responsibility for the acts of legislative or judicial organs has not been advanced for a long time. On the other hand, the possibility of invoking international responsibility for such acts has been directly or indirectly recognized on many occasions.<sup>261</sup> A detailed examination

and those of the International Court of Justice in the Case concerning the rights of nationals of the United States of America in Morocco (*I.C.J. Reports 1952*, pp. 176 *et seq.*), the Case of the monetary gold removed from Rome in 1943 (*ibid.*, 1954, pp. 19 *et seq.*, and particularly p. 32), and the Case concerning the application of the Convention of 1902 on the Guardianship of Infants (*ibid.*, 1958, pp. 55 *et seq.*). Reference may also be made to the awards of the United States/Norway Arbitral Tribunal (1922) in the Case of the Norwegian Shipowners' Claims (United Nations, *Reports of International Arbitral Awards*, vol. I (United Nations publication, Sales No. 1948.V.2), pp. 309 *et seq.*, and particularly p. 331), of the Arbitrator between Great Britain and Costa Rica (1923) in the Aguilar-Amory and Royal Bank of Canada Claims (Tinoco Case) (*ibid.*, pp. 375 *et seq.*), of the Arbitrator between the United States of America and Guatemala (1930) in the Shufeldt Case (*ibid.*, vol. II (Sales No. 1949.V.1), pp. 1083 *et seq.*, and particularly p. 1095), and the United States of America/Panama General Claims Commission (1933) in the Mariposa Development Company and Others Case (*ibid.*, vol. VI (Sales No. 1955.V.3), pp. 338 *et seq.*, and particularly p. 340).

<sup>260</sup> In this connexion, see the judgments and advisory opinions of the Permanent Court of International Justice in the "*Lotus*" case (P.C.I.J., series A, No. 10, 1927, p. 24), the case concerning the jurisdiction of the Court of Danzig (*id.*, series B, No. 15, 1928, p. 24) and the Phosphates in Morocco case (*id.*, series A/B, No. 74, 1938, particularly p. 28); and the judgment of the International Court of Justice in the Ambatielos Case (*I.C.J. Reports 1953*, pp. 10 *et seq.*, and particularly pp. 21 *et seq.*). Mention may also be made of the decisions by the Arbitrator between Great Britain and Spain (1925) in the Case of British property in Spanish Morocco (United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949.V.1), pp. 615 *et seq.*, and particularly p. 646); by the United States of America/Mexico General Claims Commission in the cases of Garcia and Garza (1926) (*ibid.*, vol. IV (Sales No. 1951.V.1), pp. 119 *et seq.*), Kennedy (1927) (*ibid.*, pp. 194 *et seq.*), De Galvan (1927) (*ibid.*, pp. 273 *et seq.*), Richards (1927) (*ibid.*, pp. 275 *et seq.*), Parrish (1927) (*ibid.*, pp. 314 *et seq.*), Chase (1928) (*ibid.*, pp. 337 *et seq.*), Way (1928) (*ibid.*, pp. 391 *et seq.*, and particularly p. 400) and Chazen (1930) (*ibid.*, pp. 564 *et seq.*); by the Italy/Venezuela Arbitral Tribunal in the Martini case (1930) (*ibid.*, vol. II (Sales No. 1949.V.1), pp. 975 *et seq.*, and particularly p. 986); by the Arbitrators between Germany and Portugal in the case concerning the Responsibility of Germany for acts committed after 31 July 1914, etc. . . . (1930) (*ibid.*, pp. 1036 *et seq.*, and particularly pp. 1050 and 1058); by the British/Mexican General Claims Commission in the El Oro Mining and Railway Company Case (1931) (*ibid.*, vol. V (Sales No. 1952.V.3), pp. 191 *et seq.*); and by the United States of America/Egypt Arbitral Tribunal in the Salem case (1932) (*ibid.*, vol. II (Sales No. 1949.V.1), pp. 1165 *et seq.* and particularly p. 1202).

<sup>261</sup> By way of example, with regard to the acts of legislative organs we may quote two opinions, expressed by the British and French Governments, respectively. In a note sent to the United States Secretary of State on 28 February 1913, the British Ambassador at Washington wrote:

"International law or usage does not support the doctrine that the passing of a statute in contravention of a treaty right affords no ground of complaint for the infraction of that right, and that a nation which holds that its treaty rights have been so infringed or brought into question by a denial that they exist must, before protesting and seeking a means of determining the point at issue,

of all the positions taken to this effect would obviously take up a disproportionate amount of space. In this report, we shall therefore merely draw attention to the fact that countries which have been parties to disputes, either as claimants or as respondents, have always explicitly or implicitly recognized the possibility of attributing to the State an internationally wrongful act due to the conduct of legislative or judicial organs, as well as one due to the conduct of executive or administrative organs.<sup>262</sup> The most conclusive expression of the belief of States on

wait until some further action violating those rights in a conclusive instance has been taken" (A. D. McNair, *The Law of Treaties* (Oxford, Clarendon, 1961), p. 548).

In a note dated 23 January 1937, the Legal Department of the Quai d'Orsay expressed the following opinion:

"In theory, it is not impossible for a law to be in conflict with an international obligation of the French State constitutionally assumed, which does not necessarily mean that the obligation has been approved by Parliament.

"In such a case the international responsibility of the French State is involved, and it is for the Government either to secure amendment of the law in question by Parliament, or to indemnify the aliens whose interests are held to be prejudiced by the law or, if that is possible, to denounce the conventions which Parliament refuses to apply". [Translation by the United Nations Secretariat.] (Kiss, *Répertoire . . . (op. cit.)*, No. 903, p. 526.)

The opinions stated, particularly in the first of these notes, are not contradicted by the fact that, in certain specific cases, States have maintained that the internationally wrongful act in question was not due to the enactment of a law or failure to enact it, but to specific measures taken in application of the law, so that the violation, if any, resulted from an act of administrative or judicial organs, not of legislative organs. We have already had occasion to point out (see para. 141 above) that these attitudes are justified, in specific cases, by reference to the content of the obligation alleged to have been violated. There are, indeed, international obligations which do not specifically require, for their fulfilment, the formal enactment of a law, but only the achievement of a certain result, regardless of whether it is attained by legislation or by some other means. On the other hand, where the international obligation specifically requires action by legislative organs, no doubt has been expressed about the possibility of attributing to the State, as a breach of an obligation, the fact that its organs have not enacted the law required or have enacted a law having a different content.

With regard to the acts of judicial organs, reference may be made to the report sent on 26 February 1887 by Secretary of State Bayard to the President of the United States of America, in which it was said that:

"This Department has contested and denied the doctrine that a government may set up the judgment of one of its own courts as a bar to an international claim, when such judgment is shown to have been unjust or in violation of the principles of international law [ . . . ]" (J. B. Moore, *A Digest of International Law* (Washington, U.S. Government Printing Office, 1906), vol. VI, p. 667).

See Also Mr. Bayard's instructions to Mr. Jackson, the United States Minister to Mexico, dated 7 September 1886 (*ibid.*, p. 680).

<sup>262</sup> In his case for Poland, when an advisory opinion was requested from the Permanent Court of International Justice in the case concerning the treatment of Polish nationals in the Danzig territory, Mr. Ch. de Visscher said:

"When a State has assumed an international obligation which imposes on it a specific line of conduct, a breach of this international obligation may result from any kind of activity, even if such activity, considered from the point of view of internal law, is a purely constitutional, legislative, administrative or judicial activity. The nature of the act which constitutes departure from an internationally obligatory line of conduct or attitude is of no importance in international law." [Translation by the United Nations Secretariat.] (*Répertoire des décisions et des documents de la procédure écrite et orale de la Cour permanente de justice internationale et de la Cour internationale de justice*, vol. I, *Droit international et droit interne*, by K. Marek, Geneva, 1961, p. 29).

this point is to be found in the opinions they advanced on the occasion of the 1930 Conference for the Codification of International Law. The request for information submitted to governments by the Preparatory Committee contained three relevant points, in the first of which (point III), concerning "Acts of the legislative organ", the following question was asked:

Does the State become responsible in the following circumstances:

Enactment of legislation incompatible with the treaty rights of other States or with its other international obligations? Failure to enact legislation necessary for the purpose of implementing the treaty obligations of the State or its other international obligations?

In the second point (point IV), concerning "Acts relating to the operation of the tribunals", Governments were asked whether the State became responsible for a series of hypothetical acts or omissions relating to the exercise of judicial functions, which are incompatible with the treaty obligations or other international duties of the State. In the third point (point V), concerning "Acts of the executive organ", the same question was asked in regard to acts or omissions of organs of the executive power. In their replies, four Governments (these of Austria, Finland, Germany and Sweden) expressly stated that in their opinion the State was responsible, in principle, for the non-fulfilment of its international obligations, whether this resulted from an act of its legislative, executive or judicial organs, and that no distinction should be made in this connexion between the different categories of organ.<sup>263</sup> The other twenty States took what was, in fact, the same view by also replying in the affirmative to each of the three main questions asked in the points referred to above.<sup>264</sup> Equally concordant opinions were expressed later by the representatives who took part in the discussions in the Third Committee of the Conference.<sup>265</sup> When the discussions had ended, three of the ten articles adopted in first reading by the Committee established the responsibility of the State for acts or omissions of its legislative (article 6), executive (article 7) and judicial (article 9) organs incompatible with its international obligations.<sup>266</sup>

147. As to the doctrine of international law, a few words will suffice to complete the examination of the subject already made in the preceding paragraphs. It may be said that, regardless of the way in which the different writers choose to treat the question and the complications that sometimes result, they nevertheless agree that the conduct of all State organs, whatever branch of the State "power" they may belong to, can be regarded as an "act of the State" for the purposes of qualifying such an act as internationally wrongful.<sup>267</sup> It is characteristic of this

subject that a classical formula such as that put forward in his day by Anzilotti, to the effect that, from the point of view of foreign States, the State is seen only in its unity and not divided into its different powers, has found continued acceptance by international jurists right up to the most recent expressions of opinion, such as Soviet doctrine.

148. The codification drafts—both those from official sources and those produced by private institutions—follow the same basic principles. Nevertheless, they differ from one another as regards the criteria for drafting the formulations proposed. One method is to set out in general terms, in a single formulation, the idea of attribution to the State of the acts or omissions of its organs, without it being considered necessary to mention that they belong to one or other of the "powers" of the State. Such formulations are found, for example, in article 1 of the draft prepared by the International Law Association of Japan (Kokusaiho Gakkwai) in 1926,<sup>268</sup> in article 1 of the draft prepared by Professor Strupp in 1927,<sup>269</sup> in article 1 of the draft prepared by Professor Roth in 1932,<sup>270</sup> and in the general rule as to attribution section 169 of the *Restatement of the Law* prepared by the American Law Institute.<sup>271</sup> A second method, on the other hand, is once again to adopt a single formulation, but to state expressly that the fact that the organs belong to different branches of the State power has no relevance for purposes of attributing their acts or omissions to the State as sources of international responsibility. For instance, the first paragraph of rule I of the 1927 draft of the Institute of International Law establishes the responsibility of the State for

any action or omission contrary to its international obligations, whatever be the authority of the State whence it proceeds: constitutional, legislative, governmental, administrative or judicial.<sup>272</sup>

Schroeder, *Die Grenzen der staatlichen Verantwortlichkeit für Handlungen von Staatsorganen im völkerrechtlichen Verkehr* (Zurich, 1939); Oppenheim, *op. cit.*, pp. 357 *et seq.*; Accioly, *Tratado . . . (op. cit.)*, pp. 280 *et seq.*, and "Principes généraux . . .", *Recueil des cours* . . . (op. cit.), pp. 371 *et seq.*; Verdross, *Völkerrecht (op. cit.)*, pp. 304 *et seq.*; Rousseau, *Droit international public (op. cit.)*, pp. 370 *et seq.*; Guggenheim, *Traité . . . (op. cit.)*, pp. 7 *et seq.*; H. H. Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* (Bonn, Röhrscheid, 1952); Colombo, "Responsabilidad del Estado por los actos de los poderes legislativo, ejecutivo y judicial", *Revista de ciencias jurídicas y sociales*, (Santa Fe, 1954, pp. 5 *et seq.*; Monaco, *op. cit.*, pp. 363 *et seq.*; Schüle, *op. cit.*, pp. 332-333; Dahm, *op. cit.*, pp. 185 *et seq.*; Cavaré, *op. cit.*, 1962, t. II, pp. 410 *et seq.*; O'Connell, *op. cit.*, pp. 1042 *et seq.*; Amerasinghe, "Imputability . . .", *Revue égyptienne* . . . (op. cit.), pp. 96 *et seq.*; Levin, *Otvetsvennost gosudarstv . . . (op. cit.)*, pp. 69 *et seq.*; Jiménez de Aréchaga, *op. cit.*, pp. 544 *et seq.*; Institute of the State and Law of the Academy of Sciences of the Soviet Union, *op. cit.*, pp. 427-428.

<sup>268</sup> See *Yearbook of the International Law Commission, 1969*, vol. II, p. 141, Document A/CN.4/217 and Add.1, annex II.

<sup>269</sup> *Ibid.*, p. 151, document A/CN.4/217 and Add.1, annex IX.

<sup>270</sup> *Ibid.*, p. 152, document A/CN.4/217 and Add.1, annex X.

<sup>271</sup> See above, p. 193, document A/CN.4/217/Add.2. However, the commentary to section 169 indicates that the term "agency", used in the text of the rule, includes the head of State as well as any legislative, executive, administrative or judicial organ, or any other State authority (American Law Institute, *op. cit.*, p. 152).

<sup>272</sup> *Yearbook of the International Law Commission, 1956*, vol. II, pp. 227-228, document A/CN.4/96, annex 8 (Italics supplied by the Special Rapporteur).

<sup>263</sup> See League of Nations, *Bases of discussion . . . (op. cit.)*, pp. 25, 26, 29 *et seq.*

<sup>264</sup> *Ibid.*, pp. 25 *et seq.*, 41 *et seq.*, 52 *et seq.*, and *Supplement to Volume III (op. cit.)*, pp. 2-3 and 6 *et seq.*

<sup>265</sup> See League of Nations, *Acts of the Conference . . . (op. cit.)*, pp. 32 *et seq.*, 59 *et seq.*, 103 *et seq.*, and 152 *et seq.*

<sup>266</sup> For the texts of these three articles, see *Yearbook of the International Law Commission, 1956*, vol. II, p. 225 and 226, document A/CN.4/96, annex 3.

<sup>267</sup> In addition to the writers already quoted in foot-notes 249, 250 and 251 above, see Anzilotti, *Corso . . . (op. cit.)*, pp. 388 *et seq.*; Eagleton, *The Responsibility of States . . . (op. cit.)*, pp. 59 *et seq.*;

paragraph 3 of article 1 of the draft prepared by the Deutsche Gesellschaft für Völkerrecht in 1930 specifies that

It is immaterial whether the violation results from acts or omissions of the constituent or legislative power, of the Government, of the administrative authorities, of the courts [. . .] <sup>273</sup>

and paragraph 1 of article 16 of the draft convention prepared in 1961 by the Harvard Law School likewise specifies that

The terms "organ of a State" and "agency of a State", as used in this Convention, include the Head of State and any legislative, deliberative, executive, administrative, or judicial organ or agency of a State. <sup>274</sup>

A third method, finally, is to adopt separate articles for the acts or omissions of the three principal powers of the State. This method, adopted in 1929 by the Preparatory Committee of the Conference for the Codification of International Law (The Hague) in drawing up its Bases of Discussion Nos. 2, 5, 6 and 7, was also followed, as we have seen, in the articles adopted in first reading in 1930 by the Third Committee of the Conference. <sup>275</sup> It was subsequently applied in 1965 by the Inter-American Juridical Committee, in drafting its "Principles of international law that govern the responsibility of the State in the opinion of the United States of America". <sup>276</sup> Mr. Garcia Amador followed the same lines in presenting articles 2, 3 and 4 of his 1957 draft on international responsibility of the State, <sup>277</sup> and articles 3, 12 and 13 of the revised draft he prepared in 1961. <sup>278</sup>

149. As to the formulation to be proposed for the present draft, we think the comments made above regarding the drawbacks of separate treatment of the acts or omissions of organs belonging to the different powers of the State show that it would be inadvisable to follow the method of drafting separate articles. We believe it to be essential that the principle of the basic unity of the State, as it appears in international relations, should be clearly brought out by the wording adopted. On the other hand, we think it may nevertheless be useful to point out that the fact of organs of the State belonging to one or other of its "powers" does not affect the possibility of treating an act or omission of one of those organs as constituting an internationally wrongful act of the State. It must not be thought that it is unnecessary, for the clarity of the rule to be adopted, to emphasize that the constituent, legislative and judicial organs may enter into consideration for this purpose, in exactly the same way as the executive and administrative organs. Consequently, while deciding in favour of a single formulation, the Special Rapporteur expresses his preference for one close to the very clear wording adopted in 1927 by the Institute of International Law.

<sup>273</sup> *Ibid.*, 1969, vol. II, p. 149, document A/CN.4/217 and Add.1, annex VIII (Italics supplied by the Special Rapporteur).

<sup>274</sup> *Ibid.*, p. 145, document A/CN.4/217 and Add.1, annex VII (Italics supplied by the Special Rapporteur).

<sup>275</sup> *Ibid.*, 1956, vol. II, p. 225, document A/CN.4/96, annex 3.

<sup>276</sup> *Ibid.*, 1969, vol. II, pp. 153-154, document A/CN.4/217 and Add.1, annex XV, articles II, III and IV.

<sup>277</sup> *Ibid.*, 1957, vol. II, pp. 128-129, document A/CN.4/106, annex.

<sup>278</sup> *Ibid.*, 1961, vol. II, pp. 46 *et seq.*, document A/CN.4/134 and Add.1, addendum.

150. It now remains to examine the last of the three points mentioned at the beginning of this section. This is the question whether a further distinction should be made between State organs to determine those whose acts or omissions can be attributed to the State as an internationally wrongful act of the State—a distinction based on the superior or subordinate rank of the organ in the State hierarchy.

151. This question has been debated for a long time. As we shall see, the view that the acts or omissions of "minor" ("subordinate" or "lower") organs can be attributed to the State as a possible source of international responsibility just as well as the acts or omissions of higher organs, is now very largely predominant. But this has not always been so. One school of thought, of which Professor Borchard <sup>279</sup> was the principal spokesman—and which has continued, even very recently, to find some support <sup>280</sup>—has vigorously maintained the view that in international law only the conduct of higher organs is attributable to the State. It maintains that the State cannot be held responsible for an act by a minor organ unless its conduct appears to be explicitly or implicitly endorsed by superior organs; and that this is the case if the superior organs have omitted to take the necessary preventive measures or refused to punish the guilty party, or if they have refused to allow the injured party access to the courts. Thus in all these cases, the State would really be responsible only for the acts of its higher organs. In support of his thesis, the learned American international lawyer cited a number of cases from American diplomatic practice and the international jurisprudence of the time. The opinion summarized here is reflected in the draft convention prepared in 1929 by the Harvard Law School, for the Hague Codification Conference (this draft was prepared under Borchard's personal supervision). Article 7 (b) provides that:

A State is responsible if an injury to an alien results from the wrongful act or omission of one of its subordinate officers or employees within the scope of his office or function, if justice is denied to the injured alien, or if, without having given adequate redress to the injured alien, the State has failed to discipline the officer or employee. <sup>281</sup>

152. Borchard's thesis met with some reservations, however, and also with firm opposition in the legal literature of his time—even in that of the United States. <sup>282</sup> In

<sup>279</sup> E. M. Borchard, *op. cit.*, pp. 189 *et seq.*

<sup>280</sup> See, in particular, C. Fenwick, *International Law*, 3rd ed. (rev. and enl.) (New York, Appleton-Century-Crofts, 1948), pp. 280-281 and 282-283. See also G. Von Glahn, *Law among Nations: An Introduction to Public International Law*, 2nd ed., (London, Macmillan, 1970), p. 227.

<sup>281</sup> See the text of the draft article and the accompanying commentary, in Harvard Law School, *Research in International Law* (Cambridge, Mass., 1929), pp. 157 *et seq.* and 165 *et seq.*

<sup>282</sup> For the clearest and best documented opposition, see Eagleton, *The Responsibility of States . . . (op. cit.)*, pp. 45 *et seq.* See also Strupp, "Das völkerrechtliche Delikt", *Handbuch . . . (op. cit.)*, pp. 37 and 38 (note 5); Hyde, *op. cit.*, pp. 935-936; Hoijer, "Responsabilité internationale des Etats en matière d'actes judiciaires", *Revue de droit international (op. cit.)*, pp. 115 *et seq.* (the position of this author is, however, very undecided); F. S. Dunn, *The Protection of Nationals: A Study in the Application of International Law* (London, Oxford University Press, 1932), pp. 125 *et seq.*



particular, he was criticized for having wrongly interpreted the affirmation that there exist other conditions for attributing to the State an act giving rise to international responsibility as a confirmation of the alleged impossibility of attributing to the State, as a source of responsibility, the conduct of its subordinate organs. In some cases it does indeed appear to have escaped Borchard that the circumstance invoked in concluding that it was impossible to attribute the conduct of a particular organ to the State was not the "minor" nature of that organ, but the fact that it had acted in complete disregard of the law and of the limits even of its apparent authority.<sup>283</sup> Of course, the competence of a minor organ, such as a policeman, a soldier, or a judge of low rank, is much narrower than that of a higher organ, so that acts manifestly exceeding such competence can occur much more easily. But it is mainly in regard to the requirement of exhaustion of local remedies and its effect on responsibility that Borchard seems to have fallen into error in developing his theory of the non-responsibility of the State for the acts of its lower organs.<sup>284</sup> The essence of the "local redress rule" consists, precisely, in laying down that, at least as a general rule, the breach of an international obligation cannot be deemed to have finally taken place so long as a single one of the organs capable of fulfilling that obligation has not yet acted in the matter. In other words, international responsibility is not incurred if there remains any other internal means by which the obligation can still be fulfilled. Now it is obvious that such a situation will occur more frequently when the organ which acted first is of inferior rank. Nevertheless, the situation in law does not change because of a mere increase in probability. Even in the case of an act or omission by a higher organ, if remedies are available against its injurious conduct there will normally be no State responsibility involved until those remedies have been exhausted. In connexion with these remarks, it must also be pointed out that a major element of confusion is introduced by the current practice of stating the problem in regard to the acts or omissions of State organs not, as would be correct, in terms of attribution of such acts or omissions to the State, but directly in terms of responsibility. The conduct of any organ is attributable to the State as a subject of international law, even when such conduct is not sufficient in itself to generate international responsibility, but must be accompanied by the conduct of other organs for their combined conduct to be regarded as an internationally wrongful act and give rise to responsibility. This basic misunderstanding is certainly one of the sources of the idea of excluding the conduct of subordinate organs from the "acts of the State".

<sup>283</sup> For example, in a letter of 14 August 1900 from Mr. Adee, the United States Secretary of State, to Baron de Fava, the Italian ambassador in Washington (Moore, *A Digest* . . . (op. cit.), p. 743) it is stated that the general rule of international law observed by the United States is that sovereigns are not liable in diplomatic procedure for damages occasioned by the "misconduct of petty officials and agents acting out of the range not only of their real but of their apparent authority".

<sup>284</sup> On this point Eagleton refers, for example, to the Lewis Case (Moore, *History and Digest* . . . (op. cit.), vol. III, pp. 3019 et seq.), in which the United States contended that it was "not responsible for the error of judgment of such subordinate officers till proper resort was had to some responsible and chief officer of the government".

153. In addition, it must be recognized that, on this point, the diplomatic practice and arbitral awards of 1850-1914, on which Borchard relied, were far from clear and uniform. The American international lawyer himself noted that there was much confusion there.<sup>285</sup> There were, no doubt, opinions and decisions which appeared to favour the thesis that the acts or omissions of "minor officials" could not be attributed to the State and, especially, that the State could not be held responsible for their conduct; but there was also much in support of the opposite view.<sup>286</sup> A close examination of the formulations used shows that one element stood out especially in a series of cases: an element calculated to justify, to some extent, the conclusion reached by Borchard and the other advocates of his thesis. The American legal system—unlike, for example, the systems of continental Europe—often provides, against injurious acts by State officials, especially those of lower rank, the possibility of personal recourse against the individual organ, not of recourse against the administration of the State as such. Hence diplomatic notes from the United States Government, or arbitral awards concerning disputes to which it was a party, sometimes pointed out that such personal recourse was available to the plaintiff, and that he should not claim against the State.<sup>287</sup> Now an opinion of this kind could be interpreted as indicating a failure to exhaust local remedies, noted in the case in question, but it could also be interpreted as an expression of the belief that the acts of lower organs, precisely because they only generate their own personal responsibility, could not be regarded as acts capable of being attributed to the State.<sup>288</sup> The confusion, then current, between the attribution of an act to the State at the internal level and the attribution of the same act to the State at the international level, clearly encouraged such a belief. This helps to explain the differences of opinion sometimes pointed out, in this connexion, in the diplomatic correspondence exchanged before the First

<sup>285</sup> *The Diplomatic Protection* . . . (op. cit.), p. 185.

<sup>286</sup> See the cases cited by Eagleton in *The Responsibility* . . . (op. cit.), pp. 46 et seq.

<sup>287</sup> In the decision in the Bensley Case, taken on 20 February 1850 by the Claims Commission established under the Act of Congress of 3 March 1849, it was stated that for injuries committed by subordinate municipal officers, the party must find his redress by a prosecution against the individual by whom the wrong was done, and while the tribunals of justice are kept open to afford this redress, an indemnity can not be demanded from the government (Moore, *History and Digest* . . . (op. cit.), vol. III, p. 3017). In the Leichardt Case, the United States member of the United States of America/Mexico Mixed Commission established under the Convention of 4 July 1868, justified his concurrence in the decision, which dismissed the claim for compensation made by the Government of the United States against the Government of Mexico, by saying that in case of injuries inflicted by "paltry petty officers dressed in a little brief authority", like the governor's secretary, for instance, they [foreigners] must resort to the courts of the country, and in such cases only appeal to their sovereign when the courts of the country refuse to do their duty" (*ibid.*, p. 3134). A similar position was taken by the umpire Thornton in the cases of Slocum (*ibid.*, pp. 3140-3141), Blumhardt (*ibid.*, p. 3146), Smith (*ibid.*, p. 3146), Jennings, Laughland and Co. (*ibid.*, pp. 3135-3136), and Burn (*ibid.*, p. 3140).

<sup>288</sup> It should be noted, however, that Borchard ("Theoretical Aspects of the International Responsibility of States", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Berlin, vol. I, part 1, 1929), pp. 231-232) himself admitted that he saw no difference of principle between the category of higher officials and that of lower officials.

World War between the United States Government and European Governments.<sup>289</sup> Above all, it explains why the theory which seeks to exclude attribution of the conduct of subordinate organs to the State flourished at one time in the American literature, whereas it never found any supporters in the literature of European countries.

154. The position of the European governments amounted to regarding the acts and omissions of its subordinate organs as emanating from the State, for the purposes of generating international responsibility of the State. An expression of this view can be found in the instructions sent on 8 March 1882 by the Italian Minister for Foreign Affairs, the learned international lawyer Mancini, to the Italian Minister to Peru, regarding injuries caused to Italian subjects by troops which had taken part in the sack of Chinchá:

As a general rule such responsibility is presumed, even when the injuries are not a direct consequence of the action of the Government, but of the action of subordinate authorities [ . . . ]<sup>290</sup> (In regola generale questa responsabilità si presume, anche quando i danni non sono conseguenza diretta dell'azione del Governo, ma di autorità inferiori [ . . . ].)

It should also be noted, as we have said, that the arbitral awards of the period preceding the First World War, besides some that can be interpreted in an opposite sense, provide many examples of recognition of the principle of attribution to the State, as a subject of international law, of the acts or omissions of subordinate organs; and this applies also to decisions on disputes involving countries of the American continent. In the *Moses Case*, for example, the umpire, Mr. Lieber, rejected the Mexican plea based on the subordinate character of the officer who had seized the goods of the American citizen Moses, and this rejection gave him occasion to enunciate the formula already quoted in this report,<sup>291</sup> according to which the Government, in an international sense, "is the aggregate of all officers and men in authority". In the *Maal Case*, adjudicated by the Netherlands/Venezuela Mixed Commission established under the protocol of 28 February 1903, the Commission, referring to maltreatment of a Venezuelan citizen by police officers, ruled that:

[ . . . ] the acts of their [the Government's] subordinates [ . . . ] however odious their acts may be, the Government must stand sponsor for.<sup>292</sup>

Without dwelling on further cases, we think we can conclude, in regard to the earliest period referred to thus far, that the practice of States and international jurisprudence were even then based mainly on the principle that, for purposes of international responsibility, the conduct of its subordinate organs can be attributed to the State; the contrary opinions appear, against the general background, rather as exceptions due to the special features of

certain legal systems and to systematic concepts that were still uncertain.

155. In any case, the uncertainty that may have existed in earlier times seems to have disappeared subsequently, particularly during the years preceding 1930. Governments were given an opportunity of showing what was their prevailing view on our problem, first during the preparatory work, and then during the actual proceedings, of the 1930 Codification Conference. The international jurisprudence of the last four decades does not appear to furnish any examples of dissenting decisions. The views of the authors of learned works are also almost unanimous.

156. Point IV of the request for information addressed to governments by the Preparatory Committee for the 1930 Conference, concerning acts relating to the operation of the tribunals, made no distinction between higher and lower courts; and, in the replies, no government expressed any reservations on that point.<sup>293</sup> Point V of the request for information referred separately to acts of the higher authorities of the State (No. 1, *a*) and to acts or omissions of officials (No. 2, *a*).<sup>294</sup> In its reply, the German Government (which answered all the questions in point V together), expressly stated that "[ . . . ] a minor civil servant [ . . . ] involves the responsibility of the State in exactly the same way as if an act contrary to international law had been committed by the Government itself".<sup>295</sup> The Czechoslovak Government said that "it makes no difference whether the executive organs in question are higher or subordinate bodies".<sup>296</sup> The great majority of the other replies implicitly showed adherence to the same view.<sup>297</sup> Only in the replies of the United States,<sup>298</sup> Hungary,<sup>299</sup> and Poland<sup>300</sup> are there some traces of the position taken by Mr. Borchard. Consequently, in preparing the bases of discussion for the Conference, the Preparatory Committee did not provide for any difference in treatment, for the purposes of attribution of responsibility to the State, between the conduct of higher organs and that of minor organs. At the Conference itself, the question of organs of lower rank was considered only occasionally during the discussions, and no trace of it was left in the conclusions.<sup>301</sup> Article 7 of the articles adopted in first reading by the Third Committee, concerning international responsibility of the State for acts or omissions of the executive power, and article 8, concerning the

<sup>289</sup> League of Nations, *Bases of Discussion . . .* (op. cit.), pp. 41 et seq.; and *Supplement to volume III* (op. cit.), pp. 2, 9 et seq.

<sup>294</sup> *Id.*, *Bases of Discussion . . .* (op. cit.), pp. 56 and 70.

<sup>295</sup> *Ibid.*, p. 52.

<sup>296</sup> *Ibid.*, p. 58.

<sup>297</sup> *Ibid.*, pp. 53 et seq., 56 et seq., 70 et seq.; and the *Supplement to volume III* (op. cit.), pp. 2-3.

<sup>298</sup> League of Nations, *Supplement to volume III* (op. cit.), pp. 15-16.

<sup>299</sup> League of Nations, *Bases of Discussion . . .* (op. cit.), p. 72.

<sup>300</sup> *Ibid.*, p. 73.

<sup>301</sup> The Mexican delegate proposed an amendment to basis of discussion No. 12 (which later became article 8), to provide that in the case of acts or omissions by subordinate officials, the State would not incur any international responsibility if it disavowed the act and punished the guilty official. No State supported the Mexican delegate's amendment, and he withdrew it. See League of Nations, *Acts of the Conference . . .* (op. cit.), pp. 82 et seq.

<sup>289</sup> See, for example, the position taken by Cushing, Attorney-General of the United States, on a claim made against the United States Government for the loss of a vessel through the negligence of a pilot in San Francisco (Moore, *A Digest . . .* (op. cit.), pp. 740-741.

<sup>290</sup> S.I.O.I. (Società Italiana per l'Organizzazione Internazionale) - C.N.R. (Consiglio Nazionale delle Ricerche), *La prassi italiana di diritto internazionale* (Rome, 1970), 1st series (1861-1887), vol. II, p. 862.

<sup>291</sup> See para. 124 above.

<sup>292</sup> United Nations, *Reports of International Arbitral Awards*, vol. X (United Nations publication, Sales No. 60.V.4), p. 732.

acts or omissions of officials,<sup>302</sup> used the same language for the two cases; they contained no reference to any distinction according to the rank of the organ.

157. At about the same time, the position of arbitral tribunals was established in a series of cases. The possibility of attributing, in principle, to the State, as a subject of international law, the conduct of all its organs regardless of their rank was thereby clearly confirmed. The problem of "minor" organs was discussed, in particular, in a number of cases brought before the Mexico/United States of America General Claims Commission established, as previously noted, by the convention of 8 September 1923. It is worth noting that article V of that convention excluded the application, in the bilateral relations between the parties, of the general principle of exhaustion of local remedies. Thus one cause of confusion concerning our problem was eliminated, and its solution accordingly simplified. In the *Roper Case*, decided on 4 April 1927,<sup>303</sup> the Commission paid particular attention to the possibility of attributing an act or omission by a subordinate organ to the State as a source of international responsibility. On this occasion, the Mexican agent pleaded that his Government was not responsible for the acts of a policeman; he relied on the general thesis that in international law the State is not responsible for the conduct of its "lower" organs. However, the Commission, referring to the decision in a previous case,<sup>304</sup> in which Mexico had been the claimant, and in which that thesis had not been accepted, rejected the arguments of the Mexican agent and declared Mexico responsible. The same issue was dealt with again in the *Massey Case*, decided on 15 April 1927, in which the argument based on the subordinate character of the organ (in this instance an assistant jail-keeper) was again put forward by the Mexican agent.<sup>305</sup> The Commission pointed out the uncertainty that had attended that issue in the jurisprudence of international tribunals. Nevertheless, after examining the precedents at length, it expressed the view that the conclusion of non-responsibility reached in some cases was not really based on the subordinate character of the organ committing the act or omission, but on the fact that that act or omission did not really constitute a breach of an international obligation of the State.<sup>306</sup> In this case the Commission therefore rejected the Mexican argument. Its conclusion, formulated by the United States Commissioner Nielsen, was as follows:

It is undoubtedly a sound general principle that, whenever misconduct on the part of any [...] persons [in the service of a nation], whatever may be their particular status or rank under domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of its servants.<sup>307</sup>

Following this decision, the international responsibility of

the State was recognized in a number of other cases by the Commission which, in its decision of 18 October 1928 in the *Way Case*,<sup>308</sup> reaffirmed the principle by which it had been guided. After this the parties ceased to invoke, in their pleadings before the Commission, the argument based on the subordinate rank of the official concerned. A few years later the Government of Panama tried to use this argument before the United States of America/Panama General Claims Commission, constituted under the agreement of 28 July 1926, in the *Baldwin Case*.<sup>309</sup> But the Commission, in its decision of 26 June 1933, affirmed that Panama was responsible for the acts of its police organs. The following year, according to Nielsen, a decision in the *Malamatinis Case* also stated the principle of the responsibility of the State for the acts or omissions of its officials, regardless of their rank, and in doing so followed the wording previously used in the decisions of the Mexico/United States of America Commission.<sup>310</sup> This was apparently the last time that a respondent Government tried to invoke in its defence, before an international tribunal, the argument that the conduct of minor organs should not constitute an act of the State, and consequently should not give rise to international responsibility of the State.

158. The problem posed by the subordinate nature of some State organs does not appear to have been the subject of any express statement of opinion by other international tribunals recently. But this does not mean that their principles actually followed by these bodies in certain instances were different from those so clearly and consistently affirmed by the claims commissions referred to in the preceding paragraph. They, too, had to deal in several cases with the acts or omissions of lower organs, and automatically regarded them as acts or omissions which must be attributed to the State, and to which international responsibility could therefore be attached. To cite only one example, the Italian/United States of America, Franco/Italian and Anglo/Italian Conciliation Commissions, established under article 83 of the Treaty of Peace of 10 February 1947, have often had to consider the conduct of persons regarded as minor organs of the State, such as receivers,<sup>311</sup> administrators<sup>312</sup> and policemen.<sup>313</sup>

<sup>302</sup> *Ibid.*, p. 400. The wording used is almost the same as that used by the Commission in the *Massey Case*.

<sup>303</sup> *Ibid.*, vol. VI (Sales No. 1955.V.3) pp. 328 *et seq.* On the agreement of 1926, see B. L. Hunt, *American and Panamanian General Claims Arbitration* (Washington, U.S. Government Printing Office, 1934), p. 324.

<sup>304</sup> See F. K. Nielsen, *American-Turkish Claims Settlement under Agreement of December 24, 1923 . . . Opinions and Report* (Washington, U.S. Government Printing Office, 1937) pp. 608 *et seq.*

<sup>305</sup> For the Franco-Italian Commission, see *Différend Société anonyme de filatures de Schappe* (1954) (United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), pp. 605-606); *Différend concernant l'interprétation de l'article 79* (1955) (*ibid.*, pp. 431-432); *Différend patrimoine Tagliarino Filippo* (1959) (*ibid.*, pp. 481-482); *Différend patrimoine Bonomo Francesco* (1959) (*ibid.*, pp. 468-469); For the Anglo-Italian Commission, see the *Currie Case* (1954) (*ibid.*, vol. XIV (Sales No. 65.V.4), p. 24).

<sup>306</sup> See the cases concerning *Société Verdol* (1949) (*ibid.*, vol. XIII (Sales No. 64.V.3), pp. 95-96 and *Joseph Ousset* (1954) (*ibid.*, p. 262) decided by the Franco-Italian Commission.

<sup>307</sup> See the cases concerning *Dame Mossé* (1953) (*ibid.*, pp. 492 *et seq.*) and *Dame Menghi née Gibey* (1958) (*ibid.*, pp. 802-803) decided by the Franco-Italian Commission.

<sup>302</sup> See *Yearbook of the International Law Commission*, 1956, vol. II, pp. 225-226, document A/CN.4/96, annex 3.

<sup>303</sup> United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No. 1951.V.1), pp. 145 *et seq.*

<sup>304</sup> *Ibid.*, p. 147. This was in the *Quintanilla Case*.

<sup>305</sup> *Ibid.*, pp. 155 *et seq.*

<sup>306</sup> *Ibid.*, p. 159.

<sup>307</sup> *Ibid.*, p. 159.

Both the Commission and the parties to the dispute have always agreed to treat the acts of such persons as acts attributable to the State.

159. As regards the most recent doctrine, it can be said that, with one or two exceptions, international lawyers trained in the most widely different systems of law all support the view that even the conduct of minor organs can be regarded as an act of the State.<sup>314</sup> Some of them are notable for the emphasis they place on the disadvantages of adopting the old contrary view. It should also be noted that none of the codification drafts, official or private—with the exception, of course, of the Harvard draft of 1929—distinguishes, for the purposes we are concerned with, between higher and subordinate organs.<sup>315</sup>

160. The conclusion which must be reached on the third point considered in the present section is, therefore, that there is no place today for the idea, which emerged at one time, of making a distinction between officials and employees of the State according to their rank in the hierarchy. There is no reason to assume that only the conduct of high-ranking officials can be regarded as conduct of the State for purposes of international responsibility. That restriction was accepted only temporarily and to a limited extent in the practice of States, the jurisprudence and the literature, all of which now reject it almost unanimously. Even if that were not so, however, such a view would have to be opposed from the standpoint of expediency and of the progressive development of international law. To accept such a distinction would be to introduce a serious element of uncertainty; the line of demarcation between the two categories of official could only be an arbitrary one, and States would find it an all too convenient means of escaping the consequences of their own acts. The State must recognize itself in all those it has charged with acting on its behalf, from the lowest to the highest. This is a requirement which satisfies both logic and the need for clarity and security in international legal relations.

161. We can now regard as concluded the examination of the many questions that had to be dealt with in connexion with the various categories of State organs and the possibility of attributing their acts and omissions to

the State. We have reached clear and consistent conclusions on the main points, and in our view there is no need to refer separately to other problems which can be said to solve themselves. It is self-evident, for example, that for our purposes there is no reason to distinguish between officials according to the place where they perform their functions, or according to whether their employment is permanent or temporary, remunerated or honorary. The unity of the State as a subject of international law, which we have seen to follow as a firm principle from an examination of inter-State relations as they really exist, requires that the acts or omissions of every individual or collective member of the State machinery be treated in the same way as acts or omissions of the State at the international level, and that, should the occasion arise, they be capable of incurring its international responsibility. It would, moreover, be absurd to believe that there is a category of organs specially set apart for the commission of internationally wrongful acts, like the category of organs designated to perform international legal acts.<sup>316</sup> Any organ of the State, if it is materially able to act in a manner that conflicts with an international obligation of the State, can give rise to an internationally wrongful act of the State. Of course, there are organs which, by the nature of their functions, will in practice have more opportunity of doing so than others; but the great variety of international obligations precludes any prior distinction between organs which can commit internationally wrongful acts and those which can not. The sole criterion in this matter is that the organ must be engaged, through its functions, in an activity in which it can enter the field of an international obligation of the State, and possibly violate that obligation by its conduct.

162. It remains to consider what formula can best express, in the present draft, the sense of the conclusions we have successively reached. It may be emphasized, once more, that such a formula will be all the more effective if it can take the form of a single, comprehensive principle. At the same time, as we have already indicated above, it seems essential that the conclusions reached on each of the main aspects of the general problem considered here should appear with the necessary clarity. In the light of these requirements, we propose the following wording:

**Article 6. Irrelevance of the position of an organ of the State in the distribution of powers and in the internal hierarchy**

For the purposes of determining whether the conduct of an organ of the State is an act of the State in international law, the questions whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the hierarchy of the State, are irrelevant.

**4. ATTRIBUTION TO THE STATE, AS A SUBJECT OF INTERNATIONAL LAW, OF THE ACTS OF ORGANS OF PUBLIC INSTITUTIONS SEPARATE FROM THE STATE**

163. When stating the basic principle of the subject-matter of this chapter—namely, the principle of the

<sup>314</sup> See Freeman, "Responsibility of States . . .", *Recueil des cours* . . . (op. cit.), pp. 284 et seq., and earlier, by the same author, *The International Responsibility of States* . . . (op. cit.), pp. 447 et seq.; Briggs, *The Law of Nations* (op. cit.), p. 697; Verdross, *Völkerrecht* (op. cit.), pp. 380-381; Cheng, *op. cit.*, pp. 195-196; Reuter, *La responsabilité internationale* (op. cit.), p. 92; Meron, *op. cit.*, pp. 97-98; Accioly, "Principes généraux . . .", *Recueil des cours* . . . (op. cit.), pp. 392-393; Dahm, *op. cit.*, pp. 186-187; Cavaré, *op. cit.*, t. II, pp. 411 et seq. (although with some concessions, as regards the past, to the opposite view); Schüle, *op. cit.*, p. 332; Münch, *op. cit.*, pp. 202-203; Levin, *Orvetstvennost gosudarstv* . . . (op. cit.), pp. 71-72; Quéneudec, *op. cit.*, pp. 55 et seq.; Amerasinghe, "Imputability . . .", *Revue égyptienne* . . . (op. cit.), p. 106; Jiménez de Aréchaga, *op. cit.*, pp. 546-547; Institute of the State and Law of the Academy of Sciences of the Soviet Union, *op. cit.*, p. 427; Greig, *International Law* (London, 1970), pp. 436-437.

<sup>315</sup> This also applies to the new Harvard draft of 1961 and to the *Restatement of the Law* by the American Law Institute, in which the commentary on the rule, already quoted, in section 169 (American Law Institute, *op. cit.*, p. 513), speaks in critical terms of the idea that the conduct of a minor official does not give rise to international responsibility.

<sup>316</sup> On this point see Ago, "Le délit international", *Recueil des cours* . . . (op. cit.), pp. 468-469.

attribution to the State, as a subject of international law, of the conduct of persons or groups of persons who are its "organs" under its internal legal system, we took care to make two reservations.<sup>317</sup> We stated, first, that there was nothing to suggest that this principle was necessarily absolute; only further detailed analysis of what really happens in international life, we said, might possibly enable us to conclude that the conduct of *all* organs of the State could be considered as an act of the State as a subject of international law. This analysis was made in the preceding section. Secondly, we stressed that there was no indication at all that this same basic principle should be exclusive. On the contrary, we suggested that an examination of the facts would probably show that the list of acts attributable to the State as a possible source of international responsibility also included the conduct of other persons or groups of persons who, according to the internal legal order, could not properly be described as organs of the State. Consequently, in order to obtain a complete picture of the acts which can be attributed to the State at the international level, we must now proceed to examine a series of different situations. The first task, which we shall undertake in this section, will be to investigate, from this standpoint, the treatment accorded to the acts and omissions of organs of public institutions separate from the State. These institutions may be roughly grouped in two main categories, which will be dealt with separately and successively: (a) public corporations and other public institutions which have their own legal personality and autonomy of administration and management, and are intended to provide a particular service or to perform specific functions; (b) territorial public entities engaged in public activities of a general nature, but carried on at the local or regional level.

164. The emergence and proliferation of public institutions is a phenomenon of our time, which is marked today by a tendency towards progressive differentiation and a wider separation between the organization of these institutions and the administration, structures and methods of the State. The diversity of the tasks of common interest which the community itself has to perform in a modern society, the ever-increasing number of services which only the community is able to provide, the gradual extension of these services to the most widely different sectors of economic, social and cultural life, the fact that they are often of a technical nature and thus require autonomy of decision and action and the possession of special qualifications, the need to make procedures more flexible and simplify controls in order to increase the efficiency of the service—these, in short, are the main causes of the phenomenon. Thus, side by side with the State, there have been and are being established a number of institutions which, though their functions give them a distinctly public character, have a separate legal personality under the internal legal system, possess their own organization distinct from that of the State and are subject, in their activities, to a legal régime *sui generis*, which may partake sometimes of public law and sometimes of private law, according to requirements. By a neologism which may be questionable from the standpoint of linguistic purity, but

is effective for describing the facts, a large group of these bodies are sometimes described as "para-State" institutions, i.e., institutions which possess an organization of their own and which, side by side with the State but separate from it, provide services and perform tasks of a public character.

165. In addition to the phenomenon described above, there are others which may be mentioned for the purposes we are concerned with here. There is one, in particular, which arises not in a specialized and usually technical sphere, but in a distinctly general and political context. Some national systems do not follow the principle of entrusting certain higher functions of organization, direction and political supervision only to organs of the State. Such functions are assigned primarily to a separate institution, a political entity organized outside the machinery of the State, though closely and indissolubly linked to it. Moreover, this institution is required to perform the above-mentioned functions not only for the community as such, but above all for the machinery of the State itself and its organs. The political entity concerned is thus certainly a public institution, and one at the highest level. This is the system applied in the socialist countries. Article 126 of the Constitution of the USSR states expressly that the Communist Party is the "leading core of all organizations of the working people, both government and non-government". According to the preamble to its Rules, the Communist Party of the USSR is "the highest form of political and social organization, the force which directs and guides soviet society", while rule 35 entrusts to the supreme organs of the Communist Party the task of directing "the work of the central organs of the State". Other systems too now have a "single" party, although its role may vary. In some recently constituted countries, in particular, the single party is a public institution charged with the functions of organizing, developing and modernizing society and maintaining permanent contact between society and the organs of the State. Lastly, political entities also calling themselves single parties, although their foundations and purposes were entirely different, existed in the recent past in countries which were under a totalitarian régime. Under the system then in force in those countries, the character of the single party as a public institution separate from the State, but integrated with it at all levels, was stressed in several legal texts.

166. The examples given in the foregoing paragraphs certainly do not exhaust the wide range—which varies considerably from system to system and may include other possible types in the future—of institutions separate from the State but also responsible for meeting public needs. Their functions vary widely and may be at the highest or lowest level and of a general or special character; but they are, nevertheless, always public functions which serve the interests of the community. At the same time, in the context of the internal legal order, we find that each of these institutions has its own machinery, which is not part of the machinery of the State, and its own organs which—usually, at least—are not organs of the State. The question thus arises whether the acts or omissions of the organs of such institutions can or cannot be considered as "acts of the State" at the international level.

<sup>317</sup> See paras. 107 and 122 above.

167. The question of the attribution to the State, as a subject of international law, of an act or omission of an organ of a public institution was raised before the International Court of Justice in the *Case of Certain Norwegian Loans*. In this dispute between France and Norway, the Government of Norway argued that the Norwegian banks which had contracted some of the loans in question had a personality distinct from that of the State, so that the international responsibility of the State could not be incurred by an act or omission of the management of these banks.<sup>318</sup> The French Government contested the validity of this argument.<sup>319</sup> During the oral proceedings, Professor Gros, the Agent of the French Government, stated its position as follows:

In internal law [...] a public institution is created to meet a need for decentralization: it may be necessary to grant some degree of independence to certain institutions or agencies, either for budgetary reasons or because of the purposes they serve, for example, welfare or cultural purposes. This independence is achieved by granting them legal personality under internal law.

But although, in internal law, the legal personality of public institutions, distinct from that of the State, has the consequence that actions relating to these institutions must be brought against them and not against the State [...], this consequence need not be transferred to international law [...]. From the standpoint of international law, these public persons merge with the State.<sup>320</sup> [Translation by the United Nations Secretariat.]

It is true that the Court did not have occasion to express an opinion on this important point, for after accepting a further preliminary objection raised by the Norwegian Government, it declared that it was without jurisdiction to adjudicate upon the dispute. However, it may well be thought that, if matters had taken a different course, the Court would have found it difficult to accept the Norwegian argument, based on the fact that the French Government had "not been able to cite any authority [...] either in doctrine or in jurisprudence" in support of the existence of a "rule of international law making a State internationally responsible for arrangements made by State agencies constituted as independent legal persons".<sup>321</sup> Indeed, two judges (Sir Hersch Lauterpacht and Mr. Read) did express opinions on this point and stressed the validity of the French argument;<sup>322</sup> Mr. Read also drew attention to the inconsistency shown by the Norwegian Government which, when an action was brought against one of the banks concerned before the *Tribunal de la Seine*, had invoked immunity from jurisdiction—the immunity internationally accorded to organs of foreign States. Thus the Norwegian Government had itself argued, in that earlier case, that the acts of the public institution concerned should be treated as "acts of the State" at the international level.

168. With regard to the practice of States, none of the points in the request for information addressed to Governments by the Preparatory Committee of the 1930 Codification Conference contained any express mention

of public institutions. However, in their replies to point VI (Acts or omissions of bodies exercising public functions of a legislative or administrative character [communes, provinces, etc.]), some Governments, including those of Germany and Great Britain, observed that the State was responsible also for acts or omissions of bodies other than those of a local character, in so far as such bodies were also required to exercise public functions.<sup>323</sup> The Preparatory Committee accordingly came to the conclusion that it should refer not only to territorial entities such as communes and provinces, but also to "autonomous institutions" in general. It therefore prepared the following basis of discussion:

A State is responsible for damage suffered by a foreigner as a result of acts or omissions of such corporate entities (communes, provinces, etc.) or autonomous institutions as exercise public functions of a legislative or administrative character [...].<sup>324</sup>

Unfortunately, the Third Committee of the Conference did not have time to consider and adopt this basis of discussion. It is, however, significant that, after receiving the replies of governments, the Preparatory Committee decided to deal in a single clause with the attribution to the State of the conduct of organs of territorial entities—which, as we shall see, is generally accepted—and with the problem of the acts or omissions of organs of "autonomous institutions" exercising public functions.

169. With regard to the other institutions we have mentioned, and in particular agencies separate from the State but closely linked to it and charged with functions of administration and political guidance, some writers cite the decision—already mentioned in this report—of the Franco-Italian Conciliation Commission in the *Dame Mossé case*. In this decision, given on 17 January 1953, the Commission stated that:

It is impossible to consider [...] the armed forces of the reconstituted Fascist Party as being unconnected with these organs [those of the so-called Saló Republic], because of the status accorded to the party in fact and in law by the aforesaid Republic [...].<sup>325</sup> [Translation by the United Nations Secretariat.]

Some writers also cite similar precedents from the practice of States. They refer, for example, to the observations contained in a study annexed to the 1932 report of the Commission of Enquiry (Lytton Commission) appointed by the League of Nations to investigate the Chinese boycott and the responsibilities relating thereto. That study indicated that the boycott had been ordered, controlled and co-ordinated not by the Nationalist Government, but by the Kuomintang. But it also stated that this movement was the maker and the master of the Government, that it directed and controlled the Government and that it could be considered as the real source of power.<sup>326</sup> Writers refer also, more particularly, to an

<sup>318</sup> *I. C. J. Pleadings*, vol. I, pp. 136-137, 237 *et seq.*, and 445 *et seq.*

<sup>319</sup> *Ibid.*, pp. 181-182 and 405 *et seq.*

<sup>320</sup> Public hearing of 15 May 1957 (*ibid.*, vol. II, p. 72).

<sup>321</sup> Hearing of 23 May 1957 (*ibid.*, p. 175).

<sup>322</sup> See *I. C. J. Reports 1957*, pp. 36 and 96.

<sup>323</sup> League of Nations, *Bases of Discussion* . . . (*op. cit.*), pp. 90-91.

<sup>324</sup> *Ibid.*, p. 92.

<sup>325</sup> United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3) p. 492. On this subject see Reuter, *La responsabilité internationale* (*op. cit.*), pp. 91-92; Quéneudec, *op. cit.*, pp. 52-53.

<sup>326</sup> League of Nations, *Appeal by the Chinese Government, Documents annexed to the Report of the Commission of Enquiry* (doc.C.663.M.320.1932.VII Annexes), pp. 244-245. In this connexion, see H. Lauterpacht, "Boycott in International Relations"

(Continued on next page.)



agreement concluded on 10 May 1935 between Germany and Belgium, following certain frontier incidents caused by organs of the National Socialist Party. In this agreement, Germany was obliged to recognize the principle of the international responsibility of the German State for the acts of persons described as "having an official status" and "directly or indirectly in the service" of the State.<sup>327</sup>

170. As these are special and relatively recent situations, the precedents provided by jurisprudence and the practice of States are naturally not very numerous. On the other hand, many writers have discussed the various points that arise quite fully and have explained the logical reasons for attributing to the State, at the level of international relations, the acts or omissions of organs of various institutions which have a personality separate from that of the State under the internal legal system, but are nevertheless responsible for providing public services or performing public functions—in a word, for an activity on behalf of the community.<sup>328</sup> Moreover, the principle of this attribution is to be found in certain codification drafts.<sup>329</sup>

(Foot-note 326 continued)

*The British Year Book of International Law*, 1933 (London) pp. 133-134; C. L. Bouvé, "The National Boycott as an International Delinquency", *American Journal of International Law*, Washington, vol. 28, No. 1 (January 1934), pp. 36-37; L. Preuss, "International Responsibility for Hostile Propaganda against Foreign States", *ibid.*, No. 4 (October 1934), pp. 667-668.

<sup>327</sup> League of Nations, *Treaty Series*, vol. CLXV, p. 174. See Reuter, *La Responsabilité internationale*, (*op. cit.*), p. 91; Quéneudec, *op. cit.*, p. 52.

On the problem of State responsibility for acts of single parties see also Ch. de Visscher, *Théories et réalités . . .* (*op. cit.*), pp. 340-341; E. Zellweger, *Die völkerrechtliche Verantwortlichkeit des Staates für die Presse* (Zürich, Polygraphischer, 1949), pp. 21 *et seq.*

<sup>328</sup> In addition to the authors of articles already mentioned concerning special questions, see W. Friedmann, "The Growth of State Control over the Individual and its Effects upon the Rules of International State Responsibility", *The British Year Book of International Law*, 1938 (London), p. 144, and "Some Impacts of Social Organization on International Law", *American Journal of International Law* (Washington), vol. 50, No. 3 (July 1956), pp. 492-493; Romano, *Corso di diritto internazionale*, 4th ed. (Padua, 1939), pp. 212-213; Balladore Pallieri, *Diritto internazionale pubblico* (*op. cit.*), pp. 129 *et seq.*; Reuter, *La responsabilité internationale* (*op. cit.*), p. 91; Sørensen, *op. cit.*, p. 225; Dahm, *op. cit.*, pp. 193 *et seq.*; L. Delbez, *Les principes généraux du contentieux international* (Paris, Librairie générale de droit et de jurisprudence, 1962), pp. 173-174; Sereni, *op. cit.*, t. II, pp. 304-305, and t. III, p. 1508; Münch, *op. cit.*, pp. 200-201 (gives many concrete examples); Quéneudec, *op. cit.*, pp. 44, 50 *et seq.*; Amerasinghe, "Imputability . . .", *Revue égyptienne . . .* (*op. cit.*), p. 103.

<sup>329</sup> Professor Roth's draft (*Yearbook of the International Law Commission*, 1969, vol. II, p. 152, document A/CN.4/217 and Add.1, annex X) used a very wide formulation in article 1, attributing to the State, as a source of responsibility, the acts "of any individuals whom or corporations which it entrusts with the performance of public functions". The corporations and institutions to which we have referred are certainly covered by this formulation.

Even more explicitly, the draft prepared in 1930 by the *Deutsche Gesellschaft für Völkerrecht* (*ibid.*, p. 149, document A/CN.4/217 and Add.1, annex VIII) mentioned in article 1, paragraph 3, together with the various State powers, "corporations and agencies which perform public functions" in the territory of the State.

Article 17 of the draft convention prepared in 1961 by the Harvard Law School (*ibid.*, p. 146, document A/CN.4/217 and Add.1, annex VII) excluded attribution to the State of the acts of "any organ, agency, official or employee" of a commercial enterprise "which is owned in whole or in part by a State [ . . . ] if such enterprise is [ . . . ] a separate juristic person" and does not enjoy immunity from

It seems logical that the decisive criterion here should be the nature of the functions performed and not whether they are performed by an organ of the State machinery proper or by an organ of a separate institution which is merely co-ordinated with the State. The distribution of public functions between the State itself and other institutions depends on methods of organization which vary from system to system; and it would be absurd to conclude, on the basis of this distribution, that an act or omission in the performance of one and the same public function should, from the international standpoint, be considered as an act of the State in one case and not in another. The principle—already mentioned and universally recognized—of the unity of the State from the international point of view cannot be limited in its effects to excluding from consideration, for the purposes of attributing acts to the State as a subject of international law, any difference between the acts or omissions of one or another of the State powers. This principle must also lead us to disregard, for the same purposes, the distinction between all the different institutions which, also in a public capacity, provide specific services for the community or perform functions considered to concern the community. In other words, it seems necessary to recognize clearly that the conduct of officials of these corporations or institutions must be regarded, at the international level, as "acts of the State"—i.e. acts which can generate international responsibility should the occasion arise. With the increasing complexity and differentiation of the machinery of the State, the importance of this principle cannot fail to become more and more evident. Consequently, even though we should hesitate to conclude that there is a rule on the matter already firmly established in practice, the need for clarity in international relations and the very logic of the principles governing these relations would have us affirm such a rule as progressive development of international law.

171. The validity of this conclusion concerning the attribution to the State, as a subject of international law, of the acts of organs of public corporations or other public institutions separate from the State, finds further confirmation, by analogy, in the principle that the acts of organs of local or territorial entities are attributable to the State. The existence of such entities may reflect the application of a principle of distribution of functions *ratione loci*, whereas the existence of the corporations and institutions mentioned above reflects, rather, a principle of distribution *ratione materiae*, but for our purposes the phenomenon is basically the same. Territorial entities, too, have a legal personality separate from that of the State and possess their own machinery and organs. Nevertheless, as we shall now see, the attribution to the State, as a subject of international law, of the acts and omissions of organs of these entities is generally accepted.

jurisdiction. The formulation used is very involved, but the conclusion may be drawn from it *a contrario* that, in the opinion of the authors of the draft, the acts of organs of non-commercial or even commercial institutions for which the State would invoke immunity are attributable to the State. This conclusion is confirmed in the comment on the "General rule as to attribution" in the American Law Institute's *Restatement of the Law* (American Law Institute, *op. cit.*, p. 512).

172. We may begin by considering the territorial entities characteristic of a unitary State: communes, provinces and regions. An early affirmation of the responsibility of the State for the acts or omissions of municipal officials is to be found in the opinion of the umpire expressed in connexion with the award made on 14 August 1905 by the French-Venezuelan Mixed Claims Commission, established by the protocol of 19 February 1902, in the *Pieri Dominique and Co. Case*.<sup>330</sup> But a much more explicit and conclusive reaffirmation of this principle is contained in the award made on 15 September 1951 by the Franco-Italian Conciliation Commission established under article 83 of the Peace Treaty of 10 February 1947, in the case concerning the *Heirs of the Duc de Guise*. This award seems to be especially significant because it is of recent date and refers to a territorial entity enjoying the highest degree of autonomy. The Commission expressed the following opinion:

For the purposes of reaching a decision in the present case it matters little that the decree of 29 August 1947 was not enacted by the Italian State but by the region of Sicily. For the Italian State is responsible for implementing the Peace Treaty, even for Sicily, notwithstanding the autonomy granted to Sicily in internal relations under the public law of the Italian Republic.<sup>331</sup> [Translation by the United Nations Secretariat]

173. We have already mentioned above<sup>332</sup> that point VI of the request for information addressed to Governments by the Preparatory Committee of the Hague Codification Conference of 1930 expressly asked the question whether the State became responsible as a result of "acts or omissions of bodies exercising public functions of a legislative or executive character (communes, provinces, etc.)". Twenty-four States expressed their views on this question in their replies. They all accepted the principle that a State did incur responsibility for such acts or omissions.<sup>333</sup> Since then, there has not been much occasion for reaffirmation of this principle in the practice of States, the main reason being that it has not been questioned, but has been applied spontaneously by States.

174. On turning to the codification drafts from official and private sources, we note that rule II of the draft prepared in 1927 by the Institute of International Law provides that:

The State is responsible for the act of corporate bodies exercising public functions on its territory.<sup>334</sup>

The same conclusion may be drawn from article 3 of the draft convention prepared by the Harvard Law School in 1929,<sup>335</sup> from article 17, paragraph 1 *d*, of the draft prepared by the same School in 1961,<sup>336</sup> from article 1, paragraph 3, of the draft prepared in 1930 by the

Deutsche Gesellschaft für Völkerrecht,<sup>337</sup> from article VII of the principles of international law that govern the responsibility of the State in the opinion of the United States of America, prepared by the Inter-American Juridical Committee in 1965,<sup>338</sup> and from section 170 of the American Law Institute's *Restatement of the Law*.<sup>339</sup> These drafts from the United States generally use the term "political subdivisions". Mr. García Amador adopted the same term in article 14, paragraph 1, of the revised preliminary draft he prepared in 1961 as Special Rapporteur:

The acts and omissions of political subdivisions, whatever their internal organization may be and whatever degree of [ . . . ] autonomy they enjoy, shall be imputable to the State.<sup>340</sup>

In commenting on this provision, Mr. García Amador noted that "It states a principle which, at least in modern times, is not in dispute".<sup>341</sup> All writers on international law who have dealt with the question, from the earliest to the most modern, have indeed concurred in affirming the same principle.<sup>342</sup>

175. The attribution to a federal State of the acts of organs of its component states, in cases where such acts enter into consideration at the international level as a source of responsibility, is also a firmly established principle. Since 1875, at least, a consistent series of legal decisions has affirmed this principle, even in regard to situations in which internal law does not provide the federal State with means of compelling the organs of component states to fulfil international obligations. In the award in the *Case of the "Montijo"*, which was made on 26 July 1875 by the arbitrators between the United States of America and Colombia, and which is the starting point for this consistent series of decisions, Mr. Bunch, the umpire, stated that in the case of violation of an international obligation by one of the component states of the Colombian federal State, the foreign State could have recourse only to the central government. He continued as follows:

If this rule, which the undersigned believe to be beyond dispute, be correctly laid down, it follows that in every case of international wrong [ . . . ] it (the general Government of the Republic), and it alone, is responsible to foreign nations [ . . . ].

But it will probably be said that by the Constitution of Colombia the federal power is prohibited from interfering in the domestic disturbances of the [federal] States, and that it can not in justice be made accountable for acts which it has not the power, under the fundamental charter of the Republic, to prevent or to punish. To this the undersigned will remark that in such a case a treaty is superior to the constitution, which latter must give way. The legislation of the

<sup>330</sup> United Nations, *Reports of International Arbitral Awards* vol. X (United Nations publication, Sales No.: 60.V.4), p. 156.

<sup>331</sup> *Ibid.*, vol. XIII (Sales No.: 64.V.3), p. 161.

<sup>332</sup> See para. 168 above.

<sup>333</sup> League of Nations, *Bases of discussion . . .* (*op. cit.*), pp. 90 *et seq.*; *Supplement to volume III* (*op. cit.*), pp. 3 and 18.

<sup>334</sup> *Yearbook of the International Law Commission*, 1956, vol. II, p. 228, document A/CN.4/96, annex 8.

<sup>335</sup> *Ibid.*, p. 229, document A/CN.4/96, annex 9.

<sup>336</sup> *Ibid.*, 1969, vol. II, p. 146, document A/CN.4/217 and Add.1 annex VII.

<sup>337</sup> *Ibid.*, p. 149, document A/CN.4/217 and Add.1, annex VIII.

<sup>338</sup> *Ibid.*, p. 154, document A/CN.4/217 and Add.1, annex XV.

<sup>339</sup> See above, p. 193, document A/CN.4/217/Add.2.

<sup>340</sup> *Yearbook of the International Law Commission*, 1961, vol. II, p. 48, document A/CN.4/134 and Add.1, addendum.

<sup>341</sup> *Ibid.*, p. 52.

<sup>342</sup> See Triepel, *op. cit.*, pp. 356 *et seq.*; Anzilotti, *Corso . . .* (*op. cit.*), p. 391; Ross, *op. cit.*, p. 253; Fenwick, *op. cit.*, p. 297; Rousseau, *op. cit.*, p. 373; Schwarzenberger, *International Law* (*op. cit.*), pp. 625-626; Dahm, *op. cit.*, p. 193; Sereni, *op. cit.*, t. II, pp. 311 and 463, and t. III, p. 1508; Münch, *op. cit.*, pp. 199-200; Levin, *Otvetstvennost gosudarstv . . .* (*op. cit.*), p. 69; Brownlie, *op. cit.*, pp. 369-370.

Republic must be adapted to the treaty, not the treaty to the laws [ . . . ]

[ . . . ] It may seem at first sight unfair to make the federal power, and through it the taxpayers of the country, responsible, morally and pecuniarily, for events over which they have no control, and which they probably disapprove or disavow, but the injustice disappears when this inconvenience is found to be inseparable from the federal system. If a nation deliberately adopts that form of administering its public affairs, it does so with the full knowledge of the consequences it entails. It calculates the advantages and the drawbacks, and can not complain if the latter now and then make themselves felt.<sup>343</sup>

Among the many arbitral awards which later expressly reaffirmed this principle, reference may be made to those of the United States of America/Venezuela Mixed Commission in 1890 in the *De Brissot Case*;<sup>344</sup> the British-Venezuelan Mixed Claims Commission in 1903 in the *Davy Case*;<sup>345</sup> the French-Venezuelan Mixed Commission on 14 August 1905 in the *Pieri Dominique and Co. Case*,<sup>346</sup> already cited above with reference to State responsibility for the acts of municipal organs; the Mexico/United States of America General Claims Commission in the *Janes*,<sup>347</sup> *Swinney*,<sup>348</sup> *Quintanilla*,<sup>349</sup> *Youmans*,<sup>350</sup> *Mallén*,<sup>351</sup> *Venable*<sup>352</sup> and *Tribolet*<sup>353</sup> cases; and finally the France/Mexico Claims Commission on 7 June 1929 in the *Pellat* case. In the latter award, the Commission reaffirmed "the principle of the international responsibility, often called indirect, of a federal State for all the acts of its separate States which give rise to claims by foreign States" and noted specially that such responsibility

[ . . . ] cannot be denied, not even in cases where the federal Constitution denies the central Government the right of control over the separate States or the right to require them to comply, in their conduct, with the rules of international law.<sup>344</sup> [Translation by the United Nations Secretariat]

It should be noted that in many of the awards cited here, the arbitrator expressly noted that the respondent party itself recognized the principle that, for the purposes of establishing international responsibility, the acts of a component state are attributable to the federal State.

176. Of course, some States with a federal structure have sometimes tried to resist claims for compensation in respect of acts of organs of a component state. But such attempts, after being unsuccessful for a long time, have become increasingly rare in this century. A typical example is to be found in the practice of the United States of

America and its development. This practice cannot be better illustrated than by the words of the United States authorities themselves. The United States agent before the Mexico/United States of America General Claims Commission had inquired of his Government whether or not he should argue that the Federal Government was not responsible in international law for the acts or omissions of organs of the federated states. The Department of State replied on 25 July 1925 in the following terms:

It must be remembered that foreign Governments cannot make representations to the [federated] States and demand reparation from them. Foreign Governments can only deal with the Government of the United States, and as under treaties and the law of nations this Government owes a duty properly to protect foreigners within its territorial jurisdiction, the question arises whether, when the lack of protection is due to an act or omission of a State authority, this fact may properly be pleaded as a defense by the Federal Government [ . . . ]. There is a long list of cases [ . . . ] in which the Federal Government has taken the position of non-liability; on the other hand some cases have been settled without raising this question. President Harrison [ . . . ] sent a message to Congress on December 9, 1891,<sup>355</sup> in which he laid down the following principle:

"It seems to me [ . . . ] that the officers of the State charged with police and judicial powers in such cases must, in the consideration of international questions [ . . . ], be regarded in such sense as Federal agents to make this Government answerable for their acts."

[ . . . ] It is also true that, in our dealings with foreign Governments having a federal system similar to our own, we have invariably insisted on the liability of the Federal Government, although the failure to protect American citizens or properly to prosecute for offences against them was chargeable to the officials of one of the constituent states or provinces [ . . . ].

Moreover, the United States Government has frequently paid indemnity in settlement of claims based on such grounds notwithstanding the fact that the acts or omissions were those of officials of the states or municipalities [ . . . ]. The Department is of the opinion that you should not specially plead immunity from liability on the ground that the acts or omissions were those of [federated] State officials.<sup>356</sup>

177. Four years later, in its reply of 22 May 1929 to point X of the request for information received from the Preparatory Committee for the Hague Codification Conference, the Government of the United States of America wrote:

In the United States, the protection of the rights of aliens is assumed by the Federal Government under treaty and international law, yet the punishment of offences against these rights is to a certain extent within the control of the [federated] states. The Federal Government has frequently paid indemnities for the delinquencies of the states where the states have failed to furnish protection and redress [ . . . ]. In claims against foreign States, the United States has refused to recognise the plea that the federal organization of the respondent State was not internationally responsible for the maintenance of order and the provision of effective redress in its constituent political subdivisions.<sup>357</sup>

<sup>355</sup> Following the refusal of the judicial and police authorities of the State of Louisiana to prosecute those responsible for the killing of Italians in New Orleans.

<sup>356</sup> Hackworth, *op. cit.*, vol. V (Washington, U.S. Government Printing Office, 1943), pp. 594-595.

<sup>357</sup> League of Nations, *Bases of Discussion . . . Supplement to volume III* (*op. cit.*), p. 21.

<sup>343</sup> Moore, *History and Digest . . .* (*op. cit.*), pp. 1440-1441; Lapradelle et Politis, *op. cit.*, 1954, t. III, pp. 674-675.

<sup>344</sup> Moore, *History and Digest . . .* (*op. cit.*), pp. 2967, 2970 and 2971.

<sup>345</sup> United Nations, *Reports of International Arbitral Awards*, vol. IX (United Nations publication, Sales No. 59.V.5), p. 468.

<sup>346</sup> *Ibid.*, vol. X (Sales No. 60.V.4), p. 156.

<sup>347</sup> Award of 16 November 1925. *Ibid.*, vol. IV (Sales No. 1951.V.1), p. 86.

<sup>348</sup> Award of 16 November 1926. *Ibid.*, p. 101.

<sup>349</sup> Award of 16 November 1926. *Ibid.*, p. 103.

<sup>350</sup> Award of 23 November 1926. *Ibid.*, p. 116.

<sup>351</sup> Award of 27 April 1927. *Ibid.*, p. 177.

<sup>352</sup> Award of 8 July 1927. *Ibid.*, p. 230.

<sup>353</sup> Award of 8 October 1930. *Ibid.*, p. 601.

<sup>354</sup> *Ibid.*, vol. V (Sales No. 1952.V.3), p. 536.

178. As regards the question under consideration, the request for information by the Preparatory Committee for the 1930 Conference was formulated in a manner liable to cause misunderstanding and complicate both the wording of the replies and their interpretation. As we have seen, point VI referred to "bodies exercising public functions"; and the examples given (communes, provinces, etc.) did not make it clear whether the component states of a federal State were supposed to be included in this category or not. The existence of point X in addition to point VI seemed to support a negative conclusion; nevertheless there were governments (including that of the United States of America) which, in their reply to point VI, referred to a case concerning a component state of a federal State (Venezuela), in which the decision had stressed the fact that from the international point of view, the existence of the federated state was completely veiled in that of the federal State.<sup>358</sup> Point X, in turn, asked one single question about the "Responsibility of the State in the case of a subordinate or a protected State, a federal State or other unions of States." Some of the situations mentioned were of a kind in which the relationship in question creates a bond between political units, all having international personality. Such is the case of a protectorate and other forms of international dependence, of unions of states of the confederation type and others—i.e. cases in which the responsibility of the superior State for the dependent state, or of the union for a member state can only be seen as the responsibility of one subject of international law for the acts of another. Along with these situations was mentioned the case of the federal State, in which the possession of international personality by a federated state is normally entirely ruled out or is exceptionally recognized only for an extremely limited international capacity—so limited that to envisage the violation by a federated state of an international obligation directly incumbent on itself is practically an academic exercise. This joint reference to very different situations might therefore have distorted the replies of governments. That of Germany, for example, took into account mainly cases of the "co-existence of several subjects of international law" and mentioned certain criteria (questionable, incidentally) for the assignment of responsibility among these different subjects in various circumstances. Bulgaria and Canada confined their replies even more closely to the same type of situation, Bulgaria propounding the principle of the responsibility of the State which caused the damage, and Canada that of the identity of the subject of the violated obligation with the bearer of the responsibility. Poland practically confined itself to the case of a protectorate. Hungary, on the other hand, dealing only with the case of a federal State whose component states are not "competent at international law", affirmed the responsibility of the federal State on that basis. Italy and Norway also tried to separate the case of the federal State and recognized its responsibility for the acts of its federated states. Australia, Austria, Belgium, Denmark, Great Britain, Japan, the Netherlands, New Zealand and South Africa affirmed in general terms the responsibility of the State which has assumed representation of, or responsibility for conducting foreign relations for, another

political unit, in some cases (Belgium) specifying that such responsibility is "indirect".<sup>359</sup> The reply of the United States has already been mentioned in the preceding paragraph. Finally, the reply of the Swiss Government was outstanding for its clear presentation of ideas:

[ . . . ] The international responsibility of a federal State is of the same nature and extent as that of a unified State.

Swiss constitutional law [ . . . ] allows the Confederation to assume international responsibility for any acts contrary to international law proved against the Cantons.<sup>360</sup>

A more recent confirmation of the position of the Swiss Government on this question was given by Mr. Petitpierre, Head of the Political Department, in a statement made to the National Council in 1955 concerning the *Case of the Legation of Romania at Berne*:

The Confederation would have to intervene only if an act contrary to international law had been committed by a person engaging its responsibility, that is to say, a person acting on its behalf. That person could be either a federal authority such as the Federal Council, or the police authorities of Berne. For although the latter are not employed by the Confederation, it must be recognized that in their surveillance of embassies and legations and in their action on the incident of the Romanian Legation, they were acting on behalf of the Confederation. Hence, *vis-à-vis* foreign countries, the Confederation could be held responsible for an injury caused by a fault of the Berne police.<sup>361</sup>

179. In spite of the relative confusion discernible in the replies of governments to an ambiguously drafted questionnaire, the conclusion to be drawn from the practice of States seems clear enough. The principle that a federal State must answer for acts or omissions involving a breach of its international obligations, irrespective of whether they emanate from organs of the federated states or from federal organs, is firmly rooted in the conviction of States. It is rather the very numerous opinions expressed by writers which make the picture less clear, owing to the differences, often more apparent than real, between the various schools of thought—differences which are sometimes reflected in the codification drafts.

180. A large group of jurists has realistically taken as a subject for study the phenomenon of the federal State, as it has developed in modern times in many parts of the world and in particular on the American Continent, in other words, as a phenomenon of constitutional law, not of international law.<sup>362</sup> They see the federal structure as an

<sup>359</sup> For these various replies, see League of Nations, *Bases of discussion . . .* (op. cit.), pp. 121 et seq.; and *Supplement to volume III* (op. cit.), p. 4.

<sup>360</sup> League of Nations, *Bases of discussion . . .* (op. cit.), pp. 123-124. After receiving the replies, the Preparatory Committee understood the need at least to have separate paragraphs for different cases and drew up Basis of discussion No. 23 accordingly. The second paragraph read as follows:

"Where one Government is entrusted with the conduct of the foreign relations of several States, the responsibility [ . . . ] belongs to such common or central Government." (*Yearbook of the International Law Commission, 1956*, vol. II, p. 223, document A/CN.4/96, annex 2.)

The 1930 Conference did not have time to examine this text, however.

<sup>361</sup> Société suisse de droit international, *Annuaire suisse de droit international, 1956* (Zürich, vol. XIII, 1957), p. 175.

<sup>362</sup> Article 2 of the Convention on Rights and Duties of States, adopted at Montevideo in 1933 by the seventh International

<sup>358</sup> *Ibid.*, p. 18.

(Continued on next page)

advanced form of decentralization. Hence, they logically regard the principle of responsibility of a federal State, in the cases considered here, as being the consequence of the attribution to that State, from the international point of view, of acts and omissions of organs of the component states<sup>363</sup>—an attribution which is made on the same basis as that of the conduct of organs of any other type of territorial entity: a province, a region, etc.<sup>364</sup> The influence of this view is to be seen in the formulation of article 3 of the draft prepared by the Harvard Law School in 1929;<sup>365</sup> in article 14 of the revised preliminary draft prepared in 1961 by Mr. García Amador for the International Law Commission;<sup>366</sup> in article VII of the Principles of international law that govern the responsibility of the State in the opinion of the United States of America, prepared in 1965 by the Inter-American Juridical Committee;<sup>367</sup> and in section 170 of the *Restatement of the Law* by the American Law Institute.<sup>368</sup> In all of these provisions the single term “subdivision”, “political subdivision” or “political unit” is intended also to cover the case of a territorial entity in a unitary State and in a federal State. Article 17 of the draft prepared in 1961 by the Harvard Law School falls into the same group, for while providing both for the case of a “political subdivision” and for the specific case of a component state or province of a federal State, it indicates that any organ of such a subdivision or component state, as these terms are used in the draft convention, is to be regarded as an “organ of a State”.<sup>369</sup>

(Foot-note 362 continued)

Conference of American States, provides that the federal State “shall constitute a sole person in the eyes of international law”. Eagleton (*The Responsibility of States* . . . (op. cit.), p. 32) cites a note published by E. Clunet in the *Journal du droit international privé*, in which the French jurist already noted that “Everyone recognizes that, in international relations, the federal State constitutes an indivisible whole, into which each of the component States has merged by complete renunciation of its external sovereignty, retaining only its internal autonomy, the evaluation of which does not concern other States [ . . . ] in the federal State, unity is absolute from the international point of view.” (*Journal du droit international privé et de la jurisprudence comparée*, Paris, t. 18, 1891, p. 1156).

<sup>363</sup> As we have seen, President Harrison’s message of 9 December 1891 was based on this idea.

<sup>364</sup> In this connexion, though the clarity of expression varies from writer to writer, see Donot, *De la responsabilité de l’Etat fédéral à raison des actes des Etats particuliers* (Paris, 1912) pp. 7 et seq.; Borchard, *The Diplomatic Protection* . . . (op. cit.), pp. 201-202, 226; Schoen, op. cit., pp. 28 et seq.; Eagleton, *The Responsibility of States* . . . (op. cit.), loc. cit.; Hyde, op. cit., p. 949; Fenwick, op. cit., p. 297; Anzilotti, *Corso* . . . (op. cit.), pp. 391 and 432; Cavaglieri, op. cit., p. 510; Ago, “La responsabilità indiretta . . .”, *Archivio di diritto pubblico* (op. cit.), pp. 18 et seq.; Cheng, op. cit., pp. 194, 195 and 197; Balladore Pallieri, *Diritto internazionale pubblico* (op. cit.), p. 349; Schwarzenberger, *International Law* (op. cit.), pp. 625-626; Monaco, op. cit., p. 376; Accioly, “Principes généraux . . .”, *Recueil des cours* . . . (op. cit.), pp. 390-391; Sørensen, op. cit., p. 224; Quéneudec, op. cit., p. 70; Brownlie, op. cit., pp. 369-370; Amerasinghe, “Imputability . . .”, *Revue égyptienne* . . . (op. cit.), pp. 119 et seq.; Jiménez de Aréchaga, op. cit., pp. 557-558.

<sup>365</sup> *Yearbook of the International Law Commission*, 1956, vol. II, p. 229, document A/CN.4/96, annex 9.

<sup>366</sup> *Ibid.*, 1961, vol. II, p. 48, document A/CN.4/134 and Add.1, addendum.

<sup>367</sup> *Ibid.*, 1969, vol. II, p. 154, document A/CN.4/217 and Add.1, annex XV.

<sup>368</sup> See above, p. 193, document A/CN.4/217/Add.2.

<sup>369</sup> *Yearbook of the International Law Commission*, 1969, vol. II, p. 146, document A/CN.4/217 and Add.1, annex VII.

181. As against this view there is another, whose supporters seem originally to have had in mind certain concrete situations, as they existed at the time, which were closer to them. These writers, especially the older ones, regard the federal State much less as a unit which has adopted a decentralized structure than as a “union” of States—an association created by an agreement between countries formerly sovereign, whose desire was not to be completely absorbed into the union, but to keep at least some vestiges of their original international sovereignty. In the opinion of these writers, therefore, it was particularly necessary to take account of the possibility that a component state of a federal State might, as part of the latter, have an international personality of its own, even though a limited one. Two possible cases would then have to be considered. The first would be that of an act or omission of an organ of a component state, relating to a sphere in which that state had no international obligation directly incumbent on it; the act or omission in question can then appear only as the conduct of a decentralized organ of the federal State, in the same way as the conduct of organs of a municipality. On this point, the conclusion of this second school of writers is the same as that of the first. The second possible case would be that of the acts or omissions of an organ of a component state in the limited sphere in which it appears as an independent subject of international rights and duties. In this case, the federal State cannot be held responsible for an act attributable to itself; its international responsibility can be invoked additionally, but as the responsibility of one subject of international law for the act of another, hence as “indirect” responsibility. In this second case, the position of a federal State with respect to a component state would be similar to that of a protecting State with respect to a protected State, or to that which may exist in other similar forms of inter-State relations.<sup>370</sup> Opinions in this group differ only as regards the justification of the indirect responsibility, some of the writers seeking it in a relationship of international representation established between the federal State and the component state and others in reasons of a different kind (criterion of control, “Ein-

<sup>370</sup> The thesis summarized here has been particularly developed by Triepel (op. cit., pp. 359 et seq., 366 et seq.) with references to the situation then obtaining in the German Empire. With minor variations of emphasis from one writer to another, this view is also supported by Strupp (“Das völkerrechtliche Delikt”, *Handbuch* . . . [op. cit.], pp. 109 et seq.), Ch. de Visscher (“La responsabilité des Etats”, *Bibliotheca Visseriana* [op. cit.], pp. 105-106), Klein (op. cit., pp. 173 et seq., 194 et seq.), M. V. Polak (“Die Haftung des Bundesstaates für seine Gliedstaaten”, *Oesterreichische Zeitschrift für öffentliches Recht* (Vienna, vol. I [new series], 1948), pp. 382 et seq., Verdross (“Theorie der mittelbaren Staatenhaftung”, *ibid.*, pp. 395 et seq., and *Völkerrecht* [op. cit.], pp. 381 and 389), G. Barile (“Note a teoria sulla responsabilità indiretta degli Stati”, *Annuario di diritto comparato e di studi legislativi*, (Rome, vol. XXII, fasc. 3, 1948), pp. 444-445), Schüle (op. cit., p. 331), Levin (*Otvetsvennost gosudarstv* . . . [op. cit.], pp. 41 et seq.). Münch (op. cit., pp. 240 et seq., 243 et seq.). The latter writer also advances the possibility of a direct responsibility of the component state in certain cases in which its acts take place within its own sphere of international competence.

To complete the picture, mention may also be made of a few writers who present the responsibility of the federal State for the component state as being, with respect to every possible situation, an indirect responsibility or a responsibility for the acts of others. See Ross, op. cit., p. 262; Rousseau, op. cit., p. 358; and Cavaré, op. cit., vol. II, p. 433.

griffstheorie", etc.). The influence of the approach just outlined is to be seen in the first paragraph of rule IX of the draft prepared in 1927 by the Institute of International Law, which expressly distinguishes between these two situations by stating that:

A federal State is responsible for the conduct of the individual States, not only if it is contrary to its own international obligations, but also if it is contrary to the international obligations incumbent upon those States.<sup>371</sup>

The same can be said of article 4 of the draft prepared in 1930 by the Deutsche Gesellschaft für Völkerrecht.<sup>372</sup>

182. After carefully considering these differences of opinion, however, one realizes that they are not such as to affect the solution of the problem we are concerned with here. It may, if desired, be admitted that the distinctions deemed necessary by the second school of thought, as regards the nature of the responsibility incurred by a federal State for a component state in the various situations mentioned above, may be justified at the level of legal theory. It may also be observed that the case of conduct by an organ of a component state involving a breach of an international obligation directly incumbent on that state as an independent subject of international law is one very unlikely to arise in practice. The most sagacious and the most modern of the writers who maintain the need to make this distinction themselves recognize the difficulty of presenting a concrete case of an internationally wrongful act occurring within the tiny sphere of international capacity some federal systems still leave to their component states; these writers also point out that not a single example of such an act can be cited from recent practice and that federalism does not seem to be developing towards a widening of that sphere.<sup>373</sup> All that can be said is that this hypothesis cannot be dismissed *a priori*, for it must be remembered that there is not just one single type of federal State, whose physiognomy is definitively fixed: historical reality has only specific situations, each with its own characteristics,<sup>374</sup> and no one can say what future situations will be like. As we have said, however, all this has no relevance to what we are trying to do now. The question under examination is that of the possibility of

attributing to the State, from the international point of view, the acts or omissions of organs of public institutions separate from the State. More specifically, we have to determine whether, at the international level, the conduct of organs of component states which prove to be in conflict with an international obligation of the *federal State* are to be regarded as acts of the federal State as a subject of international law. In other words, can a federal State violate its own international obligations through acts or omissions of persons who are not its own organs, but organs of its component states? That is the question we have to answer; and as we have seen, the answer is not in doubt. This is all we are concerned with at the moment. The Commission will certainly be able, when it comes to consider cases of responsibility of one subject of international law for the acts of another, also to take into consideration the possible cases of responsibility of a federal State for a breach by a component state of an international obligation directly incumbent on that state. It will then be able to choose a formula which can cover this situation, however theoretical it may appear. As to our present problem it remains exclusively within the limits we have just defined and does not arise for a federal State in terms other than those applicable to a decentralized unitary State following different criteria.

183. A few brief considerations will suffice to show that what has been said about the possibility of attributing to a State, as a subject to international law, the conduct of organs of separate public institutions, whether special or territorial, necessarily applies also to the organs of an autonomous administration of a colony or, more generally, of a territory outside that of the State but under its sovereignty.<sup>375</sup> Nowadays, this question has lost much of its significance, since colonialism is fortunately disappearing. Nevertheless, there are still some examples and there is certainly no reason to relieve a metropolitan State of the responsibility attached to wrongful acts of the organs of its colonial administration. For the purposes of the present study, of course, there is no need to take account either of the case in which the colonial administration is entrusted direct to organs belonging to the machinery of the metropolitan State, or of the case in which the dependent country nevertheless remains a separate State possessing its own international personality (a protectorate or similar situations). In the first case, the attribution to the State of acts of the colonial administration is merely an application of the attribution to the State of acts of its own organs properly so called; in the second case, on the other hand, international responsibility of the so-called "superior" State for the acts of organs of the dependent State can only be regarded, it has been said, as indirect responsibility. The remaining case to which we must refer is that of a country which does not constitute, in international law, a subject separate from the metropolitan country, but which is under a separate and autonomous administration. Although few cases can be cited, the practice of States leaves no doubt about the possibility of considering the acts of such a separate administration as acts of the metropolitan State and of drawing the conclu-

<sup>371</sup> *Yearbook of the International Law Commission, 1956*, vol. II, p. 228, document A/CN.4/96, annex 8.

<sup>372</sup> "A federal State is responsible for its component states, irrespective of whether a case concerns its own obligations under international law or the like obligations of such component states." (*Ibid.*, 1969, vol. II, p. 150, document A/CN.4/217 and Add.1, annex VIII). It is interesting to note the difference, in this respect, between the individual drafts of Professor Strupp and Professor Roth. Article 5 of the draft treaty prepared in 1927 by Professor Strupp (*ibid.*, p. 151, document A/CN.4/217 and Add.1, annex IX) mentions the responsibility of the superior State (*Oberstaat*) for the acts of the inferior or protected State (*Unterstaat*) in the three cases of a federation, a confederation and a protectorate, which are presented together as "composite States". Article 5 of the draft convention prepared in 1932 by Professor Roth (*ibid.*, p. 152, annex X) does not expressly refer to the responsibility of the federal State for the acts of organs of a component state, which it clearly assimilates to the acts of federal organs, though it recognizes the responsibility of the superior State for the acts of the inferior State "in the case of confederations and of dependencies under international law".

<sup>373</sup> See Münch, *op. cit.*, pp. 240-241.

<sup>374</sup> In this connexion, see the pertinent observations of Reuter in *La responsabilité internationale (op. cit.)*, p. 100.

<sup>375</sup> For example, the B and C Mandates of the League of Nations and perhaps some of the remaining Trust Territories.



sion that international responsibility for them is incurred by the metropolitan State. On 11 May 1891, Mr. Ribot, the French Minister for Foreign Affairs, speaking in the Senate about the difficulties which the colony of Newfoundland was putting in the way of implementation of the Franco-British arrangement of 11 March 1891 concerning the Newfoundland fisheries, said:

It has been pointed out that the colony of Newfoundland has on various occasions been less than eager [...] to assist in implementing the arrangements agreed to by England [...]. We, for our part, are not concerned with the colony of Newfoundland; we are not concerned with its public authorities; we are only concerned with England; it is England which we consider to be our guarantor for the conduct of its colony [...]

[...] and if [...] the colony of Newfoundland should subsequently come to evade the obligations which England has contracted, we would consider, and I am sure England considers, that it would be its duty and a matter of honour for it to take all the legislative steps necessary to overcome the resistance of the colony and to ensure the full and integral execution of the award.<sup>376</sup>

In any case, the general principle we have been able to identify as underlying the whole of the subject-matter of this section dictates the solution to be adopted for this particular problem.

184. The general principle referred to is, finally, only a corollary of that unity of the State, from the international point of view, which we have pointed to several times as the most notable aspect revealed by an examination of the facts of inter State relations. As a subject of international law, the State appears as a community equipped with a whole complex of organisms working on its behalf. The action of the community is, to be sure, carried out first and foremost through the action of the members of the State organization proper; but to this action must be added that of the machinery of all the other institutions belonging to the same complex, whether the basis for their separate existence is the special nature of their functions or the local or territorial context in which they act. This shows that the prediction made at the beginning of this section was well founded. A study of the realities of international life has proved to us that the acts and omissions of organs of the State do not exhaust the list of acts which can be attributed to the State as a subject of international law. The acts and omissions of the organs of all public institutions separate from the State must also be regarded as acts of the State at the international level and as possible sources of international responsibility of the State.

185. In the light of the successive analyses made in this section, it seems to us that, once again, the formula used to express the general principle deduced will be all the more effective if it can be both broad and concise at the same time. The wording we propose is as follows:

<sup>376</sup> See Kiss, *Répertoire* . . . (op. cit.), No. 935, p. 568. The replies of Australia, Great Britain and the United States of America to point X of the request for information by the Preparatory Committee for the Hague Conference expressly confirmed their position concerning the responsibility of the State for the conduct of a colony (see League of Nations, *Bases of Discussion* . . . (op. cit.), pp. 121-122; and *Supplement to volume III* (op. cit.), p. 21). The United States thereby modified the different position it had occasionally taken in 1881-1885 in the Tunstall Case with Great Britain (see Moore, *A. Digest* . . . (op. cit.), pp. 663-664).

**Article 7. Attribution to the State, as a subject of international law, of the acts of organs of public institutions separate from the State**

The conduct of a person or group of persons having, under the internal legal order of a State, the status of an organ of a public corporation or other autonomous public institution or of a territorial public entity (municipality, province, region, canton, member state of a federal State, autonomous administration of a dependent territory, etc.), and acting in that capacity in the case in question, is also considered to be an act of the State in international law.

**5. ATTRIBUTION TO THE STATE, AS A SUBJECT OF INTERNATIONAL LAW, OF ACTS OF PRIVATE PERSONS IN FACT PERFORMING PUBLIC FUNCTIONS OR IN FACT ACTING ON BEHALF OF THE STATE**

186. Up to now we have been considering attribution to the State, as a subject of international law, of acts or omissions by persons who in internal law are regarded as organs of the State administration or organs of specialized or territorial public institutions, and whose own functions supplement the functions of public interest provided for directly by the State itself. Let us now turn our attention to situations involving acts or omissions by persons who have no such status, but which nevertheless, in view of the circumstances in which these acts or omissions were committed and of the objects in view, can also be considered as "acts of the State" capable of generating international responsibility if they constitute a breach of an international obligation.

187. There are, indeed, a number of different situations in which an individual or even a group of individuals having no official status under the internal legal order does in fact have occasion to perform a function which should normally be performed by an organ of the State administration or of one of the other public institutions or entities, or is called upon to provide a service or perform a specific task on behalf of the State, without thereby acquiring the status of a State official. It is in connexion with situations of this kind that the theory of administrative law in certain countries has developed the concept of the "de facto official" and has sought to justify this definition, sometimes by the idea of appearance, sometimes by that of necessity and sometimes by the *negotiorum gestio*. Let us say at once that these different explanations of the validity of acts performed under such conditions, and of the responsibility under internal law which the State or other public institutions may incur as a result of them, are of significance only in the national context and have no bearing on the problem of international law with which we are concerned. The consideration of these acts as "acts of the State" at the international level is independent of their attribution to the State in internal law, even though the two may often coincide.

188. An example of a "de facto official" sometimes given is a person who has assumed public office without having been appointed, or after being appointed irregularly, or one who has been regularly appointed but has subsequently been suspended from office for the duration of proceedings taken against him. In such cases, it is said, the

person concerned has only the appearance of being an official: although he may, in good faith or in bad faith, behave as though he were occupying his post in a regular manner, his acts are not the acts of an official and cannot even be assimilated to those of an official who has exceeded his authority or acted against the law, for at the time such a person acts he is not an official at all. According to this view, he is a private person who is in fact performing public functions. Nevertheless, his acts and decisions are normally regarded, in internal law, as being valid with respect to third persons who may reasonably have been unaware of the true situation.<sup>377</sup> Hence it is only natural that these acts and decisions should be considered as acts of the State from the viewpoint of international law. This conclusion, as such, is no doubt correct, but it may be doubted whether—at least in certain situations—it is correct to describe an irregularly appointed official as a mere private person who is in fact performing public functions. Until his irregular appointment is cancelled, his position would seem to be closer to that of a genuine official properly so called.

189. In any case, this is certainly not the most typical of the whole group of situations we have to consider here. There are circumstances in which, for one reason or another, the regular administrative authorities have disappeared. During the last war, for example, in belligerent countries and any other country invaded, local administrations fled before the invaded or, later, before the armies of liberation. It then sometimes happened that persons acting on their own initiative provisionally took over the management of certain commercial concerns in order to render a service to the community, or that committees of private persons provisionally took charge of public affairs, issued ordinances, performed legal acts, administered property, pronounced judgments, etc.<sup>378</sup> In such circumstances, it also happens that private persons acting on their own initiative assume functions of a military nature: for example, when the civilian population of a threatened city takes up arms and organizes its defence.<sup>379</sup>

<sup>377</sup> For an analysis of these situations from the viewpoint of internal law, see Jèze, *Principes de droit administratif*, 3rd ed. (Paris, 1930), t. II, p. 288; Zanobini, *Corso di diritto amministrativo*, 8th ed. (Milan, 1958), vol. I, pp. 306-307; Sayagués Laso, *Tratado de derecho administrativo* (Montevideo, 1953), vol. I, pp. 300 *et seq.*; A. de Laubadère, *Traité élémentaire de droit administratif*, 3rd ed. (Paris, Librairie générale de droit et de jurisprudence, 1963), t. I, p. 239; Alessi, *Principi di diritto amministrativo* (Milan, 1966), vol. I, pp. 96 *et seq.*; E. Forsthoff, *Traité de droit administratif allemand*, translated by M. Fromont (Bruxelles, Bruylant, 1969), p. 361; Giannini, *Diritto amministrativo* (Milan, 1970), vol. I, pp. 272 *et seq.*; for an examination of the same situations from the viewpoint of international law, see Reuter, *La responsabilité internationale* (*op. cit.*), p. 90; Quéneudec, *op. cit.*, pp. 45-46.

<sup>378</sup> For examples, see M. Waline, *Droit administratif*, 8th ed. (Paris, Sirey, 1959), p. 401; Sayagués Laso, *op. cit.*, p. 301; Sandulli, *Manuale di diritto amministrativo*, 10th ed. (Naples, 1969), p. 147; de Laubadère, *op. cit.*, vol. I, p. 240.

<sup>379</sup> Verdross ("Règles générales...", *Recueil des cours...* (*op. cit.*), pp. 466-467, and *Völkerrecht* (*op. cit.*), p. 350) refers to article 2 of the Regulations respecting the Laws and Customs of War on Land,<sup>a</sup> annexed to the IVth Hague Convention of 18 October 1907, which extends consideration as "belligerents" to the inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves.

There are other situations in which the organs of administration are unfortunately lacking as a result of natural events such as an earthquake, a flood or some other major disaster. Here, again, private persons who do not hold any public office may come to assume public functions in order to carry on services which cannot be interrupted, or which must be provided precisely because of the exceptional situation.<sup>380</sup> The law of some countries makes such performance of public functions by private persons obligatory in cases of public danger, riot or disaster, and even punishes failure to fulfil such obligations.<sup>381</sup>

190. In the same context and for the same purposes, mention should be made of the many different situations in which private natural or legal persons—while definitely remaining such—are entrusted by the public authorities with the provision of a service or the performance of a specific task. The range of these possibilities is very wide. A private undertaking may, for instance, be engaged to provide public transport, postal communications or some other public service; non-official associations or groups of private persons may be used as auxiliaries in official health units, the police or the armed forces; drivers of private vehicles may be used to carry troops to the front, etc.<sup>382</sup> In other cases, private persons may be secretly appointed to carry out particular missions or tasks to which the organs of the State prefer not to assign regular State officials; people may be sent as so-called "volunteers" to help an insurrectional movement in a neighbouring country—and many more examples could be given.<sup>383</sup>

Verdross indicates that the acts of these inhabitants are attributed to the State and that the State is responsible for them. (A different opinion is held by Morelli (*op. cit.*, p. 210) and Sereni (*op. cit.*, t. II, p. 513), although the justification for it is not clear). Similar reflections may be made on article 4, para. A(6), of the Geneva Convention of 12 August 1949 on the Treatment of Prisoners of War.<sup>b</sup>

<sup>a</sup> Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907*, 3rd. ed. [J. B. Scott ed.] (New York, Oxford University Press, 1918), pp. 107-108.

<sup>b</sup> United Nations, *Treaty Series*, vol. 75, p. 140.

<sup>380</sup> See Mortati, *Istituzioni di diritto pubblico*, 8th ed. (Padua, 1969), vol. I, p. 219; A. Grisel, *Droit administratif suisse* (Neuchâtel, Ides et Calendes, 1970), pp. 236-237.

<sup>381</sup> Mortati, *op. cit.*, pp. 215-216.

<sup>382</sup> In times which are now past, it also frequently happened that governments granted charters to private companies authorizing them to carry out exploration and colonization missions in specified areas. It is open to question, however, whether the charter companies remained private companies or whether the terms of the concession charter did not transform them into public institutions under the authority of the government. In any case, their acts were considered as acts which could generate international responsibility of the State. See, for examples drawn from the practice at the end of the last century (Anglo-French incidents arising out of the activities of the Royal Niger Company in Niger and the East Africa Company in Uganda), Kiss, *Répertoire...* (*op. cit.*), No. 940, pp. 571-572, and No. 893, pp. 518 *et seq.*

<sup>383</sup> Dahm (*op. cit.*, p. 193) mentions the case of an entrepreneur engaged to recruit foreign labour in an occupied country in violation of international law, and the case of a doctor instructed to carry out experiments on prisoners. Other writers, such as Sereni (*op. cit.*, t. III, p. 1512), refer mainly to cases of private persons secretly recruited to carry out espionage, sabotage, terrorism, abduction and other such assignments, the completion of which is certainly an act of the State, even if it is disguised as a private act.

191. At the internal level, the State often assumes responsibility for offences committed by private persons exceptionally performing public functions in the place of *de jure* officials who omit to perform them or are unable to do so. Similarly, the State is often considered responsible for the acts of private natural or legal persons commissioned to provide a particular public service, or of individuals or groups carrying out any kind of mission for the State. The State, as a subject of international law, should, *a fortiori* it seems, bear responsibility for the acts of these various classes of person where they relate to one of the functions, tasks or missions mentioned above and have resulted in a breach of an international obligation of the State. The underlying principle in international law, which is becoming increasingly clear as our analysis progresses, requires that the criterion should be the public character of the function or mission in the performance of which the act or omission contrary to international law was committed, rather than the formal link between the State organization and the person whose conduct is in question. An act by the person most certainly invested with the legal status an organ of the State is still not an "act of the State" if the person-organ was acting only a private capacity. Similarly, it is logical that the act of a private person who, in one way or another, is performing a function or task of an obviously public character should be considered as an act attributable to the community and should engage the responsibility of the State at the international level. Moreover, the validity of this conclusion is confirmed by international jurisprudence and practice, even though the former, especially, has only occasionally had to deal with the acts of persons or groups who, despite the different nature of the situations we are referring to, may be brought together under the common denomination of "*de facto* organs". The cases which have actually occurred in international life relate mainly to situations in which the activities of the persons concerned were especially liable to bring them into contact with foreign countries. The conduct which has been taken into consideration for attribution to the State as acts generating international responsibility is, first, that of private persons or groups used as auxiliaries in the police or armed forces, or sent as "volunteers" to neighbouring countries; and, secondly, that of persons employed to carry out certain assignments in foreign territory, which may or may not be acknowledged.

192. With regard to the first group of situations, reference is often made to a case which dates back to the Spanish-American war, but was not settled until 30 November 1925, by a Great Britain/United States arbitral tribunal—namely, the *D. Earnshaw and Others (Zafiro)* Case. The question which arose in this case was whether the conduct of the crew of a United States merchant vessel could be considered as an act of the State. The United States argued that "the *Zafiro*, registered as a merchant ship, must be so regarded, and can not be held to be a public ship for whose conduct the United States may be held liable." The arbitral tribunal rejected that argument and affirmed, as a principle, "that the liability of the State [...] must depend on the nature of the service in which [...] [the vessel] is engaged and the purpose for which she is employed..." It concluded that the conduct

of the crew of the *Zafiro* must be attributed to the United States and engage its responsibility since, whatever the legal régime of the vessel, it was being used as a supply ship for United States naval operations and its captain and crew were, for this purpose, in fact under the command of a naval officer who had come on board to control and direct the movements of the ship.<sup>384</sup>

Another application of the same principle is to be found in the decision in the *Stephens Case*, given on 15 July 1927 by the Mexico/United States of America General Claims Commission. Stephens, a United States national, had been killed by a person named Valenzuela, who was a member of a group of auxiliaries of the Mexican armed forces. With reference to these auxiliaries, the Commission observed:

It is difficult to determine with precision the status of these guards as an irregular auxiliary of the army, the more so as they lacked both uniforms and insignia; but at any rate they were 'acting for' Mexico.

On this basis the Commission concluded that Valenzuela must be assimilated to a soldier and that Mexico must be held liable for his act.<sup>385</sup> We can finally quote the case of the pseudo-volunteers sent to Spain by some foreign States during the civil war of 1936-1939. Referring to these "volunteers", the Mexican delegate at the League of Nations, Mr Fabela, declared:

In order to maintain that the foreign soldiers fighting in Spain are volunteers, it would be necessary to consider that they left their country against the law, i.e. as criminals. And everyone knows that these soldiers have never been thus considered, but as heroes who deserved the warm congratulations of their Government. Consequently their acts are acts of the Government and engage its responsibility.<sup>386</sup>

193. With regard to the second group of situations, reference is made to the *Black Tom* and *Kingsland* cases, concerning acts of sabotage committed in the United States of America during the period of its neutrality in the First World War. These acts were attributed to German saboteurs. In its decision of 16 October 1930, the United States and Germany Mixed Claims Commission, established under the agreement of 10 August 1922, did not hold Germany responsible, but only because it had not been proved that the fires which caused the damage were in fact due to the acts of the persons suspected of sabotage; otherwise, these acts would undoubtedly have been attributed to the German State.<sup>387</sup> In the same context, reference is also made to the notorious cases in

<sup>384</sup> *United Nations, Reports of International Arbitral Awards*, vol. VI (United Nations publication, Sales No. 1955.V.3), pp. 160 *et seq.* See the comments on this case by T. Meron, *op. cit.*, p. 106.

<sup>385</sup> *United Nations, Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No. 1951.V.1), p. 267.

<sup>386</sup> League of Nations, 18th Assembly, Sixth Committee, Records of the eighteenth ordinary session of the Assembly, Minutes of the Sixth Committee, 1937 (*Official Journal, Special Supplement No. 175*), p. 61.

<sup>387</sup> Germany itself, in the agreement of 10 August 1922, had declared itself willing to make reparation for the damage caused by German saboteurs if it were proven that such damage had really been caused by the persons concerned. For an account of the two cases mentioned here and for the text of the decision of the Mixed Commission, see *American Journal of International Law*, Washington, vol. 25, No. 1 (January 1931), pp. 147 *et seq.*

which persons have been abducted from the territory of another State Cesare Rossi, resident at Lugano, was abducted on 28 August 1928, by persons probably acting by agreement with the Italian police. These persons took Rossi to Campione, in Italian territory, where the police arrested him. On 27 September Mr. Motta, Head of the Swiss Federal Political Department, speaking on this matter in the Federal Council, said:

... it is evident that acts have been committed on Swiss territory by agents of the Italian police or by persons acting in concert with them, with a view to bringing about and securing the arrest, on Italian territory, of persons wanted in Italy. The Swiss Federal Council regards these doings as acts violating the territorial security of Switzerland and hence contrary to international law.<sup>388</sup>

In its reply, dated 1 October, the Italian Government denied the charge that there had been co-operation by the Italian police and declared that it had never intended to violate the territorial sovereignty of Switzerland. The two Governments maintained their positions in further notes dated 11 October and 1 November, respectively. Leaving aside this difference of opinion concerning the facts, the principle of law on which the Swiss Government relied, and which the Italian Government did not dispute, was that Italy would have been responsible if it had been proved that the persons committing the acts on Swiss territory had acted by agreement with, and on behalf of, the Italian police.<sup>389</sup> A similar situation arose seven years later when Berthold Jacob, a German journalist who had taken refuge in Switzerland, was abducted, on 9 March 1935, by persons manifestly employed for this work by the Gestapo, and taken to Germany. Following protests by the Swiss Government, the German Government agreed, on 25 July 1935, to sign an arbitration agreement.<sup>390</sup> After the Second World War, in 1960, Adolf Eichmann, a German national actively sought for war crimes, was found during the night of 11-12 May by a group of Israeli nationals in a suburb of Buenos Aires, where he had taken refuge after staying successively in various countries. Eichmann was abducted by these persons, and on 25 May he was taken by air to Israel to stand trial there. The Government of Israel, both in its diplomatic correspondence with the Argentine Government and later before the Security Council, to which Argentina referred the matter, maintained that the abduction was the work of a "group of volunteers" who had acted on their own initiative and without the knowledge of the Government

of Israel. It nevertheless expressed its regret for any infringement of Argentine laws or Argentine sovereignty which might have been committed by the group of volunteers. The Argentine Government regarded this expression of regret as an admission of responsibility by the Government of Israel. It maintained that the operation had in fact been carried out by secret emissaries of that Government; and that even if the volunteers had acted without the knowledge of the Government of Israel, the fact remained that that Government had subsequently approved the act committed in violation of Argentine sovereignty and had supported those responsible for it.<sup>391</sup> On 23 June 1960 the Security Council adopted resolution 138 (1960) drawing attention to the dangers involved in any repetition of such acts and requesting the Government of Israel to make appropriate reparation to the Argentine Government in accordance with the Charter of the United Nations and the rules of international law.<sup>392</sup> A few years later ex-Colonel Argoud, one of the leaders of the OAS, was abducted from a Munich hotel and taken to Paris, where the police, informed by an anonymous telephone call, found him, bound, in a small van in a street in the centre of the city. They arrested him and he was tried for acts against the security of the State. The affair gave rise to long discussions, both in German political circles and at the international level. Some members of the Bundestag raised the question of the international responsibility of France for the abduction, called for an enquiry and pressed the German Government to demand the return of Colonel Argoud. In December 1963, the German Government decided to apply to the French authorities for his return. The French Government denied any participation in the abduction. There was a further exchange of notes between the two Governments, after which an exchange of personal letters between the two Heads of State seems to have closed the incident.<sup>393</sup>

<sup>388</sup> The Argentine Government also adopted, as a secondary argument, the old theory that the State sometimes becomes responsible for the act of a private person when by subsequent approval it endorses the act and adopts it as its own. See, on this subject, Eagleton, *The Responsibility of States*... (*op. cit.*), p. 79. We shall revert to this point later, when we come to deal with the acts or private persons proper.

<sup>389</sup> The dispute concerning interpretation, on the question whether reparation should take the form of the return of Eichmann or of apologies by Israel, was finally closed by a joint communiqué issued by the two Governments on 3 August 1960. The text of the Security Council resolution and that of the joint communiqué are reproduced in *International Law Reports* (London, vol. 36, 1968), pp. 58 *et seq.* For a detailed analysis of this case, see the account given in *Revue générale de droit international public* (Paris, 3rd series, t. XXXI, No. 4 (Oct.-Dec. 1960), pp. 772 *et seq.*, and, on its international law aspects, the articles by P. O'Higgins: "Unlawful Seizure and Irregular Extradition", *The British Year Book of International Law*, 1960 (London, 1961), pp. 279 *et seq.*; by H. Silving: "In Re Eichmann: A Dilemma of Law and Morality", *American Journal of International Law* (Washington, vol. 55, No. 2, April 1961), pp. 307 *et seq.*; J.E.S. Fawcett: "The Eichmann Case", *The British Year Book of International Law*, 1962 (London, 1964), pp. 181 *et seq.*; and by L. Green: "Legal Issues of the Eichmann Trial", *Tulane Law Review*, 1963, pp. 641 *et seq.* For a complete bibliography on the Eichmann case, see *International Law Reports* (London, vol. 36, 1968), pp. 342 *et seq.*

<sup>390</sup> The two letters were dated 18 February and 8 April 1964, respectively. On the Argoud case, see the information given in

(Continued on next page)

<sup>388</sup> Quoted by Scheuner: "Der Notenwechsel zwischen der Schweiz und Italien in der Angelegenheit Cesare Rossi", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Berlin, t. I, part 2, 1929), p. 283.

<sup>389</sup> After this exchange of notes, the dispute was considered as settled *de facto*. See, with reference to this case, Ch. Rousseau, "L'aménagement de compétences en droit international", *Revue générale de droit international public* (Paris, 3rd series, t. IV, 1930), p. 445, foot-note 71; and Scheuner, *op. cit.*, pp. 280 *et seq.*

<sup>390</sup> The arbitration did not take place, however, and the dispute between Switzerland and Germany concerning the Jacob Case was settled on 17 September 1935 by an extra-judicial agreement between the two Governments, under which Jacob was returned to the Swiss authorities and arrested by them. See the text of the arbitration agreement in "Die deutsch-schweizerische Schiedsordnung im Falle Jacob", *die Friedens-Warte* (Geneva, vol. 35, No. 4, 1935), pp. 157-158; and in *Revue générale de droit international public* (Paris, 3rd series, t. X, No. 5 [Sept.-Oct. 1936]), p. 638.

194. For each of the two groups of situations described at the end of paragraph 191, we have confined ourselves to cases which have been the subject of an international arbitral award or of statements of position in terms of law in diplomatic correspondence between the States concerned. It need hardly be said that, in view of the number and variety of the situations that may arise, it would be easy to mention other specific cases, even recent ones, especially in the very varied field of action on foreign territory by persons or groups connected with the State in fact, if not formally. Mention could also be made of certain statements of position made on the occasion of incidents caused by the conduct of the press, radio, television, etc. It has happened that the country claiming to be injured has alleged international responsibility for such conduct, arguing that, in the country where the conduct occurred, the press and other mass information media were not free, but were really controlled by the Government,<sup>394</sup> so that the acts complained of should not be considered as acts of mere private persons, but of persons acting, in fact, at the instigation and on behalf of the Government. It does not seem necessary, however, to take up any more time in giving further concrete examples of the application of the principle which is the subject of this section, since this principle is practically undisputed. The attribution to the State, as a subject of international law, of the conduct of persons who are in fact acting on its behalf or at its instigation (though without having acquired the status of organs, either of the State itself or of a separate official institution providing a public service or performing a public function) is unanimously upheld by the writers on international law who have dealt with this question.<sup>395</sup>

195. Attempts are sometimes made to assimilate to the situations we have been examining here the case of certain

institutions considered in section 4 of this report, such as the single parties which, in various countries, perform particularly important public functions. In the countries where they exist, however, institutions of this kind are genuine public institutions, though they are separate from the State; the public functions they perform are statutorily their own functions and not functions of the State which they perform on its behalf. Hence these institutions cannot be assimilated to private persons or private groups acting more or less occasionally on behalf of the State or in place of its organs.

196. We do not believe, either, that the case of "*de facto* officials" can be assimilated to the case of what are often called "*de facto* governments". The notion of the *de facto* official presupposes the existence of a government in office and of State machinery serving it; he takes the place of organs of that machinery or supplements their action in certain circumstances, while himself remaining outside it, but acting in fact as though he formed part of it. The *de facto* government, on the other hand, is itself a State apparatus which has replaced, for reasons that may vary from situation to situation, the State machinery that existed previously. The term "*de facto* government", or "general *de facto* government", is sometimes used to designate a government which, though it has not been invested with power in accordance with the previously established constitutional forms, has fully and finally taken power, the previous government having disappeared. The term in question then merely reflects the existence of a problem of legitimacy concerning the origin of the new government—a problem which, moreover, subsists only from the point of view of a constitutional rule that will probably cease to exist itself, being replaced by a new written or unwritten rule.<sup>396</sup> But all this is without relevance to the problems of international responsibility, in which no distinction may be made between a State ruled by a *de facto* government and one ruled by a *de jure* government. A State whose government has been established in full compliance with the prescribed constitutional forms and a State whose government was born of a revolutionary change incur international responsibility under exactly the same conditions and for the same reasons.<sup>397</sup> The State organization exists in the one case as in the other; and the persons who are part of it are no less "organs"—and true organs—because the government has a *de facto* rather than a *de jure*

(Foot-note 393 continued)

*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart, vol. 25, No. 2, May 1965), pp. 295 *et seq.*; *ibid.* (1967), pp. 188-189; and A. Cocatre-Zilgien, *L'Affaire Argoud* (Paris, 1965).

On the problems of international responsibility for abductions alleged to have been carried out by private persons, see B. de Schutter, "Competence of the national judiciary power in case the accused has been unlawfully brought within the national frontiers", *Revue belge de droit international* (Brussels, vol. 1965-I, 1965), pp. 97 *et seq.*; N. Ronzitti, "La cattura di un individuo all'estero: In margine al caso Argoud", *Rivista di diritto internazionale* (Milan, vol. XLVIII, fasc. 1, 1965), pp. 64 *et seq.*

<sup>394</sup> For examples drawn from practice, see also Friedmann, "The Growth of State Control . . .", *The British Year Book . . .* (*op. cit.*), pp. 145 *et seq.*; Zellweger, *op. cit.*, pp. 40 *et seq.*; Münch, *op. cit.*, pp. 233-234; Quéneudec, *op. cit.*, p. 54. One of the most recent cases cited is that of an article published in 1964 in *Izvestia*, which gave rise to a protest by the Government of the Federal Republic of Germany, the article being regarded as an insult to the President, Mr. Luebke. The apologies made at the German Embassy in Moscow by an editor of the newspaper were accepted by the Federal Government. See *Revue générale de droit international public* (Paris, 3rd series, t. XXXV, No. 4 [Oct.-Dec. 1964]), pp. 922-923.

<sup>395</sup> On this subject see Anzilotti, *Corso . . .* (*op. cit.*), p. 387; Verdross, *Völkerrecht* (*op. cit.*), p. 380; Reuter, *La responsabilité internationale* (*op. cit.*), pp. 90 *et seq.*; Cheng, *op. cit.*, pp. 196-197; Morelli, *op. cit.*, p. 191; Sereni, *op. cit.*, t. III, p. 1512; Dahm, *op. cit.*, p. 193; Münch, *op. cit.*, p. 199; Quéneudec, *op. cit.*, pp. 47 *et seq.*; Ténékidès, "Responsabilité internationale", *Répertoire de droit international* (*op. cit.*), p. 787; Vitta, "Responsabilità degli Stati", *Novissimo Digesto Italiano* (*op. cit.*), p. 735.

<sup>396</sup> This aspect has long been brought out in international jurisprudence. See, for example, the award of 17 October 1923 by the Arbitrator, Mr. Taft, in the Aguilar-Amory and Royal Bank of Canada Claims (Tinoco Case), in United Nations, *Report of International Arbitral Awards*, vol. I (United Nations publication, Sales No. 1948.V.2), pp. 375 *et seq.*, in particular pp. 381-382. See also the other cases quoted by Cheng, *op. cit.*, pp. 188-189.

<sup>397</sup> See, in this connexion, Borchard, *The Diplomatic Protection . . .* (*op. cit.*), pp. 205 *et seq.*; Strupp, "Das völkerrechtliche Delikt", *Handbuch . . .* (*op. cit.*), pp. 89 *et seq.*; J. Spiropoulos, *Die de facto-Regierung im Völkerrecht* (Beiträge zur Reform und Kodifikation des Völkerrechts, No. 2) (Kiel, Verlag des Instituts für Internationales Recht an der Universität Kiel, 1926), pp. 172 *et seq.*; Anzilotti, *Corso . . .* (*op. cit.*), p. 167; Verdross, "Règles générales . . .", *Recueil des cours . . .* (*op. cit.*), pp. 336-337, *et Völkerrecht* (*op. cit.*), p. 322; Cheng, *op. cit.*, *loc. cit.*; Schwarzenberger, *International Law* (*op. cit.*), p. 135; Sereni, *op. cit.*, t. III, p. 1508; Quéneudec, *op. cit.*, p. 46.

origin.<sup>398</sup> Hence, their case has nothing to do with that of private persons in fact performing a public function or in fact carrying out a mission on behalf of the State. The question may have some more complicated aspects in cases where the term "*de facto* government" is applied retroactively by a regular government, which has been re-established, to a government previously set up in its territory as a result of a revolution or a *coup d'état*, or at the instigation of a foreign State which occupied the territory and wished to make use of it as a *longa manus* for its own purposes. Complicated problems of direct or indirect responsibility and of succession of governments may then arise, but these are problems of a special nature which will have to be considered in a context other than that of the questions falling within the scope of this section.

197. Having clarified these points, it seems that we can now proceed to formulate the draft article which is to express the principle brought out in the preceding paragraphs. In the light of the observations made and of the need for a comprehensive formula that can cover a wide variety of situations, we propose the following text:

**Article 8. Attribution to the State, as a subject of international law, of acts of private persons in fact performing public functions or in fact acting on behalf of the State**

The conduct of a person or group of persons who, under the internal legal order of a State, do not formally possess the status of organs of that State or of a public institution separate from the State, but in fact perform public functions or in fact act on behalf of the State, is also considered to be an act of the State in international law.

**6. ATTRIBUTION TO THE STATE, AS A SUBJECT OF INTERNATIONAL LAW, OF THE ACTS OF ORGANS PLACED AT ITS DISPOSAL BY ANOTHER STATE OR BY AN INTERNATIONAL ORGANIZATION**

198. The successive identification of acts which must be considered as "acts of the State" from the standpoint of international law, and may involve the international responsibility of the State, has led us to establish a number of points. One essential fact must be emphasized from the start: the acts or omissions of persons who, according to the internal legal order, possess the status of organs of the State concerned and are acting in that capacity in the case in question, are acts of the State from the standpoint of international law. We have seen also that this conclusion is inescapable irrespective of the branch of government to which the persons committing these acts or omissions belong, of whether they are superiors or subordinates, of the nature of their functions or of the place where they perform them. Next, we established that the acts and omissions of persons who, again according to the internal legal order, possess the status of organs of public institutions separate from the

State—such as public corporations, autonomous public institutions, territorial entities, and so forth—must also be considered as acts of the State from the standpoint of international law. We have seen, too, that the acts and omissions of private persons who, in special circumstances, are in fact performing public functions or in fact acting on behalf of the State must likewise be added. In order to exhaust the list, we must now consider another specific group of acts, namely acts committed by organs placed at the disposal of one State by another State or by an international organization.

199. There is one point which must first be elucidated in order to make it quite clear what we are discussing. The situations we have in mind are those in which a State or an international organization places one of its organs, whether individual or collective, at the disposal of another State in order that that other State may use it within its own system to perform, in conjunction with its own machinery, a specific public task or function or to provide a public service for which its own organization is not suitably or sufficiently equipped. There is therefore a clear distinction between situations of this kind and situations in which organs of a State are performing some of their own functions which, either in the ordinary course of events or exceptionally, have to be exercised in foreign territory. Functions of that kind are, and continue to be, functions of the State to which the organs belong, and there is therefore no connexion between these organs and the machinery of the State in whose territory they are acting.

200. Once this has been made clear, it is easy to envisage possible instances of organs being "lent" by one State to another State or by an international organization to a State. A State may place at the disposal of another State a contingent of its police or armed forces so that, together with the forces of the beneficiary State, it may assist that State in putting down an insurrection or resisting foreign aggression. It may send to the other State a detachment of its health, hospital or other services to provide assistance when there is an epidemic or other natural disaster. It may authorize some of its officials to administer in the territory of a third State a service of another State, in cases where the officials of that other State are unable for one reason or another to do so. It may second specialists from its administration to help another State to organize or reorganize a service, to instal plant, to plan and put into operation a structural reform, and so forth. Obviously, assistance of this nature may be provided not by another State but by an international organization or institution; and it goes without saying that situations of this kind are likely to become increasingly frequent in the widening framework of bilateral or multilateral assistance programmes.

201. The question arises whether the activities of these organs which are "lent" to or "placed at the disposal" of another State<sup>399</sup>—these "transferred servants" as English-

<sup>398</sup> De Laubadère (*op. cit.*, p. 240) mentions as examples the National Defence Government formed in France in 1870 and the Provisional Government also formed in France, in 1944. He rightly stresses the point that State officials under these governments were *de jure* and not *de facto* officials.

<sup>399</sup> The expression "organes mis à la disposition" (of another subject of international law) is found for example in the judgment of the Civil Court of Tunis on the Trochel Case (*Recueil Dalloz de doctrine, de jurisprudence et de législation*, Paris, 1953, p. 564) and in



speaking writers call them<sup>400</sup>—should be attributed at the international level to the State within whose system they are to perform specific functions. There would appear to be no doubt about the answer. If they are organs which, though belonging to a particular State (or international organization), have in fact been *placed at the disposal* of another State, and have genuinely been placed under the authority and orders of that other State to be used for some time, then the acts or omissions which they may commit are attributable only to that other State. This principle can, of course, be applied in different ways. It may happen that the organ of one State is placed temporarily at the exclusive disposal of another State and ceases, in that case, to perform any activity on behalf of the State to which it belongs. On the other hand, it may be that if another State is given an opportunity to use the services of such an organ, its demands may not be so exacting as to prevent the organ from continuing to act simultaneously, though independently, as an organ of its own State. In such cases it will be necessary to ascertain in each particular instance on whose behalf and by whose authority a specific act or omission has been committed. It may be that a State at whose disposal a foreign State has placed a person belonging to its administration will appoint this person to a post in its service, so that at a given moment he will formally be an organ of two different States at the same time.<sup>401</sup> If that were so, the acts or omissions committed by the person in question in performing a function of the recipient State would be acts of the recipient State just as if they were acts or omissions of its own organs. If, on the other hand, the person in question is not formally an organ of the recipient State, his actions will still be considered as acts of the recipient State but will be regarded rather as of the same nature as the acts or omissions of private persons in fact performing State functions, since the status of organ accorded under the legal order of the State of origin is not valid under the legal order of the recipient State. In any case, the basic conclusion is still the same: the acts or omissions of organs placed at the disposal of a State by other subjects

of international law are attributable to that State if in fact these acts and omissions have been committed in the performance of functions of that State and under its genuine and exclusive authority. The reply to the question raised at the beginning of this paragraph is therefore in the affirmative in all the different situations envisaged here.

202. It is no accident that in considering the case of organs "lent" by one State to another, we have constantly insisted that there is one essential requirement which must be fulfilled before the acts of these organs can be attributed to the beneficiary State and before any consequences arising from these acts in terms of international responsibility can be justified. In performing the functions assigned to it within the system of another State, the organ that has been "lent", so long as it continues to be lent and to act in that capacity, must be genuinely and exclusively under the authority of the other State. Indeed, it is only when this requirement has been fulfilled, that it is really possible to speak of an organ of one State "placed at the disposal" of another State. It is clear, for example, that this requirement has not been met in cases where a State agrees that an organ of a foreign State—for example, the troops of a State with which it has concluded a defensive alliance—should be stationed in its territory and engage in activities there while retaining its status as an organ of that foreign State.<sup>402</sup> Furthermore, it is essential to stress that the situations we have in mind are not analogous to cases in which a State, because it is a dependency, a protectorate, under mandate, under military occupation, in an inequitable union and so forth, is obliged to accept that the acts of its own apparatus are set aside and replaced to a greater or lesser extent by those of the apparatus of another State. In situations of this kind, whatever the language sometimes used to save appearances, the superior, protecting, occupying, etc., State is in no sense placing its own organs at the disposal of the subordinate, protected or occupied State. What it is in fact doing is to replace, in specific sectors, the activities of the organs of the subordinate State by those of its own organs, which will go on acting under its own instructions. There is, therefore, no "loan" and no persons belonging to the apparatus of one State are really being "placed at the disposal" of another State. It is rather a case of a transfer of functions in reverse: certain functions normally carried out by the organs of the territorial State are taken away from those organs and transferred to the organs of another State, which perform them under that State's authority and control. From the international point of view, therefore, the acts and omissions of the organs concerned are obviously acts and omissions of the State to which the organs belong—the so-called "superior" State—and will consequently involve the international responsibility of that State should the occasion arise. A basic distinction must accordingly be made between the differ-

(Foot-note 399 continued)

a report dated 18 July 1960 by the Secretary-General of the United Nations concerning the United Nations Force in the Congo (*Official Records of the Security Council, Fifteenth Year, Supplement for July, August and September 1960*, document S/4389). J.-P. Ritter ("La protection diplomatique à l'égard d'une organisation internationale", *Annuaire français de droit international*, 1962 (Paris, 1963), vol. VIII, p. 444) uses this expression as well as "organes prêtés".

We are referring here solely to cases in which the beneficiary of a "loan" of an organ from another State or from an international organization is itself a State, since this draft is exclusively concerned with State responsibility. But it is clear that cases may occur in which conversely, an international organization is the beneficiary of a loan of organs by a State. In such cases, a problem of international responsibility may arise for the organization. It would be useful to see how some of these cases have been settled in practice, since this may lead to an indirect confirmation of the principle we are affirming here.

<sup>400</sup> See Brownlie, *op. cit.*, p. 376.

<sup>401</sup> In spite of this formal situation, the person in question will in fact be acting only for one of the two States or at all events in different conditions for each of them. His situation should not be confused with that of a "joint" organ, defined as such by an agreement between two States. The actions of a joint organ are acts of each of the two States at the same time and may consequently involve the international responsibility of both of them.

<sup>402</sup> Ritter states that "a State remains responsible for the acts of its armed forces as long as it retains command and control over them, even if under the terms of an alliance or in response to a request for intervention it has placed them in the service of the interests of a friendly power." [Translation by the United Nations Secretariat] (*op. cit.*, p. 445).

ent situations in which organs of one State perform functions in another State; and this distinction necessarily affects the solution to be given to the problem of determining to which State the acts of such organs are attributable. The criterion for attributing the acts or omissions of the persons in question to one State rather than another is not the specific State apparatus to which they originally belonged, and not—or rather not only—the system within which their activities are performed. The decisive element is the authority actually responsible for their acts at the time when they performed them. If at that time they are genuinely at the disposal of another State and operating under its authority, then their acts and omissions are attributable to that State and can cause it to incur international responsibility. If they are still acting under the authority and in accordance with the instructions of their own State, then their own State must be regarded as the author of their acts and must answer for them internationally.<sup>403</sup>

203. The principle which has just been stated seems to be confirmed by international jurisprudence and practice. It is true that there have only been a very few legal pronouncements on the problem we are discussing here. Reference may, however, be made to the arbitral award made on 9 June 1931 in the *Chevreau Case* by Judge Beichmann, who was appointed arbitrator under the *compromis* signed in London on 4 March 1930 by France and the United Kingdom.<sup>404</sup> Julien Chevreau, a French national resident in Persia, had been arrested in 1918 by the British Expeditionary Force under General Dunster-ville which was operating near the Caspian Sea. He was subsequently detained on suspicion of intelligence with the enemy and deported. The arbitrator, who was requested to establish first whether the measures taken against Chevreau had been taken in such circumstances as to give rise to a claim in international law, had to decide, in particular, whether the United Kingdom was required to compensate Chevreau for the loss of certain property, books and documents which, according to Chevreau, had been in his rooms at the time of his arrest and had subsequently been stolen or lost owing to the negligence of the British consular authorities. In fact, Chevreau's books and documents had been sent at the request of the French Consul at Resht—who was away from Persia at the time—to the British Consul who, in the absence of the French Consul, was in charge of the French Consulate. In

his award the arbitrator rejected the French claim, stating that:

The British Government cannot be held responsible for negligence by its Consul when in charge of the Consulate of another Power.<sup>405</sup> The situation in question was therefore precisely one of those described above; <sup>406</sup> it was a case where the organ of one State was required to administer in a foreign State an office belonging to another State, replacing an organ of the last-mentioned State which was unable to perform its functions itself. And the conclusion reached by the arbitrator, ruling out the possibility of attributing to the United Kingdom responsibility for negligence by an organ of the British State at a time when it was performing a function for the French State, was obviously based on recognition of the principle which, in our view, governs the matter—namely, that an act or omission committed by the organ of one State in the performance of functions on behalf of another State, in whose interests it has been requested to act, must be considered at the international level as an act of that other State.

204. The criteria to be applied in the matter now under discussion emerge equally clearly from an examination of State practice. The principle of the responsibility of the State for the acts of organs placed at its disposal by another State, for use as auxiliaries of its own organs, was clearly upheld by the Government of El Salvador in the *Gattorno Case*, which gave rise to an exchange of notes between the Governments of Italy and El Salvador in 1872-73. Gattorno, an Italian national residing at Amapala (Honduras) had suffered injury at the hands of the troops of a Honduran general, General Streber, commanding a body of troops which the Government of El Salvador had placed at the disposal of Honduras as an "auxiliary force". The Italian Chargé d'affaires in Guatemala, Mr. Anfora, applied in the first instance to the Government of El Salvador for compensation for the damage suffered by Mr. Gattorno. In support of his application, he said:

At the time when Amapala was occupied and these regrettable acts of violence took place, General Streber was Commander-in-Chief of the Salvadorian Oriente vanguard and was responsible to the Ministry of War at San Salvador, as is clear from a report sent by him on 8 May and published in the Official Gazette of 16 May.<sup>407</sup>

The Government of El Salvador replied to Mr. Anfora, however, that the acts of the corps commanded by General Streber were committed by Honduras and that Honduras must therefore bear responsibility for them. In support of its argument, the Government of El Salvador said:

The documents published in the Official Gazettes of this Republic and of Honduras show that during the months of May and June, the operations of the Salvadorian forces ceased to have an international character as soon as those forces entered the territory of Honduras, since they then placed themselves at the disposal of the Provisional Government of Mr. Arias as "auxiliary forces". Accordingly, General Streber occupied the port of Amapala on 8 May as Commander-in-Chief of the vanguard of the Salvadorian army

<sup>403</sup> It should be noted that, in spite of the distinction between them, the two cases mentioned here are both cases of direct responsibility—that is to say, responsibility of the author of the act. Consequently they should not be confused with cases of indirect responsibility, or responsibility for the acts of other persons, which, as we shall see later, arise when members of the apparatus of one State continue to perform their own functions themselves though they are under the control and subject to the orders of a foreign State.

<sup>404</sup> We should also mention here that the conclusion stated above regarding the international responsibility assumed by a State in the situations we have just described cannot be affected by the decision—possibly a different one—which may be adopted or imposed at the national level regarding civil or administrative responsibility.

<sup>405</sup> United Nations *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949.V.1), pp. 1115-1116.

<sup>406</sup> *Ibid.*, p. 1141.

<sup>407</sup> See para. 200 above.

<sup>408</sup> Mr. Anfora to Mr. Arbiju, 14 November 1872 (*Archivio del Ministero degli Affari Esteri italiano*, serie Politica A, No. 1244).

assisting the Provisional Government of Honduras. This is stated textually in the instrument of surrender concluded on the same day with Colonel Clotter, commanding at Amapala, and published in Official Gazette No. 53 of that Republic, on 16 May of this year. As the Salvadorian forces were auxiliaries, even if General Streber was not a Honduran national, I believe that you will agree with me that responsibility rests with the Government *under whose orders* these forces were operating and not with the Government of El Salvador.<sup>408</sup>

Mr. Anfora then transmitted the reply of the Government of El Salvador to the Italian Minister for Foreign Affairs and proposed that he (Mr. Anfora) should press the Government of El Salvador to meet Mr. Gattorno's claim and then itself seek reimbursement from the Government of Honduras. But the Secretary-General of the Ministry, Mr. Artom, did not accept this proposal and, in his reply to Mr. Anfora, he pointed out that the rule applicable in determining responsibility for the acts of troops sent by one Government to another as auxiliaries depended primarily on the agreements actually concluded between the two Governments at the time when one of them sent troops to the other. The Italian Government seemed therefore to agree with the views of the Government of El Salvador, since it was precisely the agreements in question which should have established whether General Streber's troops were genuinely operating on behalf of the Government of Honduras and under its orders, as the Government of El Salvador asserted. Mr. Anfora was therefore instructed to submit his claim to the Government of Honduras, in order to ascertain whether that Government accepted responsibility for the acts of General Streber.<sup>409</sup>

205. A similar position was adopted in a letter addressed by Mr. Geoffray, the French Ambassador at Madrid, to Mr. Cruppi, the French Minister for Foreign Affairs, on 16 June 1911. Mr. Geoffray stated in the letter that he had replied in the following terms to a note from the Spanish Minister of State, Mr. García Prieto, complaining about the conduct of a French officer named Moreaux who had been placed by France at the disposal of the Moroccan Government:

With regard to the presence of Captain Moreaux in the vicinity of El Ksar, to which reference is made at the end of your letter, I would however venture to point out to you that this is a Moroccan outpost commanded by an officer in the regular service of the Sultan. Accordingly, his movements are of no concern to us, and they were doubtless carried out under orders from the Moroccan Government itself.<sup>410</sup>

206. It therefore seems clear from these statements of position by Governments that the act or omission of an organ placed by one State at the disposal of another State and acting in the particular case on behalf of that other State must be attributed to that State. Here again, however, the idea is subject to the fundamental criterion of effectiveness which is constantly found at the root of the principles of international law and is the basis of their

interpretation. The "placing at the disposal" must be genuine and not a mere semblance. In other words, if the act is to be attributed to the "beneficiary" State, the organ "lent" by another State must *genuinely* have been placed under the authority of the beneficiary State and must be acting in accordance with instructions from that State. In cases where, on the contrary, the organ concerned, though acting on the territory of a foreign State and in its name, is not in fact acting under the authority of that State or in accordance with its instructions, the principle upheld is that the acts of that organ are attributable to the State to which it belongs and under whose authority it is continuing to act. In international law, the State on whose behalf it is operating in a purely formal sense is not considered to be the author of its acts and is not responsible for them.

207. It is interesting to consider in this connexion the position taken by the Italian Government on the occasion of the dispute concerning damage caused by French troops during the bombardment and capture of the town of Sfax, in Tunisia. In July 1881 this town revolted against the Bey. The French Government, which under the Treaty of Kasr Said had undertaken to support the Bey of Tunis "against any danger threatening the tranquillity of his domains", sent troops to put down the insurrection. During the events which followed, a number of Italian nationals residing at Sfax suffered injury; the consulate itself was occupied and the archives seized. Mr. P. S. Mancini, the Italian Minister for Foreign Affairs, instructed the Italian Consul-General at Tunis and, through him, the Italian Consular Agent at Sfax, to determine the amount of damage suffered and to ascertain whether the damage was due to the bombardment or to the looting and theft which had occurred when houses had been left empty. In particular, he wished to know, whether the authors of the various injurious acts were Tunisian insurgents or French soldiers, and he went on to say:

the latter eventuality [...] would be particularly serious and important in settling questions of responsibility for the damage caused.<sup>411</sup>

Mr. Mancini's intention was therefore to await the results of the inquiry for which he had asked before making official representations to the French Government. As a joint committee of inquiry into the events at Sfax had meanwhile been established on the initiative of the French Government, the Italian representative was instructed to emphasize that the committee's task was to establish who had caused the damage, and to determine

[...] the share of responsibility which, in the light of the findings of the inquiry, is to be borne by France and Tunisia respectively, the latter on the ground of its inability to prevent the rebellion and the former on the ground that it had used excessive force in its measures of repression.<sup>412</sup>

In his correspondence Mr. Mancini laid particular stress on this second aspect and said:

[...] the serious responsibility incurred in the circumstances by France, as a result of the acts of its troops, seems to be beyond doubt.<sup>413</sup>

<sup>408</sup> Mr. Caseres to Mr. Anfora, 23 November 1872 (*ibid.*). Italics supplied by the Special Rapporteur.

<sup>409</sup> Mr. Artom to Mr. Anfora, 9 July 1873 (S.I.O.I.-C.N.R., *op. cit.*, p. 854). Unfortunately, the outcome of this case is not known.

<sup>410</sup> Kiss, *Repertoire* . . . (*op. cit.*), No. 926, p. 558.

<sup>411</sup> S.I.O.I.-C.N.R., *op. cit.*, p. 855.

<sup>412</sup> *Ibid.*, p. 856.

<sup>413</sup> *Ibid.*, p. 855.

The French Government maintained in the first place that the damage suffered by Italian nationals was due to acts of war for which, in its view, no responsibility was involved; nevertheless, it declared that it was ready to pay compensation *ex gratia*. The French Government argued further that, if it had been a question of responsibility, it would have rested with Tunisia and not with France.<sup>414</sup> But the Italian Government maintained its position and protested against the unilateral dissolution of the Committee of inquiry by its French chairman before it had been able to establish the extent of the responsibility attributable to Tunisia and France respectively.<sup>415</sup> The dispute lasted for two years. The Italian Government maintained that there were only two ways of solving it. Either the French Government should order the resumption of inquiry into the origin of the damage, or it should undertake to pay compensation for the whole of the injury caused and then settle with the Bey which of them should be charged. In 1883 the French Government informed the Italian Government that the Bey had promulgated a decree granting Italian nationals *ex gratia* a lump sum corresponding to the total amount of compensation claimed by Italy. Mr. Mancini accepted, but observed at the same time that the question whether the compensation paid should be charged to the Tunisian Treasury or the

French Treasury was a matter which concerned only France and Tunisia. For Italy, the payment was merely the "fulfilment of an obligation which the French Government had accepted towards us".<sup>416</sup>

208. In the same context, certain statements in the House of Lords on the *Nissan Case* also seem to be instructive. Mr. Nissan, a British subject, claimed compensation from the authorities of his country for damage to his hotel in Cyprus, which had been requisitioned by United Kingdom forces in the island between 29 December 1963 and 27 March 1964. The United Kingdom Government refused to pay any compensation, on the ground that its forces had been placed at the disposal of the Government of Cyprus to help it to restore peace in the island. The United Kingdom Government therefore maintained—and this is the aspect which is of interest to us—that the forces in question should be regarded as organs of the State of Cyprus. In its view, the Nissan case was one in which Cyprus was responsible for damage caused to a foreign national and not a purely internal case in which the United Kingdom Government was responsible for damage caused by its agents to one of its nationals. But the English courts of first<sup>417</sup> and second<sup>418</sup> instance, and the judges of the House of Lords<sup>419</sup> in their opinions, agreed that the acts of the United Kingdom forces in taking possession of the plaintiff's hotel could not be attributed to the Government of Cyprus, since the United Kingdom forces had not been acting in that particular case as "agents" of that Government. They were acting under United Kingdom command, were not subject to any control by the Government of Cyprus and were not receiving any instructions from it.<sup>420</sup>

<sup>414</sup> The French courts have often attributed to the protected State financial responsibility for damage caused to private persons by the negligence of French police officials maintaining public order on behalf of the local sovereign. In support of their decisions, these courts have argued that the officials in question were acting on behalf of the protected State and not the protecting State. Reference is frequently made in this connexion to the awards of the Civil Court of Tunis in the Trochel Case (*Recueil Dalloz de doctrine, de jurisprudence et de législation* (Paris, 1953), pp. 564 *et seq.*, with the note by Ladhari), and to those of the Administrative Tribunal of the Seine (*ibid.*, 1959, pp. 357-358, with the note by Silvera) and of the French Conseil d'Etat (*Revue générale de droit international public*, Paris, 3rd series, t. XXXIV, No. 1 (Jan.-March 1963), pp. 220-221, with the note by Rousseau) in the Prince Sliman Bey Case. In both cases, the argument that the French security forces were carrying out their duties in Tunisia as agents of the Bey, and on his behalf, was deemed to have greater weight than the contrary argument that the forces concerned were subordinate to the Resident-General and were carrying out the orders of that French official. (See also the cases quoted by R. Drago, "La réparation des dommages causés par les attroupements et les attentats en Tunisie", *Revue tunisienne de droit*, Tunis, vol. I, No. 2, April-June 1953, in particular pp. 125 *et seq.*). However, if the question of responsibility had been raised at the international rather than at the internal level, it is extremely doubtful whether the purely formal fact of the sovereignty on whose behalf the police powers of the Resident-General and his subordinates were exercised would have prevailed over the actual fact that the forces concerned were in reality controlled by the protecting State and were acting under its authority and instructions. Moreover, even from the standpoint of internal law, the French Government seems in more recent times to have adopted an attitude similar to that required by international law. After the protectorate over Morocco had come to an end, the Moroccan Government refused to compensate French nationals who had been the victims of attack during the protectorate on the ground that France had at that time been responsible for security; and the French Government, after first opposing it, seems to have accepted the Moroccan point of view. See, in this connexion, the debates in the Assemblée Nationale on a bill granting a pension to French nationals who had been victims of attack in Morocco, in: France, *Journal officiel de la République française, Débats parlementaires: Assemblée nationale*, Paris, 28 July 1959, year 1958-1959, No. 52 A.N., pp. 1509-1510; and *Annuaire français de droit international*, 1959 (Paris, vol. V, 1960), pp. 895-896.

<sup>415</sup> S.I.O.I.-C.N.R., *op. cit.*, pp. 856-857.

<sup>416</sup> *Ibid.*, pp. 857-858.

<sup>417</sup> See the judgment by the Queen's Bench Division of 17 February 1967 (*The All England Law Reports*, 1967, London, vol. 2, pp. 200 *et seq.*).

<sup>418</sup> See the judgment by the Court of Appeal of 29 June 1967 (*ibid.*, pp. 1238 *et seq.*).

<sup>419</sup> See the judgment by the House of Lords of 11 February 1969 (*ibid.*, 1969, vol. 1, pp. 629 *et seq.*). For the case as a whole, see I. Brownlie "Decisions of British Courts during 1968 involving Questions of Public or Private International Law", *The British Year Book of International Law*, 1968-1969 (London, 1970), pp. 217 *et seq.*

<sup>420</sup> Lord Reid, in his statement, observed that:

"The British forces were to act under British command, and there is no suggestion that the Cyprus Government had any control over them."

Lord Morris pointed out that the United Kingdom forces "never became the agents" of the Cyprus Government. There had never been, he said, any "relationship of principal and agent" between those forces and the Government of Cyprus. The absence of any relationship of "agency" was also stressed by Lord Pearce, Lord Wilberforce and Lord Pearson. The last-mentioned based his opinion in part on the fact that the United Kingdom forces were not carrying out instructions from the Government of Cyprus.

It should be noted that the highest judicial authority of the United Kingdom maintained the principle that the United Kingdom Government was responsible for the damage suffered by Mr. Nissan as a result of the occupation of his hotel by United Kingdom troops, even during the period 27 March to 5 May 1964—that is to say, at a time when the United Kingdom forces had become an integral part of the United Nations Force in Cyprus. Contrary to the arguments of the United Kingdom Government, which refused to accept responsibility for the conduct of a contingent which had in the meantime become part of the United Nations Force, and contrary also to the

(Continued on next page)

209. It would appear therefore that the basic principle emerging from all the practice we have considered here can be summarized in the following terms: the conduct of an organ lent by one State to another State is attributable in international law to the second State if the organ is actually placed at the disposal of that State, that is to say, if it is acting under the authority and in accordance with the instructions of the "beneficiary" State. It is, on the contrary, attributable to the first State if the loan is merely apparent or if the organ has not really been placed at the disposal of the second State, because in that case the organ will in fact still be acting under the control and in accordance with the instructions of the State to which it belongs.

210. In this report we are concerned solely with the subject of State responsibility, and the only question which can be considered here, therefore, is the possible responsibility of a State for the acts of organs placed at its disposal by another State or by an international organization. It may, however, be useful to point out that a confirmation of the validity of the principle stated in the preceding paragraph is undoubtedly provided by the practice concerning acts or omissions of organs placed at the disposal of international organizations by States. Here, too, the decisive criterion for determining responsibility in such cases is the actual circumstances in which the acts or omissions concerned have been committed. In cases where State organs have been placed at the disposal of an organization on a purely formal basis and they have continued in fact to act under the sole control and in accordance with the instructions of the State to which they belong, it is that State and not the organization which has been held responsible for their acts. On the other hand, in cases where the organs have really been placed under the sole authority of an organization by the State to which they belong and have acted in accordance with instructions genuinely emanating from the organization, the organization itself has accepted its responsibility and borne the financial consequences; and—this is an interesting point—none of the member States has ever raised any objections. The situations which arose in Korea and in the Congo are particularly instructive in this connexion.

211. During the operations undertaken in Korea in 1950 on behalf of the United Nations by armed forces of the United States of America and other countries, the forces in question were placed under a unified command set up by the United States Government, and their operational orders were issued solely by this command.<sup>421</sup> Accord-

ingly, irrespective of whether the decision taken on this occasion by the Security Council was legal or illegal (as the Soviet Union maintained), the important point to note is that in this particular case the armed forces sent to Korea had not actually been placed under the authority and the orders of the organization in whose name they were acting. The Governments of the Soviet Union, the People's Republic of China and the Democratic People's Republic of Korea maintained that responsibility for the internationally wrongful acts which, they alleged, had been perpetrated by members of the United States forces rested solely with the Government of the United States. And although the United States Government asserted that the protests in question should be addressed not to it but to the United Nations, it did however state on a number of occasions that if the facts alleged in these protests were established by an impartial inquiry, it would provide the Organization with the funds necessary to pay compensation for the damage caused.<sup>422</sup> But the fact

<sup>422</sup> The Government of the USSR sent two notes of protest to the United States Government, in September and October 1950 respectively (Bowett, *op. cit.*, p. 57; Seyersted, *op. cit.*, pp. 110-111; M. Bothe *Streitkräfte internationaler Organisationen* (Cologne, Heymanns, 1968, p. 68). The United States Government refused to receive these notes, stating that they should have been addressed to the Security Council. However, after the second note, protesting against the bombing of an airfield in Soviet territory, the United States representative to the United Nations, Mr. Austin, sent the Secretary-General a letter (*Official Records of the Security Council, Fifth Year, Supplement for September to December 1950*, document S/1856) in which he admitted the bombing, the result of an error, gave an assurance that disciplinary action would be taken against the pilots involved, expressed his regret for the violation of the Soviet frontier and said that his Government was prepared to provide funds for payment of any damages determined by a United Nations commission or other appropriate procedure to have been inflicted upon Soviet property. The Minister for Foreign Affairs of the People's Republic of China, in addition to addressing protests and complaints to the United States Secretary of State, sent a number of cables to the Secretary-General of the United Nations denouncing the bombing of Chinese territory by aircraft of the United States forces in Korea (*ibid.*, *Supplement for June, July and August 1950*, documents S/1722, S/1743; *ibid.*, *Supplement for September to December 1950*, documents S/1808, S/1857, S/1870, S/1876; A/1410). He was not thereby claiming that any responsibility rested with the Organization, however; he was demanding rather that the United Nations should condemn the United States. Once again the United States representative to the United Nations declared that his Government was ready to pay compensation to the Secretary-General and to take disciplinary action against those responsible if a commission of inquiry appointed by the Security Council found that an aerial attack on Chinese territory had actually taken place (*Official Records of the Security Council, Fifth Year, No. 35*, 493rd meeting, pp. 25-26; *ibid.*, No. 41, 499th meeting, p. 11; *ibid.*, No. 43, 501st meeting, p. 4; *ibid.*, *Fifth Year, Supplement for June, July and August 1950*, document S/1727; *ibid.*, *Supplement for September to December 1950*, documents S/1832, S/1813; *Official Records of the General Assembly, Fifth Session, First Committee*, 439th meeting, p. 607). In connexion with these incidents, the USSR submitted draft resolutions to the Security Council and the General Assembly condemning the Government of the United States for the acts committed and declaring it responsible for the damage caused to the People's Republic of China (S/1745/Rev.1, A/C.1/660 and A/1777). These proposals were rejected by the Security Council and the General Assembly, not because the United States Government was held responsible in them for acts committed by the armed forces acting in Korea under the United Nations flag, but because the facts alleged had not been proved (*Official Records of the Security Council, Fifth Year, No. 43*, 501st meeting; *Official Records of the General Assembly, Fifth Session, First Committee*, 439th to 441st meetings; *ibid.*, *Plenary Meetings*, 328th meeting).

(Foot-note 420 continued)

decisions of the courts of first and second instance (*The All England Law Reports*, 1967, London, vol. 2, pp. 200 *et seq.*, 1238 *et seq.*), the House of Lords said that the United Kingdom Government was responsible. It held that the agreements concluded with the United Nations did not contain any clause relieving the Crown of its responsibility for the continuation of a wrongful act committed by forces which had not ceased to be British soldiers (*ibid.*, 1969, vol. 1, pp. 629 *et seq.*, especially pp. 646 *et seq.*).

<sup>421</sup> On the independence of the "unified command" from the United Nations, see D. W. Bowett, *United Nations Forces: A Legal Study of United Nations Practice* (London, Stevens, 1964), pp. 40 *et seq.*; F. Seyersted, *United Nations Forces in the Law of Peace and War* (Leyden, Sijthoff, 1966), pp. 41 and 98-99.

remains that the Organization as such never envisaged assuming any responsibility for the acts of the armed forces operating in Korea under the United Nations flag.

212. The situation during the United Nations intervention in the Congo in 1961 was quite different. Although the United Nations Force in the Congo consisted of national contingents, it was placed under a commanding officer appointed directly by the Organization and it acted in the Congo solely under the Organization's orders. Neither the Governments of the States which provided contingents nor the Government of the Congo were able to issue "operational" orders to members of the Force, nor were they able to co-operate with the Secretary-General in directing operations. Moreover, the cost of the operations was borne entirely by the Organization. Accordingly, it was to the United Nations that the Belgian Government applied for compensation for damage suffered by Belgian nationals at the hands of members of the Force; and the Organization accepted responsibility. The dispute between the Belgian Government and the United Nations, which was protracted owing to the difficulty of establishing the facts, was settled at New York by an exchange of letters dated 20 February 1965 between U. Thant, the Secretary-General, and the Belgian Minister for Foreign Affairs, Mr. Spaak. In this exchange of letters, the principle of the responsibility of the Organization for the unjustifiable injury caused to innocent persons by "agents of the United Nations" was accepted, and a lump sum compensation was paid to the Belgian Government.<sup>423</sup> Neither Belgium nor the Organization seems even to have considered the possibility of claiming damages from the States providing the contingents. Agreements with a content analogous to the one concluded with Belgium were concluded with Greece on 20 June 1966, with Luxembourg on 28 December 1966 and with Italy on 18 January 1967.<sup>424</sup> The principle of the responsibility of the United Nations for damage wrongfully caused by members of the United Nations Force in Katanga was also upheld in the United Kingdom Parliament by the Under-Secretary for Foreign Affairs in a statement made on 7 March 1962.<sup>425</sup>

<sup>423</sup> It should be noted that the Soviet representative, Mr. Morozov, opposed the payment of such indemnity not because he contested in general the principle of the Organization's responsibility for acts of forces under its authority, but for the specific reason that Belgium had, in his opinion, committed an aggression against the Republic of the Congo, and, being the aggressor, had no moral or legal title to present claims to the United Nations, whether on her own behalf or on behalf of her nationals (see *Official Records of the Security Council, Twentieth Year, Supplement for July, August and September 1965*, document S/6589).

On the dispute with Belgium, see P. de Visscher, "Observations sur le fondement et la mise en œuvre du principe de la responsabilité de l'Organisation des Nations Unies", *Revue de droit international et de droit comparé* (Brussels, Nos. 3-4, 1963) pp. 165 *et seq.*; and J. J. A. Salmon, "Les accords Spaak-U Thant du 20 février 1965", *Annuaire français de droit international*, 1965 (Paris, vol. XI, 1966), pp. 468 *et seq.*, 496-497.

<sup>424</sup> These agreements have been published in United Nations, *Juridical Yearbook, 1966* (United Nations publication, Sales No. E.68.V.6), pp. 41 *et seq.*; *ibid.*, 1967 (Sales No. E.69.V.2), pp. 85 *et seq.*

<sup>425</sup> See E. Lauterpacht, *The Contemporary Practice of the United Kingdom in the Field of International Law* (London, The British

213. Writers on international law who have considered the problems dealt with in this section have, in general, supported the principles emerging from international practice, though some have done so more unequivocally than others. Brownlie and Durante seem to be the only writers who have dealt explicitly with responsibility for the conduct of organs placed by one State at the disposal of another. Without distinguishing very thoroughly between the different situations, Brownlie holds that in these cases it is the State at whose disposal the organs are placed which is answerable for their acts and omissions; Durante, on the contrary, recognizes that it is important to this end to determine which of the two States has directed and organized the activity of these organs.<sup>426</sup> Among the various writers who have considered both the situation where organs have been placed at the disposal of an international organization by a State and the situation where organs have been placed at the disposal of a State by an organization, the one with the most definite views is Ritter. He says:

The organization is not responsible for the acts of persons under the authority of other subjects of international law, especially of member States, even if these other subjects of international law have caused these persons to act by agreement with organization.<sup>427</sup>

He goes on to say:

If persons entrusted with the execution of an operation decided upon by an international organization are placed under the exclusive authority of the organization, it is correct to describe them as agents of the organization, despite their original status as agents of member States, and to say that their acts, including wrongful acts, are imputable to the organization. Conversely, if an agent of the organization is placed at the disposal of a State, [...] responsibility for the acts of this person are imputable to the State or to the organization, depending on whose instructions the agent in question is required to follow.<sup>428</sup>

Other jurists, including Seyersted,<sup>429</sup> Bothe<sup>430</sup> and P. de Visscher<sup>431</sup> have reached similar conclusions. According to de Visscher, when armed forces have been lent by a State to an international organization, the decisive test to be applied in establishing which of the two is responsible is "effective control" (*maîtrise effective*).

214. Consequently, irrespective of whether an organ is "lent" or "transferred" by one State to another, by a State to an international organization or by an international organization to a State, only one principle can be applied: the beneficiary of the "loan" or "transfer" must be held responsible for any violations of international law committed by the organ placed at its disposal, when the acts of that organ are genuinely performed in the name and on

Institute of International and Comparative Law, 1962), p. 100. With regard to the compensation paid by the United Nations to the International Committee of the Red Cross for the murder, at Elizabethville, of three members of the Committee, see Seyersted, *op. cit.*, p. 195.

<sup>426</sup> Brownlie, *Principles...* (*op. cit.*), p. 376; Durante, *Responsabilità internazionale e attività cosmiche* (Padua, 1969), pp. 40 *et seq.*

<sup>427</sup> Ritter, *op. cit.*, p. 441.

<sup>428</sup> *Ibid.*, p. 444. Italics supplied by the Special Rapporteur.

<sup>429</sup> Seyersted, *op. cit.*, pp. 117 *et seq.*

<sup>430</sup> Bothe, *op. cit.*, pp. 53 *et seq.*, 67 *et seq.*, and 166 *et seq.*

<sup>431</sup> P. de Visscher, *op. cit.*, p. 169.



behalf of the beneficiary and in accordance with orders issued by the beneficiary alone. As we have seen, if this principle had not been confirmed by international practice, it would have to be applied for reasons of legal logic, effectiveness and equity. In view of the increasing number of cases in which it may have to be applied in future especially in relations between States and international organizations, to formulate the principle more clearly will contribute to the progressive development of international law. Our task now therefore is to find a definition which expresses the criterion adequately and indicates clearly the essential requirement which must be fulfilled before it is possible to consider as acts of a particular State, the acts or omissions of a person belonging to the apparatus of

another State or, more generally, of another subject of international law. In the light of the various elements which have to be taken into consideration, we envisage the following formulation:

*Article 9. Attribution to the State, as a subject of international law, of the acts of organs placed at its disposal by another State or by an international organization*

The conduct of a person or group of persons having, under the legal order of a State or of an international organization, the status of organs and who have been placed at the disposal of another State, is considered to be an act of that State in international law, provided that those organs are actually under the authority of the State at whose disposal they have been placed and act in accordance with its instructions.