Fifth report on State responsibility by Mr. Roberto Ago, Special Rapporteur - the internationally wrongful act of the State, source of international responsibility (continued)

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1976, vol. II(1)
STATE RESPONSIBILITY

[Agenda item 2]

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

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

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

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

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ABBREVIATIONS

I.C.J. International Court of Justice
I.C.J. Pleadings I.C.J. Pleadings, Oral Arguments, Documents
I.C.J. Reports I.C.J. Reports of Judgments, Advisory Opinions and Orders
ILA International Law Association
ILC International Law Commission
P.C.I.J. Permanent Court of International Justice
P.C.I.J., Series A P.C.I.J., Collection of Judgments
P.C.I.J., Series C P.C.I.J., Pleadings, Oral Statements and Documents

EXPLANATORY NOTE: ITALICS IN QUOTATIONS

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

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

Breach of an international obligation

1. PRELIMINARY CONSIDERATIONS

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

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

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

(b) That conduct constitutes a breach of an international obligation of the State.

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

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

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

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

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3 Ibid., p. 181, para. 8 of the commentary.
4 Ibid., p. 182, para. 9 of the commentary.
5 Ibid., para. 10 of the commentary.
6 Ibid., p. 184, para. 15 of the commentary.
7. The complications caused by the adoption of theoretical and a priori positions which were encountered when determining the subjective element of an internationally wrongful act and which had to be dealt with first will probably not arise in the case of the objective element. The difficulties encountered will nevertheless be just as great. The problem which is likely to arise at nearly every stage of a study is essentially a problem of “boundaries”: that of establishing how far certain aspects can be analysed without overstressing the limits of the sphere of legal wrongfulness and the resultant responsibility. For example, it will have to be asked whether the breach of an obligation created by a given source does or does not differ from a failure to comply with an obligation deriving from another source; however, this must not in any circumstances lead us to formulate a theory of the sources of international obligations in the context of the codification of international responsibility. Similarly, the content of certain different categories of international obligations will have to be taken specifically into account in order to determine against what subjects or at what time a breach of a particular category of obligation allegedly took place, for it is only on that basis that certain characterizations and essential distinctions in the field of internationally wrongful acts can be made. But that should not lead us into a search for a specific definition of the international obligations which in one sphere or another are incumbent on States. Past experience has shown how yielding to a temptation of this nature exerted a detrimental effect on the attempts to codify even the limited subject of international responsibility for damage caused to the person or property of aliens. That course would be absolutely fatal to our present goal, that of codifying the general rules of international responsibility as a whole. There would be no chance of achieving a favourable result if under the appearance of codifying international responsibility, an effort was in fact being made to codify the totality of international law.

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

9. We shall then take up the questions relating to the way in which the content of the obligation breached affects the problems at issue. The first problem that will be encountered is one of the most delicate and important in the whole study, and one of the most decisive for the subsequent determination of the type of responsibility that international law attaches to different kinds of internationally wrongful acts, namely the problem of deciding whether a basic distinction should be made between internationally wrongful acts according to the degree of essentiality that respect for the obligation concerned has for the international community, precisely because of the content of the obligation, and according to the seriousness of the breach of that obligation. We shall then have to decide whether, in determining if there has been a breach of an international obligation, a difference should be established between obligations whose content is such that a breach is revealed by the simple fact that the State engages in conduct different from that expressly required of it and obligations whose breach is only manifested when the conduct of the State is accompanied by an external event which that State should have prevented. We shall also have to consider the difference between the breach of an obligation of conduct, specifically requiring a particular action or omission on the part of the State machinery, and the breach of an obligation of result, which only requires the State to ensure the existence of a particular situation, without specifying the means and acts to be employed to achieve that end.

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

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

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10 We have already had occasion to observe that the existence of obligations of this second category, which are very frequent in international law especially when the obligation involves the treatment which the State should accord to individuals, in our view constitutes the reason for the existence of, and explains, a well-known principle, that which requires initial recourse to available local remedies as a prerequisite of establishing at the international level the responsibility of a State accused of having acted towards individuals in a manner contrary to its international obligations. As was stated in the Commission’s report on its twenty-seventh session (Yearbook ... 1975, vol. II, pp. 58-59, document A/CN.4/10010/Rev.1, para. 49), consideration will also be given in this chapter to this aspect of the more general question of how the basic characteristics of the obligation concerned affect the determination of whether it has been breached. But it is clear, and this must be stressed explicitly so as to avoid misunderstandings on the subject, that the rule of prior exhaustion of local remedies will only be taken into consideration from the point of view of its justification. The eventual definition of the scope of the rule, the description of the technique of its application, the analysis of its procedural aspects, and the determination of the conditions of its application in accordance with general international law and certain treaties will have to be examined in another context, that of the “implementation” (“mise en œuvre”) of international responsibility.
the attribution of an act to the State. Where necessary, we shall therefore have to make up for this lack by giving careful consideration, as a source of guidance when defining certain rules, to the true requirements of the contemporary international community and to the more authoritative ideas and tendencies which are emerging. In other words, the progressive development of international law will sometimes have to take precedence over codification pure and simple.

2. Source of the International Obligation Breached

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

The problem posed logically involves another: that of establishing whether the diversity of the sources of international obligations should not at least have some influence on the determination of different regimes of responsibility and, correspondingly, of different types of internationally wrongful acts. Most systems of internal law make a distinction, for example, between two different regimes of liability for civil wrongs: one of which applies to the breach of an obligation assumed by contract, the other to the breach of an obligation created by another source (statutes, rules, etc.). On this basis, legal theory has distinguished two types of civil wrongs, contractual and extra-contractual. Should the same course be followed in the case of international law? Should international law make provision for different regimes of responsibility depending on whether the obligation breached is established by a treaty or a customary rule, or whether it arises from a general normative treaty or a treaty intended only to establish special legal relationships?

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

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

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

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

15 See D. P. O'Connell, International Law, 2nd ed. (London, Stevens, 1970), vol. II, pp. 962 et seq. and 976 et seq. The parallel which the author believes can therefore be drawn with the distinction existing in internal law seems to the Special Rapporteur to be a false analogy.
aspect of the responsibility incurred by States within the framework of the international legal order. What these writers have in mind is State responsibility for the breach, not of an international obligation proper, but of an obligation, generally of a purely economic nature, provided for in a "contract", i.e., by an instrument of internal law, which retains that status even when it is concluded by one State with another State, and which is, moreover, generally concluded between a State and foreign individuals. Such contracts are not agreements in which the contracting State or States participate as subjects of international law, and they are therefore in no way "international treaties". They are generally governed by the legal system of the State (or one of the States) which concludes them; according to some writers, they are sometimes governed by another legal system, a "transnational" law,18 an "international law of contract"19 a "quasi-international" law.20 There is no need to discuss these questions here: it is sufficient to emphasize that such contracts are not governed by the international legal order.19 The breach by the State of an obligation it has entered into under a contract of this kind does not therefore constitute as such the objective element of an internationally wrongful act and is scarcely likely to entail international responsibility on the part of that State; it is governed by a different legal order, and whether that order is national or of another kind is largely immaterial. This situation would change only if the existence of a genuine international obligation was established, the source of which was a custom or a treaty making it incumbent upon the State to respect a specific "contract" or "contracts" concluded with individuals. But, even then, the material conduct of failing to respect the "contract" would constitute an internationally wrongful act only if such conduct also entailed the breach by the State of the international obligation it had assumed on the subject.20

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


20 See H. Pazarci, op. cit., pp. 49 et seq.

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

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

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

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

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

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

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

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

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

complained of involved the breach of an international obligation arising out of a treaty or a general rule of law.\textsuperscript{22}

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

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

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

... it is a universally recognized principle of international law that a State is responsible for breaches of public international law committed by its agents...\textsuperscript{24}

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

... an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard.\textsuperscript{25}

18. Finally, another very simple but none the less important observation must be made. One has only to consider the enormous mass of international decisions in which the existence of an internationally wrongful act and, hence, of international responsibility of the State has been recognized, to observe that the breach attributed to the State in these awards was sometimes the breach of an obligation established by a treaty, sometimes the breach of an obligation originating in customary law, and sometimes, though less frequently, the breach of an obligation arising from a different source of international law. This observation is quite enough to convince us that, in the opinion of the judges and arbitrators who rendered these awards, the breach of an international obligation is always an internationally wrongful act, regardless of the source of the obligation in question.

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

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

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

\textsuperscript{23} United Nations, Reports of International Arbritral Awards, vol. XIV (United Nations publication, Sales No. 65.V.4), p. 163.


\textsuperscript{25} Ibid., vol. IV (United Nations publication, Sales No. 1951.V.I.), p. 678. In another award of July 1931, relating to the case of the International Fisheries Company, the same Commission affirmed that it held States responsible for any conduct which violated "some principle of international law" (ibid., p. 701).
21. The “request for information” addressed to Governments by the Preparatory Committee of the Conference contained no proposals which were specifically designed to ascertain the views of the countries invited to the Conference as to whether the breach of a treaty obligation should have consequences different from those arising from failure to observe a customary or other obligation. However, this question was contained implicitly in the wording of points II, III and IV.

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

23. Point III, No. 1, of the “request for information” inquired whether the State became responsible by virtue of having enacted legislation incompatible with the treaty* rights of other States or with its other international obligations,* or of having failed to enact legislation necessary for the purpose of implementing the treaty obligations of the State or its other international obligations.*28

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

... irreconcilable with the treaty obligations* or the international duties of the State.*29

All the Governments which replied to these specific questions did so in the affirmative. None of them proposed that a distinction should be drawn in respect of State responsibility between the breach of a treaty obligation and the breach of an obligation arising from another source, whatever it might be.30 Taking into account the replies received, the Preparatory Committee drafted the following two Bases of Discussion:

**Basis of discussion No. 2**

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

**Basis of discussion No. 5**

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

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

**Article 2**

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

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26 League of Nations, Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, Supplement to vol. III (C.75(a).M.69(a),1929 V), pp. 2, 6 et seq.
28 Ibid., pp. 48 and 223 respectively. Basis No. 7, relating to the acts of executive powers, reproduced the wording of Basis No. 2 in the French text, and that of Basis No. 5 in the English text (ibid., pp. 55 and 223 respectively).
29 At the outset of the Committee's work, the Italian representative, Mr. Cavallari, proposed that the clause “resulting from treaty or otherwise” should be deleted or, at the very least, replaced by the words “resulting from treaties or from recognized principles of international law”. In any event, he considered that it was neither necessary nor appropriate to specify the sources of international obligations in the convention. However, the Committee did not share that view and entered into a thorough discussion of the question of sources, which thus was dealt with first by the Committee for three meetings, then by an ad hoc sub-committee, and then again by the Committee itself (League of Nations, Acts of the Conference for the Codification of International Law (held at The Hague from 13 March to 12 April 1930), vol. IV, Minutes of the Third Committee (C.531(e).M.145(e),1930 V), pp. 32 et seq.,112 et seq.,116 et seq.,159 et seq.) (op. cit., p. 237), but the Committee was no longer in a position to examine that proposal. The two versions of article 2 are reproduced in Yearbook ..., 1956, vol. II, p. 225, document A/CN.4/96, annex 3.
30 The Drafting Committee then proposed that the words “... obligations resulting from treaty, custom or the general principles of law” should be replaced by the words “... obligations which result from treaties as well as those which are based upon custom or the general principles of law ...” (League of Nations, Acts of the Conference ... (op. cit.), p. 237), but the Committee was no longer in a position to examine that proposal. The two versions of article 2 are reproduced in Yearbook ..., 1956, vol. II, p. 225, document A/CN.4/96, annex 3.
The language is not particularly precise and, from the standpoint of the problem which was discussed at such great length, it can in the end be deemed incomplete, for it appears to ignore the possible existence of international obligations arising from sources other than those expressly mentioned in the article.33 However, there can be no doubt as to the answer to the question at issue, which is not whether such obligations exist with regard to the treatment of foreigners, but rather, whether the breach of any existing acknowledged international obligation entails State responsibility. The Committee intended undoubtedly to accord equal status, as regards responsibility resulting from the breach of an international obligation, to all international legal obligations which exist with respect to the treatment of foreigners, without for this purpose drawing any distinction between the source of such obligations. None of the many speakers who took part in the discussion gave any indication that he envisaged the existence of international obligations the breach of which would not constitute an internationally wrongful act.

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

26. Before concluding the discussion of the views of Governments and their official representatives in the course of efforts to codify international responsibility, it would seem useful to recall that it was never suggested in the discussion of the reports of the International Law Commission in the Sixth Committee of the General Assembly that breaches of obligations resulting from treaties, custom or some other source should be subject to different régimes of responsibility. While it is true that members of the Sixth Committee at times recommended that the International Law Commission should devote particular attention to the consequences of the breach of obligations arising out of certain principles of the Charter of the United Nations or certain “legal” resolutions of the General Assembly,40 those suggestions obviously were prompted by the particularly important content of the obligations in question rather than by their source.

27. The codification drafts relating to State responsibility drawn up by private bodies as well as those prepared under the auspices of international organizations, are based on the same criteria as international judicial decisions and State practice. Most of those drafts attach international responsibility to the breach of an international obligation, without taking into account the origin of the obligation.41 In a few rare cases, the proposition that failure to comply with an international obligation entails the responsibility of the State is followed by an indication of what are deemed to be the sources of the international obligations. All that can be deduced from this, however, is that for the authors of those drafts the only international obligations which exist are those derived from the sources enumerated; there can be no doubt

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

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

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


39 League of Nations, Acts of the Conference ... (op. cit.), p. 111 and 129 et seq.


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

42 Among the drafts drawn up by private bodies, see that of the Kokusai Gakkai of 1926, article 1 (Yearbook ... 1969, vol. II, p. 141, document A/CN.4/217 and Add.1, annex II); rule 1, first para. of the resolution adopted by the Institute of International Law in 1927 (Yearbook ... 1936, p. 227, document A/CN.4/96, annex 8); the 1930 draft of the Deutsche Gesellschaft für Völkerrecht, article 1, para. 1. (Yearbook ... 1969, vol. II, p. 149, document A/CN.4/217 and Add.1, annex VIII); the 1927 draft by K. Strupp, article 1, first para. (ibid., p. 151, document A/CN.4/217 and Add.1, annex IX); the 1932 draft by A. Roth, article 1 (ibid., annex X), and the very recent one prepared by B. Gräfeth and P. A. Steiniger, “Kodifikation der völkerrechtlichen Verantwortlichkeit”, Neue Justiz (Berlin), vol. 8 (1973), p. 227. Among the drafts prepared under the auspices of international organizations, see the bases of discussion prepared by F. V. Garcia Amador (Yearbook ... 1956, vol. II, p. 219, document A/CN.4/96, para. 241).
that, in the view of these authors, the breach of an international obligation, whether it results from one or another of such sources, always constitutes an internationally wrongful act and always entails international responsibility. It is of particular interest to note that the preliminary draft prepared in 1957 by F. V. García Amador explicitly provides that international obligations whose breach entails State responsibility are those "resulting from any of the sources of international law". It should be added that none of the drafts to which reference is made envisages the possibility of applying different regimes of responsibility according to whether the obligation breached results from one source rather than from another.

28. The works of writers who have discussed the international responsibility of States give but scanty treatment in their works to the question of the possible significance of the source of the international obligation breached. Many writers are content merely to state that an internationally wrongful act and, hence, international responsibility, exist if there has been a breach of an international obligation. Thus they do not refer explicitly to the source of the international obligation breached, either in order to make it the basis for the characterization of the conduct inconsistent with that obligation as wrongful, or in order to draw conclusions from it regarding the regime of responsibility applying to that conduct. Clearly, this silence is tantamount to an implicit recognition of the fact that the source of the obligation has no bearing on the conclusions reached on these two matters. It is of interest to point out, too, that there are also writers who state explicitly that at the present stage international law does not distinguish between internationally wrongful acts according to the source of the obligation breached and who sometimes formulate this conclusion in very clear terms.

43 According to conclusion 1 of the 1926 Guerrero Report to the League of Nations, "Since international responsibility can only arise out of a wrongful act, contrary to international law, committed by one State against another State, damage caused to a foreigner cannot involve international responsibility unless the State in which he resides has itself violated a duty contracted by treaty with the State of which the foreigner is a national, or a duty recognized by customary law in a clear and definite form." (Yearbook 1956, vol. II, p. 222, document A/CN.4/96, annex 1.) See also conclusion 3 (ibid.)

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

Finally, para. 165 of the Restatement of the law prepared in 1965 by the American Law Institute provides that "Conduct attributable to a State and causing injury to an alien is wrongful under international law if it
(a) Departs from the international standard of justice, or
(b) Constitutes a violation of an international agreement".

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

(a) The applicable principles of international law as established by international custom, judicial and arbitral decisions, and other recognized sources or, in the absence of such applicable principles,
(b) Analogous principles of justice generally recognized by States that have reasonably developed legal systems" (Yearbook 1971, vol. II (Part One), p. 193, document A/CN.4/117/Add.2).

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

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

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48 For a criticism of this parallelism, see Scerni, loc. cit. and Vitta, loc. cit.

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

50 G. I. Tunkin, op. cit., pp. 192 et seq., calls attention to the fact that many rules of international customary law have now been codified by means of multilateral treaties, so that the same obligation is covered by a customary rule and a rule contained in a codification convention. It would not be logical to apply two different régimes of responsibility to two identical actions simply because in one instance the State committing the action was a party to the codification convention and the other was subject only to the obligations resulting from custom.
the text special provisions to that end. Apart from this case, however, there would seem to be no justification for making breaches of obligations arising from conventions subject to a different kind of responsibility from that entailed by breaches of obligations arising from custom.

31. Another possible distinction (much closer to that drawn in internal law between contractual liability and extra-contractual or delictual liability), is that which might be made between the breach of an obligation established by a normative treaty or treaty-law and the breach of an obligation established by a treaty-contract. In the category of treaty-contracts would be included those conventions which give rise only to specific relationships between given subjects, whereas the category of normative treaties would comprise multilateral conventions concluded for the purpose of establishing rules of objective law. The responsibility entailed by the breach of an obligation arising from a normative treaty, like the responsibility entailed by the breach of obligation arising from custom, would thus be considered to be delictual responsibility; the responsibility entailed by the non-observation of an obligation created by a treaty-contract would be defined as contractual responsibility. To adopt such an approach, however, may be of questionable usefulness.31 While perhaps easy to establish in theory, the distinction between the two categories of treaty may become much less easy to maintain in actual practice.32 A large grey area inevitably remains between treaties that clearly fall within the treaty-law category and those which unquestionably fall in the category of treaty-contracts. This observation has compelled several writers to abandon the idea of a distinction, despite the attraction the idea has exercised on them. Those who have remained faithful to the idea of a distinction have nevertheless avoided drawing consequences from it in such delicate areas as that of responsibility. To establish a distinction in the régime of responsibility for internationally wrongful acts on such a basis would entail a dangerous confusion of boundaries. This is not likely to serve the true interests of the international community. Moreover, in French civil law, the pre-eminence of these obligations over others is determined by their content and not by the process through which they were created. It is precisely because of this content that respect for the obligations in question appears sufficiently important to the international community as a whole to justify more serious consequences for the perpetrator of a breach. In other words, the responsibility entailed by a breach of an international obligation should be more serious not because the obligation has one origin rather than another, or because it is embodied in one document rather than another, but because international society has a greater interest in ensuring that its members act in accordance with the specific requirements of the obligation in question. In the final analysis, any distinction between the régimes of responsibility to be applied to breaches of the different types of obligation should be based on considerations quite other than those of the "source" of those obligations. It will therefore be necessary to consider this important question in detail in another section of this chapter.

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

33. It seems appropriate at this point to review the observations made and the considerations presented. A study of international judicial decisions and State practice has led to the two following conclusions: under existing international law, the source of the international obligation affected by the conduct of a State has no bearing on the characterization of such conduct as an internationally wrongful act. Nor does it have any bearing on the régime of responsibility applicable to the internationally wrongful act. As to the advisability or inadvisability of promoting a change in the existing situation, a succession of different hypotheses has been advanced but in each case the findings
have been negative. If the International Law Commission agrees with the Special Rapporteur on this point, it will then remain only to decide on appropriate terms for the translation of these findings into an article in the draft.

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

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

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

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

Article 16. Source of the international obligation breached

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

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

3. Force of an international obligation

37. We have already shown⁴⁴ that, in addition to the question of the “source” of the obligation breached, we have to consider another question, still in connexion with the formal aspects of the obligation, namely, that of its “force”. We have to consider whether the fact that the international obligation was in force at the time when the State engaged in conduct incompatible with the obligation is or is not an essential condition for concluding that an international obligation has been breached.

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

⁴¹ It has already been noted (para. 27 and note 44 above) that Mr. Garcia Amador proposed similar wording in article 1, para. 2, of the preliminary draft submitted by him in 1957 and article 2, para. 2, of the revised draft submitted in 1961.

⁴⁴ See para. 8 above.
it adopted the said conduct. We must therefore consider the question, what rule of international law is applicable to the three possible cases we have just stated?

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

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

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

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

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

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

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

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

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

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

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

56 P. Tavernier, Recherche sur l’application dans le temps des actes et des règles en droit international public (Problèmes de droit intertemporel ou de droit transitoire), (Paris, Librairie générale de droit et de jurisprudence, 1970), p. 129, observes: “the rule formulated by Max Huber was expressed in deliberately broad terms and that confers on it a scope which goes well beyond the simple case under consideration . . . The notion of appreciation covers, in our opinion, not only the question of the interpretation of instruments and rules but also that of the determination of their validity and their effects” [Translation from French].
59 There is one further point worth remembering. Very occasionally, a treaty provides that some of its provisions shall continue to apply after the termination of the treaty itself. Article XIX of the Convention on the Liability of Operators of Nuclear Ships, of 25 May 1962, has been mentioned in this connexion (Yearbook . . . 1964), vol. II, p. 179, document A/5809, chap. II, Sect. B, draft articles on the law of treaties, para. 6 of the commentary to article 56; and P. Gugenheim, Traité de droits internationaux publics (Geneva, Georg, 1967), vol. I, p. 219). The article in question simply states that certain obligations created by the Convention with regard to damage caused by nuclear incidents shall remain in force for a given period, notwithstanding the termination of the Convention and the other obligations it creates. Consequently, if a nuclear incident takes place after the termination of the treaty and a State

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

44. *A priori,* it seems quite logical that international law should reject the internal penal law principle of applying the most favourable law to the accused. Although such a principle may be justified in a relationship where the individual is opposed to society, as represented by the State, it seems out of place in a relationship where one State is opposed to another State. To apply the most favourable law to a State which commits an offence would mean applying the most unfavourable law to the State which is injured by the offence. Moreover, if we follow the general logical principle stated by Max Huber in his award in the *Island of Palmas* case,\(^{69}\) we are obliged to answer in the affirmative the question whether international responsibility exists where the conduct of a State at the time the conduct takes place is in breach of an international obligation then in force, regardless of whether the obligation has ceased to be in force by the time the dispute is settled.

45. In any case, to proceed inductively in accordance with our usual practice, what appears to be decisive is the fact that in specific cases where the question has arisen, the attitude of adjudicators and diplomats fully confirms the conclusion which would seem to follow in the first place from considerations of principle. To begin with, there are the awards delivered by J. Bates, umpire of the United States-Great Britain Mixed Commission set up under the Convention of 8 February 1853. The cases referred to the Commission included a number relating to the conduct of British authorities towards American vessels engaged at the time in the slave trade. The United States claimed compensation from Great Britain because British authorities had freed a number of slaves who were on board American vessels and belonged to American nationals, or had seized vessels fitted out for the slave trade. In the view of the umpire, the answer to the question whether the conduct of the British authorities was a breach of an international obligation depended upon the answer to the preliminary question whether slavery was “contrary to the law of nations”. In the umpire's opinion, if the answer to the preliminary question was in the negative, the conclusion must be that the conduct of the British authorities was a breach of the international obligation to respect and protect the property of foreign nationals and to afford shelter in British ports to foreign vessels in distress. In that case, the British Government would be required to pay compensation, but it would not be if the answer to the preliminary question was in the affirmative. Now the incidents referred to the Commission had taken place at different times. The umpire therefore set out to establish whether or not at the time each incident took place, slavery was “contrary to the law of nations”. On that basis, he found as regards the earlier incidents—dating back to a time when, in his view, the slave trade still existed by law in “several countries”, including some British dominions—that the conduct of the British authorities was a breach of an international obligation and entailed the international responsibility of Great Britain.\(^{61}\) The later incidents, on the other hand, he held to have occurred when slavery, in his opinion, had been “prohibited by all civilized nations”, including the United States, whose protection the slave owners were accordingly unable to claim. No responsibility, he therefore held, could be imputed to Great Britain.\(^{62}\) To sum up, the umpire laid

\(^{69}\) This is what happened in the case of the *Enterprize*, which in 1835, being in distress, had had to put into harbour in the British colony of Bermuda. The local authorities had freed the slaves found on board. While condemning slavery on grounds of justice and humanity, the umpire said that it was not “contrary to the law of nations” at the time and that the *Enterprize* was as much entitled to protection as though her cargo consisted of any other description of “property”. He therefore found the behaviour of the Bermuda authorities a breach of the law of nations and awarded compensation, to be paid by Great Britain to the owners of the slaves (J. B. Moore, op. cit., vol. 4, pp. 4372-4373). The umpire applied the same principles in the *Hermosa* and *Creole* cases (ibid., pp. 4374 et seq.). For the French text of these awards, see A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux* (Paris, Les éditions internationales, 1957), vol. I, pp. 703 et seq.

\(^{61}\) He made this award in the case of the *Lawrence*, a vessel which in 1848 was forced to seek the coast of Sierra Leone, a country under British dominion. When the vessel arrived at Freetown, it was seized, condemned and confiscated, along with its cargo, for having been equipped for the slave trade in a British port. The umpires awarded that “since the African slave trade, at the time when the vessel was condemned, was prohibited by all civilized nations, it was contrary to the law of nations”; and since it was prohibited by United States law, the owners of the *Lawrence* could claim no protection from their Government. The umpire therefore held that the owners of the *Lawrence* could “have no claim before this Commission” (Moore, op. cit., vol. 3, pp. 2824-2825). (For the French text of this award, see A. de Lapradelle and N. Politis, op. cit., p. 741.) The umpire followed the same principles in his award in the *Volusia* case (ibid.).
down as a condition for establishing that there had been a breach of an international obligation, and consequently a wrongful act entailing responsibility, that the conduct of the organs of the State has been contrary to an obligation in force at the time when the conduct took place. And having ruled that at the time in question the obligation still existed, the fact that it later ceased to exist and was no longer in force at the time of the award was in his opinion irrelevant.

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

Whereas the Arbitrator has to decide:
I. Whether the seizure and confiscation of the schooner James Hamilton Lewis and its cargo, as well as the imprisonment of its crew, are to be considered as unlawful acts;
II. . . .

Ad. I. Considering that this question should be settled according to the general principles of the law of nations and the spirit of the international agreements in force and binding upon the two High Parties at the time of the seizure of the vessel;
That at that time there was no Convention between the two Parties providing for a derogation in the special case of seal-hunting, from the general principles of the law of nations with respect to the breadth of territorial sea;
. . . .
Considering that any agreements concluded between the Parties after the date of the seizure and confiscation of the James Hamilton Lewis cannot affect the consequence resulting from the principles of international law generally recognized at the time when those acts were performed:
. . . .
The Arbitrator then examines the question whether, according to the principles in force at the time of the alleged acts, Russia had the right to seize the American schooner. Having answered that question in the negative, he concluded that “Since the seizure and confiscation of the James Hamilton Lewis and its cargo, as well as the imprisonment of the crew, must consequently be considered as unlawful acts”; Russia was required to pay damages to the United States for the acts in question.64 Mr. Asser therefore states even more clearly than Mr. Bates the principle that conduct of a State constitutes an internationally unlawful act entailing its international responsibility if such conduct is contrary to an international obligation in force when the conduct took place, even where the obligation has subsequently ceased to exist and is no longer in force at the time of the award. It is true that, in the case in point, the arbitrator was bound by the compromis itself to apply the law in force at the time the acts were performed; consequently, his position is primarily a reflection of a treaty rule. However, as already stated65 all the indications are that, by expressly embodying the principle in the compromis the parties simply wished to confirm the application of the principle in question and not to establish an exception to a different principle hallowed by custom.

47. More recently, we find the same principle stated once again in the decision rendered on 5 October 1937 by Arbitrator J. C. Hutcheson in the Lismam case. Before examining the facts of the complainant’s claim, the Arbitrator ruled that these facts are to be read, examined, and interpreted in the light of the applicable principles of international law, as that law existed in 1915, when the acts complained of are alleged to have transpired, the wrongs complained of having been inflicted, and the claim, if ever, arose.66

Lastly, it may be recalled that the International Court of Justice has recently recognized the same principle in its Judgment of 2 December 1963 in the Northern Cameroons case between Cameroon and the United Kingdom. The Court found that if during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship Agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust.67

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

On the other hand, the treaty continues to have effects for the purpose of determining the legality or illegality68 of any act done while the treaty was in force or of any situation resulting from its application; in other words, rights acquired under the treaty, whether in consequence of its performance or its breach, do not lapse on its termination.69

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

63 See para. 41 above.
67 I.C.J. Reports 1963, p. 35.
68 Yearbook . . . 1964, vol. II, p. 179, document A/5809, chap. II, sect. B, para. 6 of the commentary to article 56. Article 56, para. 2 lays down that the provisions of a treaty do not apply "to a party in relation to any fact or act which takes place or any situation which exists after the treaty has ceased to be in force with respect to that party, unless the treaty otherwise provides" (ibid., p. 177). Referring, in the same commentary, to draft article 33, the Commission noted, in re-examining that article, that "as wording might need some adjustment in order to take account of acquired rights resulting from the illegality of acts done while the treaty was in force" (ibid., p. 179).
69 United Nations, Reports of International Arbitral Awards, vol. IX (op. cit.), pp. 69 et seq. [translation from French]. Arbitrator Asser developed the same arguments in his decision in the C. H. White case (ibid., p. 74 et seq.).
In our view, it is important to consider certain possible cases which, though they may not have arisen in the past and are unlikely to arise in the future, except very seldom, should nevertheless not be disregarded. This will perhaps be clearer if we have another look at the freeing-of-slaves cases mentioned above.\(^6\) In a first series of cases, Umpire Bates held Great Britain responsible for having freed a number of slaves found aboard a United States vessel, since in his opinion such an act was a breach of the international obligations incumbent on Great Britain at the time when the slaves were freed. Yet he acknowledged, at least implicitly, that such an act would have been lawful if it had taken place at the time when he rendered his award. Now if we ourselves had to decide the Enteprise case, should we reach the same conclusion as Umpire Bates? There is no doubt that we should be loath to do so,\(^7\) for the simple reason that, between the date of the Umpire’s decision and the present day, a profound change has occurred in the rules of international law concerning the question to which this case related. We should be forced to take a different decision from Umpire Bates by the fact that slavery and the slave trade are no longer merely—as Bates noted at the time—practices prohibited by the law of “civilized nations”: they have become practices banned by a humanitarian rule of international law which is considered by the international community as a whole, as fundamental and, we believe, “peremptory.”\(^8\) States have reciprocally undertaken to combat such practices by all the means at their disposal. This is therefore a rule which, in our opinion, would prevent us, even as far as the past is concerned, from finding a source of international responsibility in conduct which has in the meantime become not only “lawful”, as at the time of the Bates’ decisions, but also “due”: the refusal to grant protection to individuals engaging in a practice which is unanimously condemned, and action designed to prevent this practice from attaining its inhuman goals.

50. Of course, it could be objected that it is difficult to imagine an arbitrator being entrusted, now, with the settlement of a dispute caused by conduct adopted at a time when the slave trade was still internationally lawful. But other situations can be envisaged in which the lapse of time between the moment when a State adopted conduct contrary to an existing international obligation incumbent upon it, and the moment when that obligation was abrogated or even replaced by a contrary obligation, as a result of the supervision of a “peremptory” rule of international law, would not be so long. For instance, it is not inconceivable that an arbitrator could today be called upon to decide an old dispute concerning the international responsibility of a State which, being required under a treaty in force to deliver arms to another State, had refused to fulfill its obligation, knowing that the arms were to be used for the perpetration of genocide or aggression, and had done so before the norms of jus cogens prescribing genocide and aggression had been adopted. Can anyone imagine an arbitrator condemning a State which had refused to pay compensation for evading, at that time, the fulfilment of an obligation which would today appear as participation in an international crime? There are other possible cases too which could arise in the future. Consequently, if the Commission agrees, the Special Rapporteur would be inclined to recognize an exception\(^7\) to the basic rule that the lawfulness or unlawfulness of particular conduct is decided by reference to the obligations incumbent on the State at the time when the conduct was adopted: the exception would state that conduct of a State which, although wrongful at the time of its adoption would, in the light of contemporary international law, be judged not only lawful, but legally required under a peremptory rule of that law, does not entail the international responsibility of that State.

51. It remains to examine the third case,\(^7\) which may be summarized as follows: The State adopts a given conduct at a time when that conduct is not contrary to any international obligation incumbent upon it; subsequently, a new obligation is imposed on the State, in the light of which conduct such as that previously adopted by the State is characterized as wrongful. Is it possible to see a breach of the new obligation, and consequently an internationally wrongful act entailing responsibility, in the conduct adopted by the State at a time when the new obligation did not yet exist or, at least, did not exist for the State implicated? That is the question.

52. In internal law, the principle that a person may not be held criminally liable for an act which was not prohibited at the time he committed it (nullum crimen sine lege praevia) is a general rule of all legal systems. It is always included in the general provisions of the penal code and sometimes even in the constitution of the State: in the latter case there is even a prohibition on derogation from the principle by ordinary legislation. The same principle is stated in the Universal Declaration of Human Rights of 10 December 1948,\(^4\) in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950,\(^7\) and in the International Convenant on Civil and

\(^6\) See para. 45 above.

\(^7\) Whereas we would probably have no hesitation in settling a dispute of the kind in the James Hamilton Lewis case (see para. 46 above) in terms similar to those of Arbitrator Asser’s award.

\(^8\) No one can challenge the jus cogens character—as defined in article 53 of the Vienna Convention on the Law of Treaties—attaching to the rule prohibiting slavery and the slave trade and binding all States to cooperate in punishing this practice. It is difficult to imagine a more typical example of a void treaty than a treaty concluded between two States for mutual assistance in the trade in slaves.


\(^7\) This exception would not, of course, have any retrospective effect on the lawfulness of what might have happened at the time as a legitimate reaction to conduct then considered wrongful.

\(^7\) see para. 38 above.

\(^4\) General Assembly resolution 217 A (III). Article 11, paragraph 2 of the Declaration provides that:

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

\(^7\) United Nations, Treaty Series, vol. 213, p. 221. Article 7, paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides that:

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed . . .”.
Political Rights of 16 December 1966. In matters of civil responsibility, the principle in question is not so often expressly stated, but there is no doubt that in this sphere too it constitutes the general rule. Moreover, the raison d'être of the principle is obvious: first, since the main function of rules imposing obligations on subjects of law is to guide their conduct in a certain direction and divert it from another, this function can only be fulfilled if the obligation exists before the subjects prepare to act; secondly, and above all, the principle in question provides a safeguard for the said subjects of law, since it enables them to foresee the legal consequences of their acts or omissions—or, more precisely, to establish in advance what their conduct must be if they wish to avoid a penal sanction or having to pay compensation for damage caused to others.

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

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

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

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

... the lawful termination of a treaty:

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

It is an inescapable consequence of such a provision that any conduct authorized by a treaty and adopted by the State while the treaty is in force continues to be considered lawful even if prohibited by a customary rule coming into force between the parties after the termination of the treaty or by a new rule laid down by a new treaty. We have already quoted the passage from the Commission's commentary to article 56, paragraph 2, which states that, after its termination, "the treaty continues to have effects for the purpose of determining the legality or illegality of any act done while the treaty was in force or of any situation resulting from its performance or its breach, do not lapse on its termination."

Admittedly, this commentary relates primarily to the case of conduct prohibited by a rule of a treaty which has terminated, but permitted by a customary or treaty rule which has succeeded it. But it can also relate to the converse case, that of conduct authorized by a rule of the treaty but prohibited by a customary or treaty rule which has succeeded it.

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

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

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

77: M. Suresnes, "Le problème dit du droit intertemporel dans l'ordre international", Provisional Report, Annuaire de l'Institut de droit International, 1971 (Basle), vol. 55, p. 31, notes that:

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


80: See para. 48 above.

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

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

58. It may be useful, on the other hand, to add one small point of detail. A treaty sometimes provides that the obligations it imposes on the parties shall be retroactive. This is expressly permitted by article 28 of the Vienna Convention. Now the fact that the clauses of a treaty provide for retroactive obligations in no way signifies that the parties have necessarily agreed to consider unlawful the conduct adopted by one of them before the treaty entered into force, which would naturally be different from the conduct required by the treaty. D. Bindschedler-Robert cites as an example the Convention of 17 October 1951 between Italy and Switzerland, concerning social insurance. This Convention stipulates that it shall enter into force on the day of the exchange of instruments of ratification (which took place on 21 December 1953), but with retroactive effect to 1 January 1951. Obviously this stipulation does not mean that a government bound by the treaty to provide certain insurance services and not having provided those services before the treaty entered into force, is therefore to be considered as the author of an internationally wrongful act. The stipulation in question only imposes on the Government concerned the obligation, after the entry into force of the treaty, to provide the required services for starting a war of aggression or committing genocide had to be undertaken, care was taken to show that the prohibition of such crimes was covered by the international law in force at the time of their commission, and thus that there was no question of applying new international obligations retroactively.

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

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

84 Even at particularly grave moments in history, such as those at the end of the Second World War, when the punishment of acts such as
the two previous years also.\footnote{Another example is the Agreement of 20 August 1971 between Italy and Tunisia concerning fishing in Tunisian waters. The Agreement, concluded for a certain number of years as from 1 January 1971, came into force in accordance with its provisions on 2 January 1973. After that date, the Italian Government was required to pay the Tunisian Government the annual sum stipulated in the treaty and also to pay it for 1971 and 1972. But that was all.} As the above-mentioned writer notes, in a case of this kind

... the extent of obligations to provide ... services depends on previous facts and situations. Nevertheless, the rule of conduct thus established is not in itself retroactive, it only creates obligations for the future, and does not mean that the conduct of a State during the period preceding the convention is to be judged, as to its legality, in the light of the convention, so that any such conduct would constitute a wrongful act, with all the consequences entailed thereby.\footnote{D. Bindschedler-Robert, loc. cit., p. 194 [translation from French].}

59. The writers who have dealt with the international responsibility of States have devoted only very limited attention to the problem discussed in this section. It is rather in works on the succession of rules of international law in the course of time that we find some cursory investigations of this subject. Among the most interesting may be mentioned a monograph by P. Tavernier,\footnote{Op. cit., p. 119 et seq., 135 et seq., 292 et seq.} the reports of M. Sørensen to the Institut de droit international,\footnote{Loc. cit., pp. 1 et seq., and in particular pp. 38 and 56 et seq.} and articles by J. T. Woodhouse,\footnote{"The principle of retroactivity in international law", The Grotius Society. Transactions for the Year 1953 (London), vol. 41 (1956), p. 69 et seq.} H. W. Baade,\footnote{"Inter tempore Völkerrechte", Jahrbuch für Internationales Recht, vol. 7, nos. 2-3 (January 1958), p. 229 et seq.} D. Bindschedler-Robert,\footnote{Loc. cit., p. 184 et seq.} and M. Sørensen.\footnote{"Le problème inter-temporal dans l'application de la Convention européenne des droits de l'homme", Mélanges offerts a Polys Modinos (Paris, Pedone, 1968), pp. 304 et seq.} The manuals of international law of P. Guggenheim,\footnote{P. Guggenheim, op. cit., pp. 215 et seq.} Ch. Rousseau\footnote{Ch. Rousseau, Droit international public (Paris, Sirey, 1970), vol. 1, pp. 198 et seq.} and R. Monaco,\footnote{Op. cit., pp. 173 et seq.} contain outlines of the question. All these writers recognize that, apart from the case in which a contrary intention appears from a particular treaty, the lawfulness or wrongfulness of an act must be established on the basis of obligations deriving from the rules in force at the time the act was performed.\footnote{See, in particular, P. Tavernier, op. cit., p. 135 et seq.; M. Sørensen, "Le problème dit du droit intertemporel ..." (loc. cit.), pp. 38 and 56 et seq.} No mention is made of possible exceptions to the general rule.

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

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

2. In application of this principle:

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

3. States and other subjects of international law shall, however, have the power to determine by common consent the temporal sphere of application of norms, notwithstanding the rules laid down in Paragraphs 1 and 2 and subject to any imperative norm of international law which might restrict that power.\footnote{Annuaire de l'Institut de droit international, 1975, vol. 56 (Basle), pp. 537 and 539.}

61. The investigation conducted so far has established with certainty the existence of a basic principle which, although subject, as we have seen, to an exception relating to a very special situation, undoubtedly has general validity, provides a solution applicable to all the different cases we have successively considered, and is unanimously recognized by international jurisprudence, State practice, and the learned writers who have dealt with the question. According to this principle, there is a breach of a specific international obligation by a State if that obligation was in force for the State at the time when it adopted conduct contrary to that required by the obligation. The time might thus have come to formulate this principle as an article, were it not necessary, before concluding, to take account of certain complications introduced by the complexity and the great variety of State conduct. For the application of the basic principle would not give rise to difficulties in the case of "instantaneous" conduct, or, indeed, in the case of conduct which, although spread over a period of time, nevertheless fell wholly within the period for which the obligation was in force or, conversely, took place entirely outside that period. But difficulties of application could arise if the conduct was continuous over a period of time and began while prohibited by an obligation but ended after the extinction of the obligation or, vice versa, began at a time when the State was free to act in the matter and continued after the entry into force, for the State, of an obligation prohibiting such conduct. And matters might become further complicated if the non-coincidence of the duration of an act of the State with the continuous period in force of the international obligation of which the act constituted a breach, related not to "continuing" conduct of the State remaining, as such, identical throughout its duration, but to a series of separate acts relating to separate concrete situations which in aggregate could constitute a breach of the obligation in question ("composite" wrongful act), or to a succession of acts connected with the same situation, the conjunction of which would render complete and final the breach begun by the first of those acts ("complex" wrongful act).\footnote{The determination of the distinction to be made between "instantaneous" internationally wrongful acts and "continuing" internationally wrongful acts (permanent wrongs, Dauerverbrechen, illeciti permanenti), between "simple" acts and "complex" acts, between "simple" acts and "composite" acts, etc. will be one of the tasks that must be taken up later in this chapter, with special reference to the question of fixing the tempus commissi delicti and its consequences, in particular as regards reparation due. For the time being the Special Rapporteur will merely refer, for fuller treatment, to what he said on the subject in his lecture on "Le délit international" (R. Ago, loc. cit., pp. 506 et seq., 518 et seq., 522 et seq.).} It will therefore be necessary to devote some
attention to these different possible situations, in order of
succession.
62. Let us take first the case of a “continuing” act of the
State consisting, as we have just said, of conduct extending
over a period of time and of a lasting character, for
example, the act of maintaining in force a law which the
State is internationally required to repeal, or, conversely,
the act of not passing a law that is internationally required;
or again, the act of improperly occupying the territory of
another State, or of improperly obstructing the innocent
passage of foreign ships through a strait, or of establishing
an unlawful blockade of foreign coasts or ports, etc. There
is no real difficulty here in applying the basic principle.
There will be a breach of the international obligation with
which the conduct of the State is in conflict so far as, for
a certain time at least, the continuance of the act of the
State and the existence of the obligation incumbent on it are
simultaneous. If the conduct began before the obligation
came into force for the State and continues thereafter, there
will be a breach of the obligation from the moment when it
began to exist for the State. If, on the other hand, the
obligation was incumbent on the State at the time when the
conduct began and ceased to exist for the State before the
conduct ceased, there will be a breach of the obligation, and
an internationally wrongful act, from the time of the
beginning of the conduct until the extinction of the
obligation for the State.
63. The European Commission of Human Rights has
recently applied these criteria. It has declared admissible
applications revealing a “continuing violation” of the
European Convention for the Protection of Human Rights
and Fundamental Freedoms if the conduct constituting
such violation, although it had commenced, prior to the
entry into force of the Convention, continued thereafter.
The clearest expression of the Commission’s jurisprudence
is to be found in the celebrated De Becker case. There the
Applicant complained that, as a result of a conviction in
1947, he had had ipso facto been deprived for life of certain
rights, including the right to exercise his profession as a
journalist and writer. He argued that this deprivation
began to be followed, but during its continuation comes to be
characterized as unlawful by a new rule of international law, it is then
transformed ... into a wrongful act.” (R. Ago, loc. cit., p. 521)
[translation from French].

have been the victim of a “violation of the right to freedom
of expression guaranteed by Article 10 of the Convention”.
Accordingly, it ruled that the Application was admissible
in so far as it concerned “this continuing situation”.
64. Let us now deal with the other cases mentioned
above: those of acts of the State which are neither
instantaneous nor constituted by a single and continuing
conduct but (a) by a series of separate acts relating to
separate situations, which in the aggregate could constitute
a breach of an international obligation; or (b) by a
succession of acts connected with the same situation, the
conjunction of which would render complete and final
the breach begun by the first of those acts.
65. In the case described under (a) (a so-called “com-
posite” internationally wrongful act) there are two
possible situations: either the separate acts which, in the
aggregate would constitute a breach of an international
obligation, may, severally, be internationally lawful; or each
such act in itself may constitute a breach of an interna-
tional obligation other than that breached by the acts as a whole.

103 See para. 61 above.
104 On the distinction between a “composite” internationally unlawful
act and a “single” internationally unlawful act, see Ago, loc. cit. pp. 522
et seq.
Rejection of an application for employment by a worker of a particular nationality or race may not, as such, qualify as a breach of an international obligation, but rejection of a series of applications by persons in the same category may constitute a "discriminatory practice" prohibited by treaty. Again, a decision to expropriate an alien of an industrial or commercial enterprise may constitute as such, a breach of an international treaty obligation to refrain from such expropriations, but a series of expropriations of aliens of the same nationality or of aliens in general may, in the aggregate, qualify as a breach of another international treaty obligation, namely, the obligation to refrain from "discriminatory practices" in regard to industrial or commercial activities or from restricting the exercise of particular activities to nationals.

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

67. The case postulated under (b) above is that of a so-called "complex" internationally wrongful act. As will be shown later in this chapter, customary or treaty rules of international law often commit the State, not to a specific act or omission, but to the achievement of a certain result, frequently leaving the State to decide how it should set about achieving that result and particularly, allowing it to do so by means which are not necessarily extraordinary if the result could not have been achieved by ordinary means. If that is conceded, it would not be logical to regard the achievement of the result required by the international obligation as finally precluded so long as it is only one organ or certain organs of the State that have adopted a line of conduct different from the one which would have enabled the desired result to be achieved, and it is still possible for a superior organ to remedy the deficiency of the former. In such a case, a breach of the international obligation has undoubtedly been initiated but is not really complete. If, however, the last organs still capable of bringing about the situation required by the international obligation also fail to do so, the breach of the obligation will then be complete and will definitely entail the international responsibility of the State. For the purposes of the present discussion, it is important to note that such a breach, "initiated" by the act or omission of a given organ and "completed" by its confirmation by other organs, is thus constituted by a conjunction of separate successive acts of separate organs.107

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

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

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

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

108 See para. 68 above.
conduct was not in conformity with the result required by an international obligation then in force; it could not therefore have the effect of completing and making final a breach which had not until that time begun. Refusal to rescind the previous decision may, however, be accompanied by a refusal to allow a fresh application addressed direct to these superior organs. In that case, the refusal, as such, may represent the beginning of a complex process of breach of the obligation in question. The condition for the existence of a breach of obligation is accordingly the existence of an organ, whatever its nature, which by its act or omission has initiated the process of breach of an international obligation which has already entered into force. That breach will then undeniably have begun and unless action is taken to eliminate it completely, it will continue. Subsequent termination of the obligation may preclude future breaches of it, but cannot alter the fact that a breach has already begun. Consequently, if the other organs competent to intervene in the matter wish to prevent the breach from becoming consolidated and final and producing its effects in the sphere of international responsibility, they must act to bring the ab initio situation into conformity with the result required by the obligation, regardless of the fact that the obligation has meanwhile ceased. The validity of the solution suggested above therefore seems to be confirmed, regardless of how the intertemporal problem arises in the case considered.

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

**Article 17. Force of an international obligation**

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

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

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

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

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

   (c) is a complex act comprising the initial act or omission of a given organ and the subsequent confirmation of such act or omission by other organs of the State, it constitutes a breach of the obligation in question if that obligation was in force when the process of carrying out the act of the State not in conformity with such obligation began.

4. **Content of the international obligation breached**

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

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

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

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

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

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

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

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

114 See, in particular, the replies to point II of the request for information (League of Nations, Bases of Discussion ... (op. cit.), pp. 20 et seq.; and Supplementi to volume III, pp. 2 and 6).

115 See, in particular, the discussions held at the 2nd, 3rd, 4th and 13th meetings (League of Nations, Acts of the Conference ... (op. cit.), pp. 26–59 and pp. 159–161).
obligation, or because they are careful to specify that a breach of any international obligation may be involved.

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

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

79. It is less easy to answer the second of the two questions, namely, whether there is justification for drawing a distinction between different types of internationally wrongful act on the basis of the content of the international obligation breached. In posing this question we have in mind the possibility of drawing a distinction of normative scope rather than purely descriptive value. It is not a question of whether, from the theoretical and above all the didactic standpoint, it is useful to make classifications of internationally wrongful acts in law manuals, mainly on the basis of the matter to which the obligation breached relates, or on the basis of the importance which the international community attaches to respect for that obligation. There is no reason for making such classifications in the text of an international convention on State responsibility if they are only of theoretical value. For their inclusion to be justified they must constitute the basis of a normative distinction. It would be absurd to propose that a distinction should be made in this draft between different categories of internationally wrongful acts on the basis of the content of the obligation breached if this distinction does not involve the application of different regimes of international responsibility. It must therefore first be established whether the regime of the international responsibility of the State should be the same for all internationally wrongful acts or whether a distinction must be made between different regimes of responsibility corresponding to breaches of international obligations having a different content.

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

81. International judicial and arbitral bodies never seem...
to have considered the question which concerns us per se. None of their decisions show that they have deliberately raised questions regarding a possible difference in régimes of responsibility, based on the content of the obligation breached, for internationally wrongful acts of States. The analysis of international judicial decisions will therefore have to be based on indirect research; it will seek to establish whether any view of judges and arbitrators on the problem can be deduced indirectly from their decisions.

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

83. However, this observation does not justify our drawing mistaken conclusions therefrom. In ruling as they did on the cases brought before them, international judges and arbitrators by no means went so far as to exclude the possibility that under international law different forms of responsibility for wrongful acts could exist or that a possible difference in the régime of responsibility could be related to the difference in the content of the international obligations breached. It is true that international tribunals have always recognized the existence of an obligation to make reparation on the part of the State committing an internationally wrongful act; however, there is no justification for deducing therefrom that, in their view, the State could never be subject to any form of responsibility other than that of making reparation, particularly when the content of the obligation breached was of special importance.

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

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

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

124 In the Memorial of 30 September 1947 submitted to the International Court of Justice by the United Kingdom on 1 October 1947 concerning the Corfu Channel case, the action of Albania was defined as an “international delinquency” and, given the particular circumstances of the case, an “offence against humanity” which most seriously aggravated the breach of international law and the “international delinquency” committed by that State (see I.C.J. Memorials 1949, p. 40, para. 72 (b)). The form of responsibility which the United Kingdom was seeking to have applied to Albania was solely the obligation to “make reparation”, an obligation which Albania had vis-à-vis the Government of the United Kingdom “in respect of the breach of its international obligations” (ibid. p. 51). However, a limitation was imposed by article 36, paragraph 2d of the Statute of the Court, which empowers the Court to determine only the extent of the reparation due. Thus, the United Kingdom could not have requested the Court to rule on the applicability of another form of responsibility, even if general international law had, in such cases, also recognized the possibility of applying such other form of responsibility. Moreover, the United Kingdom had brought the case before the International Court of Justice after the adoption of the draft resolution which it did earlier submitted to the Security Council—and which had described the laying of mines in peace-time without notification as an “offence against humanity”—had been blocked by the veto of the Soviet Union (ibid. p. 369).
commissions have explicitly affirmed that the breach of any international obligation entails the obligation to make reparation\(^\text{125}\) prompts similar observations. Once again, it should be emphasized that this assertion, which is fully justified, does not necessarily deny the possibility that that breach may entail other consequences arising out of international responsibility. The judges and arbitrators who rendered the decisions referred to had been expressly requested to determine, in connexion with a given case, whether or not the obligation existed to make reparation for the injury. Their reply, based on what the Permanent Court defined as “a principle of international law” as well as a “general conception of law”, was that if an obligation had been breached, there also existed an “obligation to make reparation in an adequate form”. However, they had by no means been asked to affirm that the obligation was, in any case, the sole consequence entailed by the breach complained of, and they did not intend to pronounce on that point.

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

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

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

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

In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also

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

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

\(^{127}\) Considering the date of the awards in question, it may be presumed that such was the tribunal’s belief.

\(^{128}\) Except for cases where a different conclusion has been explicitly or implicitly provided for in a specific treaty.

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

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

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

91. As to the problem at issue, State practice has undeniably evolved during the twentieth century. Two successive phases in its evolution should be distinguished: that preceding the Second World War and that which begins after the War ended. During the first period, the dominant idea in the view of States seems to be that the content of the obligation breached has no bearing on the regime of responsibility applicable to an internationally wrongful act—even if, as will be seen, a few examples are encountered of a trend towards a different view.

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


With reference to State responsibility, Mr. Reuter, at the twenty-second session of the International Law Commission, took the view that according to the Court a special responsibility was involved (see Yearbook . . . 1970, vol. I, p. 187, 1076th meeting, para. 3).

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

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


135 The “request for information” dealt with reprisals not from the standpoint of the consequences of the breach of an international obligation, but rather from that of the circumstances excluding responsibility. For the replies of Governments, see League of Nations, Bases of discussion . . . (op. cit.), pp. 128 et seq., and Supplement to Volume III (op. cit.), pp. 4 and 22. Basis of discussion No. 25, which was drafted in accordance with the replies of Governments, recognized the legitimacy of the exercise of reprisals in certain circumstances.
“responsibility” per se. In any event, what is important is that they considered that the breach by a State of an international obligation could entail different legal consequences, depending on the situation.

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

94. Finally, the States that participated in the work on the codification of the international responsibility of States for damage caused to foreigners did not believe that the content of the obligation breached had a bearing on the regime of responsibility attached to that breach. A distinction between two or more categories of internationally wrongful acts in terms of the content of the obligation in question was thus excluded. Of course, the objection could be raised that the limited field to which the 1930 codification work referred concerned only the consequences of the breach of international obligations with respect to the treatment of foreigners: a matter offering perhaps less opportunity than others of singling out exceptionally important obligations some breaches of which could have very serious consequences for the international community as a whole. However, apart from the possibility that here, too, internationally wrongful acts of that category can occur, would the positions taken by Governments have really been different if the “request for information” had concerned, for example, a breach of the obligation to respect the territorial sovereignty of other States or a breach of the obligation—already provided for at that time through conventional rules—not to launch a war of aggression? It should be borne in mind that the replies of Governments were often formulated in very general terms and did not therefore refer solely to the area in which the attempt at codification was being made. It would be arbitrary to assume that, in relation to other areas, those replies would have led to different conclusions on the question under consideration.

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

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

97. The need to distinguish, in the general category of internationally wrongful acts of States, a separate category including exceptionally serious wrongful acts has, in any case, become more and more obvious since the end of the Second World War. Several factors have no doubt contributed to this more marked development. The terrible memory of the unprecedented ravages of the Second World War, the frightful cost of that war in human lives, in property and in wealth of every kind, the fear of a possible recurrence of the suffering endured earlier and even of the disappearance of large portions of mankind and of all traces of civilization, as the result of a new conflict in which the entire arsenal of weapons of mass destruction would be used, are all factors which have established in the consciousness of peoples a conviction of the paramount importance of prohibiting the use of force as a means of settling international disputes. The feeling of horror left by the systematic massacres of millions of human beings perpetrated by certain political régimes, the still-present memory of the deportation of entire populations, the outrage felt at the most brutal assaults on the human personality have all pointed to the need to take steps to ensure that not only the internal law of States but, above all, the law of the international community itself should set forth imperative rules for the protection and respect of the essential rights of the human person; all of this has prompted the most vigorous affirmation of the prohibition of crimes such as genocide, apartheid and other inhuman practices. The solidarity of broad strata of the world’s population in the liberation struggle carried on by the peoples subjected to colonial domination, the firmness with which those peoples have resolved to defend the supreme treasure of liberty which they have now acquired, are the decisive elements which have led to the emphatic recognition of the right of every people to establish itself as an independent political entity and the prohibition in general of any action which challenges the independence of another State. Thus, some new rules of international law have appeared, others in the process of formation have been definitively secured, and still others, already in existence, have taken on a new vigour and a more marked significance; these rules impose on states obligations whose fulfilment represents an increased collective interest on the part of the entire international community. Furthermore, there has gradually arisen a conviction that any breach of the obligations imposed by rules of this kind cannot be regarded and dealt with as a breach “like any other”, that it necessarily represents an internationally wrongful act which is far more serious, an infraction which must be differently described and must therefore be subject to a different régime of responsibility.

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

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

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

The second point seems no less significant for the purposes considered here. It is known that today international law imposes upon States the obligation to punish crimes known as "crimes under international law"; this unique category includes crimes against peace, crimes against humanity and war crimes in the strict sense. The system provided by international law since the Second World War for the punishment of such "crimes" is characterized by two features: (a) it regards as "punishable" individuals who have committed actions in their capacity as organs of the State; (b) it holds that tribunals of States other than that to which the organs in question belong have the right—which is also a duty—to try and punish such actions. The derogations from the usual criteria of international law that this implies are obvious. Moreover, "principles of international co-operation" have been proclaimed for the detection, arrest and extradition of "persons guilty of war crimes and crimes against humanity even if they acted as State organs". The principles also exclude the possibility of granting territorial asylum "to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity"; they also exclude the possibility of refusing to extradite such persons by invoking the "political" nature of the crimes committed by them. Lastly, States have subscribed to the obligation to regard the crimes involved as not subject to statutory limitations.

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

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

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

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

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

149 In connexion with this content, again see R. Ago, loc. cit., p. 324, note 37.

"If one examines carefully the opinions expressed in the International Law Commission and, more generally, in the writings of jurists, one becomes aware that a certain unity of views exists with regard to the determination of the rules which the consciousness of the world regards today as rules of *jus cogens*. These include the fundamental rules concerning the safeguarding of peace, in particular those which prohibit any recourse to the use or threat of force, fundamental rules of a humanitarian nature (prohibition of genocide, slavery and racial discrimination, protection of essential rights of the human person in time of peace and of war), the rules prohibiting any infringement of the independence and sovereign equality of States, the rules which ensure to all the members of the international community the enjoyment of certain common resources (the high seas, outer space, etc.)." [Translation from French.]
101. Having said that, we hasten to add that, in our view, it would be a mistake to assimilate the right or duty accorded to certain States to punish individuals who have committed such crimes to the "special form" of international responsibility applicable to the State in such cases. 

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

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

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

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

103. Article 2, paragraph 3, of the Charter provides that the Members of the United Nations "shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

This principle is supplemented by another of the utmost importance which is laid down in Article 2, paragraph 4, and which reads as follows:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

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

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

155 Article 2, para. 5, provides in general that "The Organization shall ensure that States which are not Members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security."

156 These two terms are used in article 5.

157 Article 2, para. 5, provides in general that "All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action."

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

(Continued on next page.)
Article 41 enumerates measures not involving the use of armed force, and Article 42 enumerates measures involving the use of force which may be undertaken if the measures provided for in Article 41 prove to be inadequate. Moreover, until such time as the Security Council is able to take the necessary steps to organize and implement such collective enforcement action, article 51 envisages the possibility of immediate enforcement action, whether "individual or collective", in the exercise of the right of "self-defence", thereby making a temporary exception to the general prohibition of the use of force. This exception relates to a Member State which is the victim of an armed attack, as well as to other Members which likewise consider themselves threatened by the acts of the aggressor or are merely associated with the victim of aggression by collective security agreements, especially by one of the regional arrangements referred to in chapter VIII (Articles 52–54) of the Charter. Articles 5 and 6 round out the Charter provisions concerning the consequences of a breach of one of the legal obligations specified by the Charter with respect to the pursuit of the institutional purposes of the United Nations. Article 5 envisages the possibility of suspending a Member "against which preventive or enforcement action has been taken by the Security Council" from "the exercise of the rights and privileges of membership". Article 6 envisages the possibility of expelling assistance among Members in carrying out such measures. It could not be stated more clearly that participation in such "collective" measures is by no means limited only to those States directly or indirectly affected by the breach complained of in a given case.

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

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

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

At first sight, Article 94, para. 2, would appear indirectly to extend to all international legal obligations the safeguards specifically established with respect to respect for obligations imposed on Member States in connexion with the pursuit of the institutional purposes of the Organization. In fact, however, there is only one obligation which, under this provision, is safeguarded by the possibility of Security Council action, namely the obligation incumbent upon Members pursuant to Article 94, para. 1, "to comply with the decision of the International Court of Justice in any case to which it is a party". Should a Member State fail to perform the "obligations incumbent upon it under a judgment rendered by the Court", the Security Council has a twofold power, i.e. to "make recommendations", or "decide upon measures to be taken to give effect to the judgment". The order in which these two powers are rendered by the Court, the Security Council has a twofold power, i.e. to

The answer to these questions is found in the text of Article 2, paragraph 4, which we have already referred to as crucial to this subject, whereby Member States are bound to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". The Purposes of the United Nations are listed in Article 1 of the Charter. Paragraph 1 of that Article gives first place to the purpose of "prevention and removal of..."
of threats to the peace, and ... the suppression of acts of aggression or other breaches of the peace ...". Among the other purposes, paragraph 2 lays down the “principle of equal rights and self-determination of peoples”, and paragraph 3 refers to “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion”. However, Chapter VII, in its title and in the text of article 39, specifies the conditions under which enforcement action may be taken upon the decision of the Security Council; it does so in wording reminiscent of that used in Article 1, paragraph 1, by referring to “the existence of any threat to the peace, breach of the peace, or act of aggression”. The possibility of taking against a State enforcement action initiated and organized by the United Nations itself is thus strictly linked to the pursuit of the first purpose of the Organization, which the framers of the Charter unquestionably considered as most essential for the life and survival of international society. The internationally wrongful acts for the prevention and suppression of which this exceptional possibility of resorting to collective enforcement action was envisaged are thus covered by the three terms “threat to the peace”, “breach of the peace” and “act of aggression”.

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

108. However, the link established by the Charter between the possibility of taking collective enforcement action under the auspices of the Organization and the condition that a threat to the peace, a breach of the peace or an act of aggression must exist also explains other developments which have taken place within the United Nations. This link is at the origin of the efforts made by many States to secure acceptance for the view that the above-mentioned condition is fulfilled even in cases in which the acts complained of do not strictly speaking fit in with the traditional concept of the threat or use of force in international relations. The acts taken into consideration for this purpose are primarily that of forcibly maintaining a régime of apartheid or of absolute racial discrimination within a State and that of forcibly maintaining colonial rule. In this connexion, we should first point out, that from a general standpoint, article 1 of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly by resolution 1904 (XVIII) of 20 November 1963, affirms that:

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

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

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

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

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

The Declaration adds that:

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

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

110 Including the violation of “the existing international boundaries of another State” or the violation of “international lines of demarcation, such as armistice lines”.

171 The argument which the representatives of these countries put forward in various organs of the United Nations is that, on the basis of Article 1, paras. 2 and 3 of the Charter, the use of force by a State to maintain a people, either in its own territory or in a territory administered by it, under a régime of apartheid or of colonial domination can be described as a use of force which is “inconsistent with the Purposes of the United Nations”. It follows that they consider such use of force as prohibited under the terms of the final phase of Article 2, para. 4. One obstacle nevertheless remains; that paragraph prohibits the threat or use of force by Members “in their international relations”. Consequently, these countries sometimes maintain that the peoples subjected to the régimes in question should be regarded as separate subjects of international law before they emerge as independent States and even before they attain international status as insurgents. Without going so far, they feel that there is justification for the view that the use of force by a State to maintain an apartheid régime within a country or to keep a colonial territory under its domination must be regarded as an act capable of having dangerous consequences in international relations, in the true sense of the term, and, hence, as an act covered by the general notion of a “threat to the peace”. This view opens the way for the use in such cases of the enforcement measures envisaged in Chapter VII of the Charter.
General Assembly and the Security Council, from 1960 onwards, adopted resolutions in which the situation in South Africa was described as “endangering” or “seriously disturbing” international peace and security. From 1965 onwards, the General Assembly regularly drew the attention of the Security Council to the fact that the situation in South Africa constituted a “threat” and even a “grave threat” to international peace and security and that economic and other measures of the kind envisaged in Chapter VII were essential in order to solve the problem of apartheid. At the same time, the General Assembly appealed directly to Member States, first, in order to invite them to adopt measures designed to induce South Africa to abandon its policy of apartheid and urge them to terminate diplomatic, consular, economic, political and military relations with that country, and, later, in order to request them to adopt such enforcement measures as the blocking of ports and the boycotting of goods. Finally, the General Assembly recognized the legitimacy of the struggle of the people oppressed by apartheid and made increasingly urgent appeals to Member States to provide political, moral and material support to those struggling against apartheid. An indirect allusion to the sanction provided for in Article 6 of the Charter is also to be found in these resolutions. The Security Council, however, employs more cautious language. It acknowledges successively that the situation in South Africa “might endanger international peace and security”, “is seriously disturbing international peace and security” and “constitutes a potential threat to international peace and security”. It does not have direct recourse to the measures provided for under Article 42 of the Charter but nevertheless invites Members to declare an embargo on supplies of arms, ammunition and military vehicles to South Africa.

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

173 See General Assembly resolutions 2054 (XX) [1965], 2202 A (XXI) [1966], 2307 (XXII) [1967], 2396 (XXIII) [1968], 2505 (XXIV) [1969], 2671 (XXV) [1970], 2735 F (XXVI) [1971], 2933 E (XXVII) [1972], 3151 G (XXVIII) [1973], 3324 E (XXIX) [1974] and 3411 G (XXX) [1975].

174 See resolution 2646 (XXV) of 1970, in which the recommendation also covers the “other racist régimes in southern Africa”.

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

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

In the case of **Namibia (South West Africa)**, after the termination of South Africa's Mandate over the Territory, the General Assembly called upon that State to withdraw from the Territory all its military and police forces and its administration, etc. The Assembly considered the continued South African presence to be a flagrant violation of the territorial integrity of Namibia.183 In addition to recognizing the legitimacy of the struggle by all means of the people of Namibia against the "illegal occupation of their country" and inviting States and international organizations to assist the Namibian people in its struggle, the General Assembly notes that the situation in the Territory "constitutes a threat to international peace and security".186 It therefore invites the Security Council to take the measures provided for under Chapter VII of the Charter.187 Both the Assembly and the Council call upon Member States to take a series of measures to obtain the withdrawal of the South African Administration from the Territory.

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

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

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

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

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

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183 Resolution 2325 (XXII) [1967].
186 Resolution 3399 (XXX) [1975]. See also resolution 2678 (XXV) [1970].
187 Resolution 2678 (XXV).
189 See, *inter alia*, General Assembly resolutions 2022 (XX) [1965], 2652 (XXV) [1970] and 3396 (XXX) [1975].
190 This point of view is quite independent of the political and moral sympathy which these States and their peoples may feel for the "legitimate" cause of a people struggling for its freedom.
that acts such as the maintenance by force of apartheid and colonial domination constitute internationally wrongful acts and particularly serious wrongful acts. On the other hand, these differences of opinion make it impossible to conclude that there exists a similar agreement on the part of all essential sectors of the international community as to the type of “action” or “measures” which may legitimately be taken to meet those situations. It must also be recognized that the point of view of the group of States experiencing the difficulties mentioned in the previous paragraph has considerable weight in the Security Council. This explains the caution with which the Security Council has proceeded in the matter and also the fact that, despite repeated appeals by the General Assembly, in only one case—that of Southern Rhodesia—has the Council decided to apply enforcement measures in accordance with Chapter VII of the Charter, and then only measures which did not involve the use of armed force. Furthermore, it must be said that, in this field, the General Assembly itself has never gone beyond identifying any of the situations concerned as cases of a “threat to the peace”. In such cases it is no doubt harder to contemplate the application of enforcement measures involving the use of armed force. Cases of “a breach of the peace” or “an act of aggression” thus apparently belong to a category apart, even in the view of those States which have advocated the adoption of the most advanced resolutions by the General Assembly.

In order to evaluate precisely the scope of United Nations practice relating to the matters under discussion, it might be useful to examine certain conventions. The Convention on the Prevention and Punishment of the Crime of Genocide, which the General Assembly adopted unanimously on 9 December 1948 (resolution 260 (III)), will be examined first.\(^1\) There can be no doubt that genocide is now regarded by world opinion as an international crime and it will be recalled that article I of the Convention clearly reflects that conviction. Article VIII stipulates that:

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they may consider appropriate for the prevention and suppression of acts of genocide.\(^2\)

The language is notable for its lack of precision.\(^3\) Determining the type of measures to be taken in each particular case is left entirely to the “competent organs” of the United Nations, and the Contracting Parties have not entered into any special commitment concerning cooperation with regard to such measures. Furthermore, no explicit mention is made of any action specifically reserved to the Security Council, nor of the application of the measures provided for in Chapter VII of the Charter. Everything therefore leads to the conclusion that, despite the horror aroused by such a crime and by the memory of its perpetration, as regards the consequences it would entail, States did not really wish to place it on the same level as a proper act of aggression.

116. The text of the International Convention on the Suppression and Punishment of the Crime of Apartheid\(^4\)—a phenomenon which, in General Assembly resolutions, is closely linked with that of the maintenance by force of colonial domination—would seem at first sight to justify different conclusions. In article I, the States Parties declare that apartheid is a “crime against humanity” and specify that inhuman acts resulting from the policies of apartheid and other similar policies “are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.”\(^5\) Article VIII is based on the corresponding article of the Convention on Genocide. In article VI, however,

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

The provisions of this Convention therefore differ noticeably from those of the Convention on Genocide. They are very similar to those contained in chapter VII of the Charter concerning action to be taken in cases of threats to international peace and security. However, it is precisely because of this similarity that the Convention in question could not be adopted unanimously. It obtained 91 votes to 4, but there were 26 abstentions. Furthermore, to date there have been only 34 signatures and 18 ratifications. Thus, it cannot be said that its provisions received the same broad and unconditional unanimous support as the Convention on Genocide. This is certainly not because apartheid is less widely condemned than genocide, but because States differ as to the type of action to be taken to suppress this condemned practice, and because of the similarity, considered excessive by some States, between the treatment provided for under the new Convention for the crime of apartheid and that provided for in the Charter for the crime of aggression. In fact, therefore, an examination of conventions drawn up to prevent and suppress certain “international crimes” seems to reaffirm rather than invalidate the conclusions outlined above.\(^6\)

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

\(^1\) The Convention came into effect in 1951.

\(^2\) This is due also, at least in part, to the fact that the same Convention provides both for the prevention and suppression of genocide as an international crime of the State, and for the punishment of persons having committed acts of genocide or having participated in such acts in any way whatsoever.

\(^3\) Adopted by the General Assembly on 30 December 1973 (resolution 3068 (XXVIII), annex).

\(^4\) See para. 114 above.
people to colonial domination. But it seems undeniable that
today, for the international community as a whole, such acts violate principles formally embodied in the Charter, and even if the Charter is not taken into account, principles which are now so deeply embedded in the consciousness of mankind that they have become particularly important rules of general international law. It also seems undeniable that world opinion regards the acts in question as genuine “crimes”, i.e., wrongful acts which are more serious than others, and that they must therefore entail more serious legal consequences—but without necessarily attaining the degree of seriousness of the supreme international crime, namely the war of aggression, and without necessarily involving all the legal consequences of the latter. All this seems to represent a sufficiently well-based conclusion and one which is also perfectly adequate to our present needs, since, in this section, we are seeking only to determine whether there are grounds for recognizing the existence of a distinction between two fundamentally different categories of internationally wrongful acts on the basis of the content of the obligation breached. The current response of States to this question seems quite definitely affirmative.

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

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

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

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

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

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

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

197 And not only for certain sections of this community to the exclusion of others.

198 The action to be taken against different wrongful international acts within the same category is not at issue here.

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

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

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

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

203 Ibid., 1544th meeting, para. 9. A similar position had been adopted by the representatives of the USSR at the twenty-eighth session (ibid., Twenty-eighth Session, Sixth Committee, 1406th meeting, para. 15) and the twenty-ninth session (ibid., Twenty-ninth Session, Sixth Committee, 1489th meeting, para. 35).
Lastly, at the same session, the representative of Cyprus emphasized that;

One of the essential questions that would arise in further work by the Commission on the latter topic was whether it would be necessary to recognize the existence of a distinction based on the importance to the international community of the obligation breached and, accordingly, whether international law should acknowledge a separate and more serious category of internationally wrongful acts which could be described as international crimes. Noting the significant distinction between "primary" and "secondary" rules on which ILC had based its work, he said his delegation agreed with the view that the study of the objective element of the internationally wrongful act would render plainly apparent the need to take into consideration the content, nature and scope of the obligations laid on the State by the "primary" rules of international law and to distinguish on that basis between different categories of international obligations. In order to be able to assess the gravity of the internationally wrongful act and determine the consequences attributable to that act, it would be necessary to take into consideration the fact that the importance attached by the international community to respect for some obligations—for example, those concerned with peace-keeping—would be of a completely different order from that attached to respect for other obligations.201

During the same debates, other representatives made similar statements.202 In these statements, aggression, genocide, apartheid and colonialism were also quoted as examples of offences to be included in the category of the most serious internationally wrongful acts. Moreover, the fact that other representatives remained silent on this point does not necessarily mean that they had reservations. Paragraph 49 of the introduction to the report of the International Law Commission on its 1975 session gave rise to no objections, and the fact that several representatives remained silent on this point does not necessarily mean that they had reservations. Paragraph 49 of the introduction to the report of the International Law Commission on its 1975 session gave rise to no objections, and the fact that several representatives remained silent on this point does not necessarily mean that they had reservations. 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was taken in the determination of the legal consequences of the internationally wrongful act of a State. At all events the works examined do not show that their authors particularly considered whether the diversity of content of the breached obligation could be the criterion for a differentiation in the regime of responsibility applicable to the State guilty of a breach. Moreover, some writers implicitly excluded all differentiation of this kind by regarding reparation as the sole consequence of a breach of an international obligation. Those who have paid particular attention to the various forms of reparation mention restitution, redress for material and moral damage, satisfaction and sometimes also the adoption of appropriate measures to prevent a recurrence of the breach. However, the choice between these various forms is not in any way related to the content of the obligation that has been breached. The view generally held would seem to be that the State which is the victim of an internationally wrongful act may claim each of the various forms of reparation indicated. However, it is pointed out by some that satisfaction can be due only in the case of a grave breach; but the gravity of the breach does not correspond to the content of the obligation breached.

123. The writers of this period also do not generally speak of a differentiation between internationally wrongful acts hinging on the difference in content of the obligation breached that would serve as a basis for determining the measures which the injured State is authorized to take by way of "sanctions". The question of repressive or, in general, coercive measures to be applied against a State that has committed an internationally wrongful act is treated only in a fragmentary manner. It is brought up in the context of studies dealing specifically with reprisals, embargoes, pacific blockade, intervention or war itself. Most authors recognize the right of the injured State to conduct itself towards the guilty State in a manner that would itself be wrongful, if the guilty State had not first committed a breach. The lawfulness of recourse to the measures envisaged is usually made dependent on an unsuccessful prior attempt to obtain reparation. On the other hand, the fact that the breached obligation had a specific content is not mentioned as a pre-condition for the lawfulness of the application of a penalty. The choice between the different measures is left to the injured State: it is merely stated that the reaction must be proportionate to the breach and to the aim that may lawfully be pursued. But there again the gravity of the breach is not specifically related to the content of the breached obligation.

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

125. Bluntschli's opinion is also interesting from another

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The text continues with further analysis and references to various legal works and experts, discussing the evolution of international law concerning state responsibility.
angle: the determination of the subject or subjects of international law entitled to invoke the responsibility of the State guilty of an international breach. In a manner consistent with his premises, he maintains that when a breach constitutes a danger to the community, not only the injured State, but all the other States which have the necessary power to safeguard international law, are entitled to take action to restore and safeguard the legal order. Other authors of the same period express similar views on this point. Some enunciate the principle while remaining somewhat vague as to details, others, such as Heffter and Bluntschli himself, endeavour to go into details and to draw up lists of breaches which all States would be justified in punishing. But the difficulty of such a task, the arbitrary nature of the enumeration, the omissions that are inevitably remarked in these lists and the confusion existing between acts attributable to the State and other acts committed by private individuals, or between breaches of law and breaches of ethics, are all conducive to general mistrust of the basic idea underlying the compilation of the lists in question. Most authors, following Anzilotti, therefore maintain that in the case of a breach of an international obligation, whatever its content, the injured State alone has the right to react against the State responsible for the breach. 129

126. During the period between 1915 and 1939 great advances were made in studies on State responsibility. The papers on this subject in general, and the contributions made on particular aspects, are innumerable. It must be noted, however, that in none of these works, which vary in scope and value, is the idea of making a distinction between two or more categories of internationally wrongful acts, on the basis of the criteria we are concerned with here, developed ex professo.

127. First, it should be noted that in the writings of this period no mention is generally made of the possibility of referring to the diversity of content of the international obligations breached and to the relative importance of this content to the international community with a view to establishing a criterion for differentiating between the types of action which may be required of the State committing the offences, as ex delicto obligations. In the opinion of those who, like Kelsen, a priori rule out the possibility that general international law should recognize obligations of this kind, and who maintain that an "obligation" to perform specific acts as reparation for damage or the like can only derive from an agreement between the State committing the breach and the injured State, 122 the problem does not even arise. But this observation also applies to the great majority of authors, who maintain that general international law precisely imposes on the State committing any internationally wrongful act an ex delicto obligation to provide the injured State with reparation lato sensu for the wrongful act in question. 122 The authors holding this view scarcely envisage the possibility of making the content of the breached obligation the criterion for determining with regard to each individual case, what particular action the guilty State is required to take and for deciding when other, more exceptional forms of "reparation" should be required in addition to the ordinary forms. All the international lawyers of this school mention, as ordinary forms of reparation—forms which in their view constitute reparation in the narrowest and most appropriate sense of the word—restitutio in pristinum, repayment by equivalent, and material compensation. 122 Most of them, however, also recognize the right of the injured State to demand satisfaction on occasion. The notion of "satisfaction" is taken to include a variety of acts such as the adoption by the guilty State of measures to prevent a repetition of the breach, apologies, punishment of the individuals responsible, saluting the flag, payment of a symbolic sum of money, and so forth. Some authors describe such measures as a form of redress for "moral damage", whereas others go so far as to attribute penal qualities to them. This, however, is not the

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

217 According to W. E. Hall (A Treatise on International Law, 2nd ed. (Oxford, Clarendon Press, 1884), p. 54), "When a State grossly and patently violates international law in a matter of serious importance, it is competent to any State or to the body of States, to hinder the wrongdoing by accomplishing, or to punish the wrong-doer". According to E. von Ullmann, (op. cit., p. 1463), collective intervention by the principal Powers is justified when the conduct of a State implies the breach of international law and an offence against all States obeying the national law. See also F. von Holtzendorff, "Grundrechte und Grundpflichten", Handbuch des Völkerrechts (Hamburg, Richter, 1870), vol. II, p. 70.

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

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

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

128. One might next consider whether the writers of this period took the content of the breached obligation as a basis for making distinctions, not with regard to the forms of reparation which the injured State is entitled to demand of the State committing the internationally wrongful act, but with regard to the coercive or other "measures" that the injured State itself or other subjects can legitimately take as sanctions against the State guilty of wrongfulness. In this regard, too, it is clear that those who believe, like H. Kelsen, that the power to take coercive measures as "sanctions" is the sole consequence attached by general international law to the internationally wrongful act of a State, must be convinced that this consequence follows any breach of an international obligation, whatever its content. But even those authors—and they are in the majority—who believe that general international law requires a State committing a wrongful act to make reparation, recognize the legitimacy, at least in certain cases, of recourse by the injured State to measures which would otherwise be wrongful, as sanctions in response to an internationally wrongful act committed by another party. The problem is to ascertain how these authors view the relationship between these two different forms of consequences of the wrongful act, and whether they consider these two forms as cumulative or alternative. If they favour the latter course, the question arises as to whether they believe the injured State is free to choose between demanding reparation and applying a sanction or, whatever the case, that it can only resort to sanctions after having met with refusal on the part of the State committing the wrongful act to make reparation, or still further, whether the answer to this question should vary according to the content of the obligation breached.

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

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225 H. Kelsen, loc. cit., pp. 548 et seq., 568 et seq.


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

228 L. Reitzer, op. cit., pp. 31 et seq., and 213.

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

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

231 See L. Reitzer, op. cit., p. 91 et seq.

232 This opinion is, in fact, widely shared by those who dealt with self-defence at the time. See, for instance, Ch. de Visscher, loc. cit., pp. 107 et seq.; A. Verdross, "Règles générales du droit international de la paix", Recueil des cours . . . 1929-V (Paris, Hachette, 1931), vol. 30, pp. 481 et seq. and 491; E. Giraud, "La théorie de la légitime défense", Recueil des cours . . . 1934-III, (Paris, Sirey, 1934), vol. 49, pp. 691 et seq. On the other hand, there are no other authors who, like Reitzer, deal with the
regarded as a means of enforcing the “responsibility” of the aggressor; and there is nothing to prove that Reitzer himself took that view. But what is certain is that he did not regard aggression as an internationally wrongful act like any other, since he allowed that in the event of aggression, and in that event only, an exception could be made to the rule which normally applied to the reaction of a State injured by a wrongful act committed by another State.

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

131. However, we are also concerned—perhaps even more so—with the views of the authors of that period concerning the other aspect of the consequences of an internationally wrongful act, namely, the question of determining which subject of international law is authorized to invoke the responsibility of the State which has committed such an act. Some open-minded writers were in fact fully aware of the need to make a distinction here on the basis of the content of the obligation that has been breached, and it is not surprising that this requirement should have arisen in the doctrine of the United States, given the state of mind created by the outbreak of the First World War. E. Root, in 1915, and A. J. Peaslee, in 1916, strongly maintained that international law must evolve along the same lines as municipal law and arrive at a distinction between two kinds of breaches: those affecting only the injured State and those which, instead, affect the community of nations. With regard to this second kind of internationally wrongful act. Root considered that any State should be authorized and indeed required to punish it. 234 Peaslee suggested that the organs of the community, which he recommended should be established after the end of the war, should be responsible for the punishment of such acts. 235 His idea was thus in line with the proposals generally inclining towards the institutionalization of the international community. Root’s idea, on the other hand, was feasible within the framework of a non-institutionalized society.

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

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

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

234 After recalling the distinction made in municipal law, this author states that: “Up to this time, breaches of international law have been treated as we treat wrongs under civil procedure, as if they concerned nobody except the particular nation upon which the injury was inflicted and the nation inflicting it ... If the law of nations is to be binding [sic] ... there must be a change in theory, and violations of the law of such a character as to threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilized nation to have the law maintained and a legal injury to every nation.” (E. Root, “The outlook for international law”, American Journal of International Law (Washington, D.C.), vol. 10, No. 1 (January, 1916), pp. 7–9.)
such a differentiation. They were the proponents of a theory which enjoyed a certain vogue precisely between the two world wars: the theory known as the criminal responsibility of the State. It would, however, be a mistake to establish too close a connexion between this theory and the idea of differentiating between the internationally wrongful acts of the State: this does not mean to say that such a distinction is necessarily ruled out by those who do not endorse the principles of this theory, or vice versa, for that matter. For, in addition, the term “criminal responsibility of the State” is given very different meanings by different authors. There is actually only a small group of authors whose opinion is worth mentioning, in that they openly advocated the adoption of the distinction we are concerned with. This is the school of thought that includes V. Pella, Q. Saldaña, H. Donnedieu de Vabres and others, who urged the adoption of a code listing the most serious breaches of international law and specifying the sanctions attaching to them. These sanctions range from punitive damages to the occupation of territory and, as a last resort, the loss of independence. All the authors in question made the implementation of their principles contingent upon the establishment of an international criminal court, responsible for applying these sanctions. This is probably the reason why broader acceptance of the principles themselves has not been possible. Without entering into this discussion, we may merely note the essential point, namely, the emergence of a doctrinal trend openly advocating the establishment of a distinction between internationally wrongful acts of States, the least serious of which would be governed by the traditional régime of responsibility, and the most serious—those internationally wrongful acts designated as criminal—by a far stricter régime of penal sanctions.

134. To sum up, the scientific works of the years between the wars show that the doctrine of the time, although not fundamentally focused on the search for a solution to the problem we are concerned with, did not necessarily overlook it, and sometimes even made a useful contribution in the matter. A study of these works shows us above all that the authors who were fully aware of the development needs of the international community understood that an answer had to be found outside the traditional framework of the law and specifying the sanctions attaching to them.

The comprehensive notion of an international delinquency ranges from ordinary breaches of treaty obligations, involving no more than pecuniary compensation, to violations of International Law amounting to a criminal act in the generally accepted meaning of the term. The author then goes on to state that the consequence of an “ordinary” internationally wrongful act consists in the obligation to make reparation for the moral and material wrong, such reparation possibly including punitive damages. Only if the State committing the wrongful act refused to make reparation could the injured State take the necessary measures to enforce the obligation to make reparation. On the other hand, Lauterpacht goes on to say, the consequences are different in the case of breaches which, “by reason of their gravity, their ruthlessness, and their contempt of human life place them within the category of criminal acts as generally understood in the law of civilized countries”. The author gives the example of mass massacre, on the orders of a Government, of aliens residing in the territory of a State, and preparations for and the outbreak of a war of aggression. In such cases, he concludes, State responsibility is not confined to the obligation to make reparation, but also includes the applic-

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


241 Ibid., p. 321.

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

137. At the beginning of the 1950s, we find a resurgence of this "penal law" school of thought, in which there was a certain amount of interest between the two wars and which we have already outlined. This school certainly considers it necessary to single out, in the over-all context of the internationally wrongful acts of the State, real international "crimes", which should be more severely punished than others. But, as we have seen, the authors belonging to this group make the idea of the recognition of more serious international responsibility for such offences subject to the somewhat unrealistic condition that such responsibility should be established in each specific case by an international criminal court. Besides, more generally speaking, they seem not to realize how arbitrary it is to equate international conditions with domestic conditions in too facile a way. The idea of drawing a parallel between the treatment to be accorded to offences by a State—which is a subject of international law—and that meted out by State law in the case of offences committed by individuals, encounters opposition, at the theoretical level, from the vast majority of international law specialists and, at the practical level, from States at large. The proposals of this school have therefore never been put into effect, and the concern to avoid any confusion with the theories advocated by the supporters of this school of thought somewhat discourages the other writers from paying special attention to the problem we are dealing with. One possible exception is D. H. N. Johnson. This writer forcefully points out that it is inconsistent to continue to treat an act of aggression as a mere "illegal" act involving no more than the obligation to provide compensation, in view of the existence of the complex machinery provided for in the Charter for dealing with acts of aggression and of the General Assembly's definition of aggression as the gravest of all crimes against peace and security [General Assembly resolution 380 (V)].

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

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

244 See para. 133 above.

245 In 1950, V. Pella submitted to the International Law Commission a memorandum concerning a draft Code of offences against the peace and security of mankind (see Yearbook ... 1954, vol. II, p. 278, document A/CN.4/39, and in particular pp. 315 et seq.). The author had already put forward his proposals in 1946, in his work entitled La guerre crime et les crimes de guerre (reprinted Neuchâtel, Editions de la Baconnière, 1964). It is not altogether clear whether, in putting forward his ideas, he had in mind a reform of international law or simply the application of principles already accepted by existing international law. There is also evidence in his draft of some confusion between the idea of applying punitive measures against States and the idea of punishing individuals held personally responsible for certain decisions and certain misdeeds.

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248 See para. 133 above.

249 In 1950, V. Pella submitted to the International Law Commission a memorandum concerning a draft Code of offences against the peace and security of mankind (see Yearbook ... 1954, vol. II, p. 278, document A/CN.4/39, and in particular pp. 315 et seq.). The author had already put forward his proposals in 1946, in his work entitled La guerre crime et les crimes de guerre (reprinted Neuchâtel, Editions de la Baconnière, 1964). It is not altogether clear whether, in putting forward his ideas, he had in mind a reform of international law or simply the application of principles already accepted by existing international law. There is also evidence in his draft of some confusion between the idea of applying punitive measures against States and the idea of punishing individuals held personally responsible for certain decisions and certain misdeeds.

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

An author who deserves special mention in view of the role he played in the International Law Commission between 1954 and 1961 is F. V. Garcia Amador. He also made a distinction between merely "unlawful" acts involving only the "civil" responsibility of States and "punishable" acts involving "criminal" responsibility. The transformation of some acts of the State which were previously regarded as merely wrongful or unlawful into punishable acts is, in his view, a result of the transformation which took place after the Second World War. It would seem, however, that in his opinion the "criminal" responsibility of the State is reflected only in the obligation to punish individuals organs which have engaged in conduct incompatible with certain international obligations of the State. On this point Garcia Amador's opinion seems to differ from Johnson's. It may be noted, on the one hand, that the existence of an obligation to punish the material authors of a particular act is no novelty vis-à-vis the provisions of traditional international law. On the other hand, the punishment of guilty individuals has nothing to do with a sanction applied to the State itself for a breach of certain obligations having a particularly important content. It is therefore hard to regard this punishment, whoever imposes it, as a special form of "State responsibility". For the views of this writer, see Yearbook ... 1954, vol. II, p. 24, document A/64/480; "State Responsibility in the light of the new trends of international law", American Journal of International Law (Washington, D.C.) vol. 49, No. 3 (July 1955), p. 345; "State Responsibility—Some new problems", Recueil des cours ... 1958-II (Leiden, Sijthoff, 1939), vol. 94, pp. 293 et seq. See also his first report on State responsibility in the Yearbook ... 1956, vol. II, document A/CN.4/296, in particular pp. 180 et seq. and 192 et seq.

249 Even the supporters of Kelsen's views, to the effect that subjection to coercive measures is the only form of international responsibility, acknowledge that a breach by a State of a "primary" international
the power of the injured State to adopt sanctions against the State committing the wrongful act is in principle subject to the refusal of that State to provide compensation. They describe the various forms of compensation without relating the particular forms to different cases of internationally wrongful action; and the same is done as regards satisfaction and its various forms, and “punitive damages”.  

139. It would be wrong, however, to draw hasty conclusions from the fact that the writers of the 1950s seem to concentrate on the questions just mentioned. It is true that in their writings they do not generally make a theoretical distinction between two separate types of internationally wrongful acts, on the basis of the content of the obligations breached and entailing the application of different regimes of responsibility. None the less a distinction of this kind does emerge from their works, in which a specific breach of the obligation not to resort to the use of force is treated as a wrongful act quite distinct from other such acts. According to these writers, the restrictions usually placed on the power to retaliate against the State guilty of an internationally wrongful act cease to apply in cases of aggression, and the régime of responsibility becomes much more strict. This difference in régime takes three forms: (a) A State that is the victim of aggression is considered empowered to take, against the aggressor State, measures infringing the rights of that State, and, in exceptional cases, this power is not made subject to the general obligation to make a prior attempt to obtain reparation for the injury suffered; (b) it is recognized that the measures to which a State that is the victim of an act of aggression can have immediate recourse extend to the use of armed force for purposes of self-defence, although the use of armed force is not allowed in other cases of reaction to an internationally wrongful act by another party, even when due reparation has been refused; (c) it is acknowledged, lastly, that, contrary to

obligation involves a “secondary” obligation of that State to make reparation. See P. A. Zannas, La responsabilité internationale des États pour les actes de négligence (Montreux, Ganguin et Laubscher, 1952), pp. 21 et seq. P. Guggenheim, op. cit., vol. II (1954), pp. 65 et seq.), does not include the obligation to make reparation among the consequences of an internationally wrongful act, but also recognizes that the injured State can apply a sanction against the State committing the offence only after seeking compensation and meeting with a refusal. In earlier periods as well, many authors upheld the principle that the injured State must have tried, without success, to obtain reparation before being empowered to apply punitive measures. But it was only after the Second World War that this principle was unanimously accepted by the doctrine. See, for example, P. A. Zannas, op. cit., pp. 21 et seq.; P. A. Bissonnette, La satisfaction comme mode de réparation en droit international (Annemasse, Grandchamp, 1952); P. Guggenheim, op. cit., p. 65; G. Daimh. Völkerrecht (Stuttgart, Kohlhammer, 1958), vol. I, pp. 265 et seq.; A. P. Sering, op. cit., pp. 1557 et seq.; I. Brownlie, International Law and the Use of Force . . . (op. cit.) p. 219; R. Rinando, “Rappresaglia (diritto internazionale), Novissimo Digesto Italiano (Turin), vol. XIV (1968), p. 793; H. J. Schlochauer, “Die Entwicklung des völkerrechtlichen Deliktsrechts”, Archivio des Völkerrechts, (Tübingen), vol. 16, No. 3 (1975), p. 274.


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


127 An outline of a distinction in principle is, perhaps, to be found in the work published by the State Institute of Law of the Soviet Academy of Sciences, Methdunarodnoe pravo (Moscow, Gosudarstvennoe izdatel’stvo juridicheskoj literatury, 1957) where it is stated that “State responsibility depends on the nature of the wrongfulness and its consequences” (p. 126). As to those consequences, the work distinguishes between “political” responsibility (involving, for example, limitations of the State’s sovereignty), material responsibility (reparation) and moral responsibility (satisfaction). Viewed in the light of this distinction “the most serious international crime, planning and carrying out an act of aggression”, gives rise to “political” as well as to “material” responsibility (p. 127).

128 These writers are thinking of measures which do not involve the use of armed force, but which would still be unlawful if their application was not warranted by the fact of being a reaction to the wrongful conduct of another party. The applicability of such measures is considered to come under the concept of responsibility by writers of the Kelsen school (P. A. Zannas, op. cit., pp. 15 et seq.; P. Guggenheim, op. cit., vol. II, pp. 82 et seq.), and also by writers who, like R. Ago, loc. cit., pp. 426 et seq., consider that the “responsibility” of the State guilty of a wrongful act includes the obligation to make reparation as well as liability to a sanction that may be imposed by the injured State (G. Morelli, op. cit., pp. 213 et seq.). Writers who, like B. Cheng (op. cit., p. 99), Jiménez de Aréchaga (loc. cit., pp. 541–542) and Tenekides (op. cit., pp. 785–786), apply the term “responsibility” exclusively to the obligation to make reparation none the less consider it lawful for the injured State to resort to punitive measures, precisely by way of reaction to an internationally wrongful act by another party.

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

130 In the case of the United Nations system—and, in the opinion of many writers also, in the case of customary international law—the prevailing view is that the injured State should not be allowed to resort to the use of force, even in response to an internationally wrongful act, except in the case of armed aggression. See for example, S. Caçogeropulos Stratis, “La Souveraineté des États et les limitations au droit de guerre”, Revue hellénique de droit international (Athens), vol. 2 (1949), pp. 163 et seq.; H. Wehberg, “L’interdiction du recours à la force—le principe et les problèmes qui se posent”, Recueil des cours . . . 1951-I (Leiden, Sijthoff, 1952), vol. 78, pp. 70 et seq.; H. Kelsen, Principles of International Law (New York, Rhinehart, 1952), pp. 16, 45, 60–61; G. Aranguí-Ruiz, “Diferencias jurisprudenciales”, Novissimo Digesto Italiano (Turin), vol. V (1960), p. 633; for the theory (whose proponents are in a clear minority), that the use of force by the injured State may be admitted where it is a reaction against other, also illicit, acts, see B. Colbort Speyer, Retaliation in International Law (New York, King’s Crown Press, 1948), p. 203; J. Stone, Aggression and World Order—A Critique of United Nations Theories of Aggression (Continued on next page.)
what happens in all other cases of internationally wrongful action,\(^{259}\) a third State may assist a State that is the victim of an act of aggression, and in doing so may resort to the use of armed force.\(^{259}\) In writings of this period the authors do not normally envisage any other consequences of aggression to be suffered by the guilty State after the aggression has ceased.\(^{260}\) Nor do they envisage the existence of other obligations, the breach of which would entail the applicability of a special régime of responsibility.\(^{261}\)

140. During the 1960s and 1970s the idea of distinguishing among different kinds of internationally wrongful acts according to the importance of the content of the obligation breached took shape and the theory was formulated in the writings of internationalists. On this subject, mention may be made first of the position taken by a number of Soviet authors. G. Tunkin, in a 1962 study devoted to consideration of the consequences of the internationally wrongful act of the State, supported by an analysis of international jurisprudence, arrived at the conclusion that since the Second World War international law has distinguished between two categories of breaches of the law, each entailing distinct types of responsibility. In the first category, he included offences which represent a danger to the peace, while the second covered all other breaches of international obligations.\(^{262}\) In 1966, D. B. Levin published a short monograph on State responsibility in which he adopts and further develops, using practically the same language, the distinction established by Tunkin between international crimes and simple breaches. He also echoes Tunkin's ideas with regard to the consequences of that distinction for the régime of responsibility.\(^{263}\) The distinction between "international crimes" and "simple breaches of international law" has thus become, over the years, one of the central points of Soviet doctrine on the international responsibility of States. Among the many writings devoted to this subject which have appeared in recent years, the most interesting for our purposes is the chapter on State responsibility in *Kurs mezhdunarodnogo prava*, published in 1969 by The State Institute of Law of the Academy of Sciences of the Soviet Union. In defining the internationally wrongful act ("delikt") as a breach ("narushenie") of international law, the authors of this textbook distinguish between two categories of breaches: those affecting the rights and interests of a particular State and those more serious breaches which "are assaults upon the fundamental principles of international relations and thus encroach upon the rights and interests of all States". The latter category comprises assaults upon the peace between peoples and upon the freedom of peoples. For these authors, the distinction between simple offences and "international crimes" entails consequences in respect of the subjects of the legal relations arising by reason of responsibility: besides the State directly injured, in the case of an "international crime" other States may "require compliance with the rules of international law". This distinction also entails consequences with regard to the forms of responsibility, inasmuch as the transgressor is liable to the immediate application of sanctions, including measures of military coercion, there being no need to wait until the transgressor has refused to meet the obligation to make reparations.\(^{264}\) It must be pointed out that these concepts, which are systematically set out in the form of principles, are in fact not far removed from those which, in the preceding paragraph, were derived implicitly from the positions taken in the legal literature of other countries. Reference may also be made to a monograph by P. Kuris published in 1973\(^{265}\) and articles by L. A. Modzhorian,\(^{266}\) by Y. V. Petrovsky and translations. That effect is said to extend also to the breach of other obligations, such as those guaranteeing the freedom of the high seas, the conservation of the living resources of the sea, etc.


\(^{259}\) The theory that any State, even if not directly injured, is entitled to intervene to punish the breach of an international obligation, regardless of the content of the international obligation breached, has been abandoned by almost all writers since 1945. R. Quadri (*Diritto internazionale pubblico* (Palermo, Priulla, 1949), pp. 187 et seq.), is an exception.

\(^{260}\) As we remarked in note 257 above, D. W. Bowett (*Self-defence ... op. cit.* p. 24), considers recourse to force in self-defence, in the event of a violation of "essential rights" of the State, to be legitimate.

\(^{261}\) D. B. Levin, *Otvetsvennost' gosudarstva ...* (op. cit.), pp. 19 et seq., 44 et seq., 112 et seq., 129 et seq. According to this author, the category of international crimes also covers acts constituting a threat to the freedom of peoples. He states that in the case of international crimes the faculty of applying sanctions against States which have committed such crimes arises immediately after the perpetration of the crime, whereas in the case of other offences, sanctions cannot be imposed on the perpetrator unless he has failed to meet his obligation to make reparations. Sanctions themselves are considered as being of different types in the two cases.

\(^{262}\) We have seen, however (note 254 above), that in *Mezhdunarodnoe pravo* (Moscow, 1957), mention is made of the possibility of imposing restrictions on the sovereignty of that State.

\(^{263}\) The study is included in G. Tunkin's work *Voprosy teorii mezhdunarodnogo prava*, Moscow, Gosizdat, 1962. The same paper was published in Italian with the title "Alcuni nuovi problemi della responsabilita dello stato nel diritto internazionale" (see note 116 above). The régime of responsibility in respect of the breach of obligations essential to the maintenance of peace is considered as comprising all forms of responsibility, from the obligation to make reparations to the application of the most severe sanctions permissible under international law. On the other hand, the responsibility attendant upon the breach of other international obligations is considered as more limited. Moreover, offences of the former type are said to give rise to a legal relationship not only between the State at fault and the State directly injured but also between the State at fault and all other States, and even international organizations.
by P. M. Kuris and E. I. Skakunov. Their ideas are developed within the framework of the principles formulated by Tunkin. Similar viewpoints are stated in the legal literature of other socialist countries, in particular in the works of certain East German authors, including J. Kirsten, B. Grafrath and P. A. Steiniger. The first-mentioned of these has closely followed the theories of Tunkin and Levin; the other two take a more elaborate and personal position, proposing a division of internationally wrongful acts into three groups based on the content of the obligation breached.

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

For J. H. W. Verzijl, for example, an international crime should be distinguished from a delinquency in that it not only creates an obligation on the part of the offending State to restore the previously existing situation or to indemnify the victim of the offence but also entails the application of sanctions by the international community. In this connexion, the author refers to the growing conviction that certain internationally wrongful acts of a "criminal" character call for a collective response by inter-State society. He states that the term "international crime", first used to describe a war of aggression, was subsequently extended to cover grave breaches of the laws of war, crimes against humanity and similar misdemeanors. Various authors extend the category of international crimes to other cases, but they do so only in order to recognize that the faculty of reprising them is also possessed by States other than the State directly injured. D. Schindler, in an interim report to the Institute of International Law on the principle of non-intervention in civil wars, proposed that the perpetuation of a colonial régime or a régime of racial discrimination should having to wait for the rejection of a demand for reparation (supra note 256), see P. Lamberti Zanardi, La legittima difesa nel diritto internazionale (Milan, Giuffrè, 1972), p. 135.


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

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

See para. 139 above.

On the faculty of the State which has been the victim of aggression to take measures infringing upon the rights of the aggressor State without
142. In conclusion, the necessarily broad-based and detailed analysis we have been obliged to adopt, owing to the delicate and complex nature of the subject, has shown that in the internationalist literature of various countries and of various legal systems, ideas have moved substantially ahead. The positions which in older doctrine represented the isolated voices of certain especially forward-looking thinkers have become more and more frequent and increasingly firm, to the point where in modern works they represent a solidly established viewpoint and significantly, one which is not contested. Many men of science have had to follow in their writings a development similar to that observable on a parallel plane in the attitude of various Governments and their representatives, and they have even helped to establish and consolidate the views of the latter. Thus, a basic unity of viewpoint is seen in the development of practice and theory on the matter. Willy-nilly, the idea has progressively forced itself upon the general awareness that one must distinguish between two different types within the over-all category of internationally wrongful acts. This is a substantive distinction, related to the difference in the content of international obligations and to the fact that, while all of them are important and while respect for all of them must be ensured, some of them are recognized today as being of more fundamental value than others for inter-State society as a whole, and observance of these must therefore be guaranteed by laying a heavier responsibility on those infringing them.

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

144. On the other hand, it may be more profitable to review briefly the positions taken by the members of the International Law Commission on the topic of State responsibility. For our purposes, it suffices to consider two specific periods in the work of the Commission. First, the years 1961–1963, when the Commission became aware of the need to embark on a new course in its work on the topic under consideration and took a decision to that effect. At the thirteenth session...
(1961) we may note the statements made by J. Žourek and G. I. Tunkin, which were still rather vague and placed particular emphasis on the effect on international responsibility of the changes which had taken place with the establishment of the principles of non-aggression and prohibition of the threat or use of force.280 At the fourteenth session, (1962), another member of the Commission, the author of this report, expressed the view that a clearer distinction would have to be drawn today between acts which called for reparation and torts which called for sanctions. The distinction might be in relation to the nature of the rule violated. There were probably rules whose breach would call only for reparation, but there were others whose breach called not only for reparation but also for sanctions.281

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

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

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

He added:

Relations involving responsibility were established solely between the State committing the infringement and the State suffering the injury; but, even so, the infringement might be so serious as to concern the international community as a whole and to lead to the imposition of collective sanctions applied through international organizations, or to what had been called actio publica, which was action instituted by a State other than the injured State with a view to the adoption of measures against the infringement.285

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

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

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

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

An attitude generally favourable to the distinction in question is also reflected in the statements by M. Bartoš,292 M. K. Yasseen,293 A. J. P. Tammes294 and E. Hambro.295 P. Reuter acknowledged the existence of special régimes of responsibility as well as a general régime which did not allow for the application of punitive sanctions nor the institution of action by a third State concerning

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

286 Ibid., p. 112, 1012th meeting, para. 38. N. Ushakov added that the forms of international responsibility could be classified “according to the nature of the violation of international law”.

287 Ibid., p. 115, 1013th meeting, paras. 12 et seq.

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

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

290 Ibid., p. 222, 1080th meeting, para. 81. Mr. Elías said he was in favour of the concept of an “international crime”.

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

292 Ibid., p. 7, 1202nd meeting, para. 27.

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

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

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


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

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

283 He observed: “If it were admitted that international responsibility could produce consequences of that kind [i.e. ‘sanctions’], the further question would arise whether that was true of breaches of all international obligations or only of some of them. Another question to be determined was whether there was to be a choice between reparations and sanctions, and if so, who would be called upon to make that choice.” (Yearbook ... 1963 vol. II, p. 234, document A/5509, annex I, appendix 1.).

responsibility.

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

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

147. The operation that must now be undertaken inevitably leads us to take into consideration the content of the “primary obligations” of international law. In its report, the International Law Commission made clear the need for this, which has also been recognized by the Sixth Committee of the General Assembly. It could not be otherwise, since it is on the basis of the content of those obligations that the different categories of offences are to be established. In this respect too, however, we must carefully avoid falling into the error that brought to grief the attempts at codification of State responsibility for damage caused to foreigners. We should not ourselves define the “primary” rules that are to govern inter-State relations in specific domains. We should simply take cognizance of the existence of those rules and accept them as they have been defined in other instruments, to the extent that this has been done. Moreover, for our purposes we should refer to sets of rules concerning certain subjects rather than to specifically selected rules; in other words, it would be preferable to refer to the entire body of international obligations concerning the pursuit of a particular purpose rather than to any one obligation enunciated in precise terms. It would be dangerous to forget that the work of codification should be carried out with an eye to the future. As time passes, new rules will be added to the rules already existing in a particular domain, and tomorrow their violation will be considered fully as grave as a breach of the rules currently in force is considered today.

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

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

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

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

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

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

298 See para. 96 above.
We have seen that in the debates of the United Nations and in the works of contemporary authors, this terminology has come into common use.\textsuperscript{299} There is therefore no reason for us to deviate from this practice.\textsuperscript{300} As for the term to be used for denoting what are sometimes vaguely called “other” internationally wrongful acts, or “ordinary” or “simple” breaches of an international obligation, we believe that the classical term “delict”\textsuperscript{301} is especially appropriate. This term was commonly used in works on international law as a synonym for “internationally wrongful act” at a time when the introduction of a special category of “international crimes” was not yet envisaged;\textsuperscript{302} it has the advantage of being customarily used, in the various legal systems, to denote wrongful acts less serious than those referred to by the word “crime”.

\textsuperscript{299} The term “crime”, which is identical in French and English, and the terms with the same Latin etymology in Spanish and Italian are generally translated by the term “prestuplenie” in Soviet literature on international law.

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

\textsuperscript{301} There are terms which exactly correspond to the English word “delict” in French (“delit”), in Spanish (“delito”), in Russian (“delikt”), in Italian (“delitto”) and in German (“Delikt”).

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

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

\textsuperscript{155} In the light of the foregoing, the Special Rapporteur proposes the following text for adoption by the Commission:

\textit{Article 18. Content of the international obligation breached}

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

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

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

\begin{itemize}
  \item[(a)] respect for the principle of the equal rights of all peoples and of their right of self-determination; or
  \item[(b)] respect for human rights and fundamental freedoms for all, without distinction based on race, sex, language or religion; or
  \item[(c)] the conservation and the free enjoyment for everyone of a resource common to all mankind
\end{itemize}

is also an “international crime”.

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

\begin{itemize}
  \item[(a)] respect for the principle of the equal rights of all peoples and of their right of self-determination; or
  \item[(b)] respect for human rights and fundamental freedoms for all, without distinction based on race, sex, language or religion; or
  \item[(c)] the conservation and the free enjoyment for everyone of a resource common to all mankind
\end{itemize}